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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID CEJA-JUNEZ,

Petitioner,

2016IICC0689

vs.

NO: 13 WC 021023

LABOR NETWORK,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission views the evidence concerning the Arbitrator's award of temporary total disability differently and finds that the award of benefits to Petitioner should extend to September 14, 2015, rather than terminate on July 14, 2015. The medical records of Dr. McNally, Petitioner's treating physician (PX2), reveal that on September 22, 2015, Petitioner reported that he first returned to work on September 15, 2015. For that reason, the Commission modifies the award of temporary total disability benefits to commence June 7, 2013 and extend through September 14, 2015 to conform to the evidence.

Additionally, the Commission finds, based upon the evidence, that the opinion expressed by Dr. Humberstone in the Utilization Report dated March 4, 2014 is persuasive on the issue of whether the physical therapy administered by RNS Physical Therapy commencing June 10, 2013 through February 24, 2014, (totaling 101 visits) was reasonable and necessary. The Commission finds that while all physical therapy administered was causally related to the work accident of June 6, 2013, that only the initial 18 sessions (PX6 June 9, 2013 through July 6, 2013) were

reasonable and necessary, and therefore compensable. Pursuant to the foregoing analysis the Arbitrator's award of outstanding medical expenses contained in Petitioner's exhibit 6 is therefore modified and limited accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $348.34 per week for a period of 118 3/7 weeks, commencing June 7, 2013 through September 14, 2015, that being the period of temporary total incapacity for work under §8(b) of the Act, less the sum of $4,000.05, which Respondent previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $313.51 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of 25% use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner outstanding medical expenses contained in Petitioner's exhibit 6 related to the initial 18 physical therapy sessions provided by RNS Physical Therapy. Respondent shall pay to Petitioner outstanding medical expenses contained in Plaintiff's exhibits, 5,6,9.13 and 15 under Section 8(a) and 8.2 of the Act, subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive a credit, pursuant to Section 8(j) of the Act for medical bills previously paid by Respondent.

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 pay Petitioner compensation that has accrued from June 6, 2013 through August 16, 2016 and shall pay the remainder of the award, if any, in weekly payments.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $60,000.00. 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.

DEC 1 - 2020

DATED:
o: 10/07/20
SM/msb
44

Stephen Mathis

D Douglas McCarthy

Douglas McCarthy

L Elizabeth Coppoletti

L.Elizabeth.Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CEJA-JUNEZ, DAVID
Employee/Petitioner

Case# **13WC021023**

LABOR NETWORK INC
Employer/Respondent

20IWCC0689

On 11/27/2019, 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 1.58% 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:

0226 GOLDSTEIN BENDER & ROMANOFF
DAVID Z FEUER
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

5001 GAIDO & FINTZEN
JASON ALLAIN
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

20IWCC0689

STATE OF ILLINOIS)
)SS.
COUNTY OF Kane)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Ceja-Junez, David
Employee/Petitioner

v.

Labor Network, Inc.
Employer/Respondent

Case # **13** WC **021023**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Geneva**, on **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. [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

20IWCC0689

FINDINGS

On **6/6/2013**, 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 **$27,170.52**; the average weekly wage was **$522.51**.

On the date of accident, Petitioner was **37** 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 **$4,000.05** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0.**

ORDER

Respondent shall pay to Petitioner the outstanding medical amounts contained in Petitioner's exhibits 5, 6, 9, 13 and 15 pursuant to sections 8(a) and 8.2 of the Act, subject to medical fee schedule and Respondent shall receive a credit, pursuant to Section 8(j), for medical bills previously paid by Respondent, as set forth in the Conclusions of Law attached hereto;

Respondent shall pay Petitioner 109 4/7 weeks of TTD benefits from June 7, 2013 through July 14, 2015, less the sum of $4,000.05 which Respondent previously paid, as set forth in the Conclusions of Law attached hereto;

The Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% person as-a-whole pursuant to Section 8(d)2 of the Act, as set forth in the Conclusions of Law attached hereto.

Respondent shall pay Petitioner compensation that has accrued from June 6, 2013 through August 16, 2016 and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

11/26/19
Date

ICArbDec p. 2

NOV 27 2019

Procedural History

This matter was tried on August 16, 2019. The disputed issues involve whether Petitioner's current condition of ill-being is causally related to his injury, whether Respondent is liable for unpaid medical bills, whether Petitioner is entitled to TTD benefits and the nature and extent of the injury. (Arb. Ex. #1).

At the end of trial, Respondent sought to submit two utilization reviews into evidence. (RX 3 and RX 4). One of the utilization reviews, dated March 4, 2014, was authored by Dr. Kimberly Terry (RX 3) and the other utilization review, dated March 5, 2014, was authored by Dr. Jocelyn Bush. (RX 4). Petitioner objected to the utilization reviews authored by Drs. Bush and Terry (RX 3 and 4) based upon hearsay since the reports were prepared for the purpose of litigation. Drs. Bush and Terry did not testify. A third utilization review was prepared by Lawrence Humberstone, D.C., DABCC, and was admitted into evidence, without objection, during his evidence deposition. (See Respondent's Deposition Exhibit #2). The Arbitrator also notes that Respondent's exhibits 3 and 4 did not contain certifications that the records were true and correct nor were the exhibits obtained via Commission subpoena. The Arbitrator finds that Respondent's exhibits 3 and 4 are inadmissible.

Findings of Fact

David Ceja-Junez (hereinafter referred to as "Petitioner") testified that on June 6, 2013, he was employed by Labor Network (hereafter referred to as "Respondent"). Petitioner testified that his job duties including placing metal coils onto each side of a machine. Petitioner testified that on June 6, 2013 he was work with a metal coil, which was on the left side of the machine, applying force to the coil when his foot slipped, and he felt something happen to his back. Petitioner testified that he reported the incident.

Petitioner testified that he was unable to work the following day and he sought medical care at Concentra. The medical records from Concentra indicate that Petitioner reported pushing and moving a large metal object when he felt pain in his left lower back. The examination found decreased lumbar range of motion to flexion extension with pain. Petitioner was positive for diffused lower back pain on the left paraspinous with palpation. Waddell's tests were negative. An x-ray of the spine was taken and was negative. Petitioner was assessed with a low back strain and lumbosacral strain. Petitioner was issued work restrictions of no lifting over 20 pounds, no pushing/pulling over 20 pounds and no bending or squatting. (PX1). Petitioner testified that he was unable to return to work because Respondent would not accommodate his restrictions.

Petitioner returned to Concentra on June 10, 2013. At that time, Petitioner reported that his symptoms had not improved. Physical therapy was recommended. (PX 1).

Petitioner sought physical therapy at Rivera & Santiago d/b/a Nuestra. At that time, Petitioner reported being injured on the job on June 6, 2013 while pushing some very heavy coil weighing approximately 5,300+ pounds. Petitioner further reported the following day he was unable to work. Petitioner rated his pain level as 7

out of 10. An examination was performed and the Lesgue's test was found to be positive and Petitioner had decreased range of motion. Petitioner was diagnosed with nerve root irritation and sacroiliac joint irritation. The treatment plan was recommended which consisted of adjustments, cryotherapy, electric stimulation and physical therapy. Petitioner was taken off all work as of June 10, 2013. (PX 4).

Petitioner returned to Concentra on June 18, 2013. Petitioner reported that he has not been working because no light duty work was available. The records show that Petitioner's pain was located on the right lumbosacral region and that his symptoms were exacerbated by sitting or walking. The examination found decrease range of motion and negative Waddell's tests. Physical therapy was recommended. (PX 1).

On June 21, 2013, Petitioner returned to Nuestra. The examination showed tenderness to the right lumbar spine and right sacroiliac. At that time, Dr. Rivera, order a lumbar MRI. (PX 4).

On June 21, 2013, Petitioner presented to Fox Valley Imaging for a lumbar MRI. The radiologist's impression was herniated disc at L5-S1, annular tear at L5-S1, and transitional vertebral segment at the most inferior disc space at S1-S2. (PX 4).

On June 24, 2013, Petitioner returned to Nuestra and was referred to Dr. Axel Vargas, a pain specialist, at Chicago Pain & Orthopedics. Petitioner continued to treat with Drs. Rivera and Vargas until November 13, 2013. The Nuestra's medical records indicate that Petitioner's treatment consisted of physical therapy, adjustments, cryotherapy and electric stimulation. On August 7, 2013, Petitioner reported his pain level as 8 out of 10 and the records show that Petitioner's pain was aggravated after walking 10 minutes and sitting for 30 minutes. While treating at Nuestra, Petitioner underwent several physical therapy re-evaluations. On October 12, 2013, Petitioner reported that his pain level had decreased to 6 out of 10 and he could walk 15-20 minutes and sit for 30 minutes before it aggravated his pain. On November 13, 2013, Petitioner reported his pain levels decreased to 5-6 out of 10. (PX4).

On October 17, 2013, Petitioner underwent a diagnostic prevocational functional lumbar discography of L2-3, L3-4, L4-5 and L5-S1 at Ambulatory Care. The test was administered by Dr. Axel Vargas. The report summery states that Petitioner had concordant discogenic pain at L5-S1 with controls at L2-3, L3-4 and L4-5. During the test the maximum psi applied was as follows: 38 psi at L2-3, 42 psi at L3-4, 100 psi at L4-5, 92 psi at L5-S1. Petitioner was diagnosed with (1) intractable chronic lower back pain syndrome, (2) chronic intractable lumbar discogenic radiculopathy, (3) chronic lumbar discogenic pain syndrome and (4) L5-S1 herniated disk with associated central and neuroforaminal stenosis. (PX 4).

On October 17, 2013, Petitioner also underwent a lumbar spine CT scan at Edgebrook Radiology. The CT scan impression was 4-5 mm right intraforaminal disk herniation with lateral recess and neuroforaminal narrowing, with no significant spinal stenoses at L5-S1 that was probably a Dallas classification type III. (PX 2).

On January 7, 2014, Petitioner was examined by Dr. Thomas McNally of Suburban Orthopaedics. The records state that Petitioner sustained a work-related injury on June 6, 2013 and has not worked since the date of injury. Petitioner complained that he could not bend his let at a 90-degree angle when sitting down. Petitioner also complained of experiencing a sharp pain when he bends his leg and his pain radiates into his left hip and left groin. The records state that Petitioner was taking pantoprozole sodium, Meloxicam, Tramador, carisoprodol and gabapentin, proscribed by Dr. Vargas. (PX 2).

Dr. McNally noted that the x-rays, dated November 21, 2013, showed transitional S1, opening and closing of L5-S1 disc space on flexion and extension. The discogram, dated October 17, 2013, showed concordant discogenic pain at L5-S1 with controls at L2-3, L3-4 and L4-5. The post-discogram CT, which was also performed on October 17, 2013, showed a 4-5 mm right intraforaminal disc herniation seen with right lateral recess and neuroforaminal narrowing. The MRI, dated June 21, 2013, showed a transitional vertebral segment at the most inferior disc space or L1-2 and a herniated disc at L5-S1. Dr. McNally diagnosed lumbar disc displacement and discogenic low back pain. Dr. McNally recommendation continuing McKenzie Therapy at Nuestra, continue with the medications prescribed by Dr. Axel Vargas, and obtain an EMG. (PX2).

The records from Suburban Orthopaedics show that Petitioner underwent an EMG of the bilateral lower extremities on January 15, 2014, performed by Dr. Axel Vargas. The review of the EMG found electrodiagnostic evidence of mild acute left L5-S1 radiculopathy without nerve entrapment. At that time, Dr. McNally recommended surgery consisting of L5-S1 decompressive laminectomy and fusion with local autograft, iliac crest autograft and allograft and allograft and instrumentation, possible L5-S1 posterior lumbar interbody fusion or transforaminal interbody fusion with cages. (PX 2).

On March 4, 2014, Petitioner followed up with Dr. McNally. Petitioner stated that he is interested in the surgery and that he would like to feel better and return to work. Dr. McNally reviewed a MRI, taken on February 11, 2014 at Suburban MRI, and noted the MRI showed minimal lumbar spondylosis at L4-5 with no evidence of canal stenosis, foraminal stenosis, or direct nerve root compression. Dr. McNally reviewed the MRI and found transitional anatomy at L5-S1. Dr. McNally noted that MRI was consistent with the post discogram CT, discogram and the June 21, 2013 lumbar MRI. Dr. McNally recommended continuing with the physical therapy at Nuestra until the surgery approval. (PX 2).

Petitioner returned to Dr. McNally on August 26, 2014. The records show that surgery was scheduled for September 15, 2014, at Alexian Brother's Medical Center. Dr. McNally's records state that Petitioner failed non-operative care with interventional pain management, chiropractic care, physical therapy, activity modification, rest, NSAID's, bracing, membrane stabilizers and narcotic pain medication. (PX 2).

Petitioner underwent surgery at Alexian Brother's Medical Center. Petitioner underwent a L5-S1 lumbar laminectomy and posterior fusion. The post-operative diagnosis was lumbar spinal stenosis, diskogram positive, discogenic low back pain. In the medical records, Dr. McNally noted that Petitioner was a 38-year old male who was injured at work on June 6, 2013 and had back and left leg pain since that time. Petitioner underwent a discogram which was positive for discogenic pain at L5-S1. Petitioner also had stenosis and an EMG confirmed radiculopathy. Dr. McNally's records state that Petitioner failed non-operative care and opted for surgery which was performed without incident. (PX 3)

Dr. Charlotte Glenn, who assisted in the surgery, noted that Petitioner, a machine operator, developed back pain while working with a roll of metal. Dr. Glenn also noted that an MRI found a 3-4 mm right inraforamminal disk herniation at L5-S1 with right lateral recess and neural foraminal narrowing with no significant spinal stenosis which was thought to be a Dallas classification class III. Dr. Glenn indicated that after the surgery, Petitioner reported that his pain was well controlled with only some mild burning feeling. (PX 3).

On October 21, 2014, Petitioner followed up with Dr. McNally. At that time, Petitioner reported that he was doing well after the surgery. Petitioner indicated that his pain level was 3 out of 10. Petitioner reported that he was no longer experiencing numbness or tingling or the burning sensation in the lumbar spine. Petitioner also reported that he could now lift his left leg up to 90 degrees without pain. (PX 2).

Petitioner returned to Dr. McNally on January 8, 2015. Petitioner reported that he was making progress in physical therapy and that he would like to begin work conditioning. Petitioner followed up with Dr. McNally on May 26, 2015. Petitioner stated that he has been able to walk much better. Petitioner reported some numbness in the left groin after sitting for long periods of time. An EMG was performed on April 22, 2015, which showed some mild acute left L3 lumbar radiculopathy and a chronic right L5 lumbar radiculopathy. Dr. McNally noted the fusion was healed but there were some areas of continued impingement present. Petitioner reported that he would like to get back to work. Dr. McNally ordered CT myelogram before deciding to release Petitioner back to work. (PX 2).

Petitioner returned to Dr. McNally on September 26, 2015. Dr. McNally's records state that Petitioner returned to work for a different employer on September 15, 2015. Petitioner reported that his new job does not require him to lift more than 60 pounds. Petitioner complained of intermittent pain in his left groin after prolonged sitting or standing on hard surfaces. Petitioner indicated that he is happy with the results of the surgery and that his residual complaints were tolerable. Dr. McNally found that Petitioner's residual complaints were permanent, Petitioner was a maximum medical improvement and he released Petitioner from care. (PX 2).

Section 12 Examiner, Dr. Butler

Petitioner was examined by Dr. Butler, pursuant to Section 12 of the Act, on August 29, 2013. During the exam Dr. Butler found that Petitioner had a normal gait, reported weakness of essentially all lower extremities and had positive Waddell's testing. (RX 1).

Dr. Butler testified that he reviewed Petitioner's imaging and he opined that the June 21, 2013 MRI was normal and showed only a small annular tear on the opposite side of Petitioner's radicular pain. Dr. Butler opined that Petitioner sustained a lumbar sprain. Dr. Butler testified that manipulating a large roll of steel was a reasonable mechanism of injury for a lumbar strain. (RX 1).

Dr. Butler testified that Petitioner's complaints of radicular symptoms lacked objective pathology. Dr. Butler opined the lack of objective pathology was suggestive of symptom magnification. Dr. Butler testified that the MRI showed no compression or pathology on the left side to correlate with Petitioner's left lower radicular pain. (RX 1).

Dr. Butler was asked whether he had an opinion regarding causation. Dr. Butler testified that it was difficult to answer that question because Petitioner's magnification since his subjective complaints did not correlate to the objective exam findings. (RX 1).

Dr. Butler opined that all of Petitioner treatment, imaging studies, physical therapy and work restrictions was been reasonable and appropriate through the date of his IME. Dr. Butler further opined that all treatment after the first epidural injection was not medically necessary. Dr. Butler also opined that surgery was not necessary and that Petitioner was at maximum medical improvement and could return to work full duty. (RX 1)

Dr. Butler testified that he authored an additional report in January of 2015. Dr. Butler testified that he reviewed the records from Dr. Freedberg, of Castle Orthopedics, Dr. Tulipan, Dr. Rivera, Dr. McNally, the EMG and additional imaging. Dr. Butler testified that also reviewed the operative report that showed lateral recesses, foraminal stenosis bilaterally at L5-S1 was inconsistent with Petitioner's preoperative imaging, which did not show any neural compression at the L5-S1 neural foramen. Dr. Butler testified that the preoperative imaging did not demonstrate compressive foraminal stenosis from either a disk herniation or any degenerative changes. Dr. Butler opined that the operative findings could not be correlated with the preoperative imaging. (PX 1).

Dr. Butler further opined that the diskogram procedural resulted in a false positive finding due to the high pressure which as a false positive procedure which caused a false positive result. Dr. Butler testified that one would anticipate pain responses when you increase pressure to 90 and 100 psi. Dr. Butler further testified that it was hard to determine whether Petitioner had L5-S1 pain because the pressure was increased over the baseline. Dr. Butler opined that a four-level diskogram was excessive and inappropriate. (RX 1).

On cross-examination, Dr. Butler testified that a fusion surgery is appropriate to relieve intractable pain. Dr. Butler testified that the purpose of a fusion is to reduce mechanical back pain. Dr. Butler also testified that, with discogenic pain, the best outcome of good and excellent is between 60-80% and that's about you can do. Dr. Butler testified that he agreed that Petitioner's condition significantly improved after surgery. Dr. Butler testified that the fact that Petitioner feels better is fortunately but doesn't justify performing surgery. Dr. Butler also testified that when you perform a fusion you change the anatomy in a major way and for whatever reason despite the imaging studies and the physical exam concerns, Dr. McNally and the Petitioner are fortunate the positive outcome. (RX 1).

Section 12 examiner Dr. Humberstone

Dr. Humberstone, a chiropractic doctor, testified that he received his degree as a doctor of chiropractic in 1985 and had been performing Utilization Reviews for the past 25 years. (RX 2).

Dr. Humberstone testified that he authored a Utilization Review report, on March 4, 2014, to determine whether the 101 physical therapy sessions Petitioner underwent were necessary and appropriate. Dr. Humberstone opined that the treatment was gross overtreatment and that only the first 6 visits were reasonable. Dr. Humberstone testified the Official Disability Guidelines (ODG) recommended a maximum of 10 physical therapy visits for an acute strain/sprain. (RX2).

Dr. Humberstone testified that based on a review of the medical records, Petitioner was a 38-year-old male, who worked as a machine operator, and sustained a left back injury by pulling a roll of metal. Dr. Humberstone further testified that, based on the records, he opined that there was no clinically significant objective or functional improvement with Petitioner and that 100 physical therapy visits were ridiculous when there was no improvement during the first 6 visits. (RX. 2).

Dr. Humberstone testified the chiropractic and therapy records reflected that Petitioner's condition remained the same and that there was no improvement from the sessions. Dr. Humberstone testified that under the ODG for low back pain and acute flare-up, usually 10 visits of physical therapy visits are reasonable, and 18 for chiropractic manipulative services. Dr. Humberstone further testified that the American Association of Colleges of Osteopathic Medicine recommend no more than 12 visits of chiropractic manipulation under most any circumstances, and the Chiropractic Council on Guidelines and Practice Parameters recommends, 12 to 24 visits, with a recheck at the first 6 visit mark, to establish benefit (RX 2).

Regarding his current condition, Petitioner testified that he has returned to work and he drives a forklift. Petitioner operates both a standing and sitting forklifts. Petitioner testified that if he is standing are sitting too long, at work, he experiences some back pain. Petitioner testified that when he experiences pain while at work it mainly occurs after pushing things. Petitioner testified that the pain is more of a tense feeling. Petitioner testified

that his radicular pain resolved and that he is not currently receiving medical treatment. Petitioner also testified that when he feels pain he takes Advil or Tylenol. Petitioner testified that prior to his work accident of June 6, 2013, had not experienced any problems with his low back and had not received any medical care.

The Arbitrator finds 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).

With respect to issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *Sisbro v. Indust. Com'n*, 207 Ill.2d 193, 205 (2003). Workers need only prove that some act or phase of employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Indust. Com'n*, 359 Ill.App.3d 582, 592 (2005). The work-related task need not even be the sole or principal causative factor of the injury, as long the work is a causative factor. *See Sisbro*, 207 Ill.2d at 205. Even if the claimant has a preexisting degenerative condition which makes him more vulnerable to injury, recovery for an accidental injury will not be denied as long as she can show that her employment was also a causative factor. *Id.* At 205. Employers are to take their employees as they find them. *A.C. &S v. Industrial Commisston*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982).

Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (First Dist. 1988). A claimant's prior condition need not be a of good health prior to the accident, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting deterioration from whatever the previous condition had been. *Schroeder v. Illinois Worker's Compensation Comm'n*, 4-16-0192WC (Fourth Dist. 2017).

The Arbitrator has carefully reviewed and considered all medical evidence along with the testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the evidence that his current lumbar spine condition of ill-being is causally related to his work accident of June 6, 2013.

Petitioner testified that he had not experienced any low back pain prior to June 6, 2013. Petitioner testified that he injured his low back when he was pushing a steel coil on a machine. Petitioner testified that he was unable to work the following day. Petitioner started treating at Consentra Medical Center the following day, on June 7, 2013. Petitioner was issue light duty restrictions which Respondent was unable to accommodate. Petitioner was subsequently taken off all work. Petitioner did not return to work until September 15, 2015 after undergoing surgery.

Petitioner underwent a L5-S1 lumbar laminectomy and posterior fusion on July 15, 2014. The post-operative diagnosis was lumbar spinal stenosis, diskogram positive, discogenic low back pain. In the medical records, Dr. McNally noted that Petitioner was a 38-year old male who was injured at work on June 6, 2013 and had back and left leg pain since that time. In his medical records, Dr. McNally indicated that Petitioner underwent a discogram which was positive for discogenic pain at L5-S1 and an EMG confirmed radiculopathy. Dr. Charlotte Glenn, of Alexian Brother's Medical Center, noted that Petitioner, who is a machine operator, developed back pain while working with a roll of metal. Dr. Glenn also noted that an MRI found a 3-4 mm right inraforamminal disk herniation at L5-S1 with right lateral recess and neural foraminal narrowing with no significant spinal stenosis which was thought to be a Dallas classification class III. Dr. Glenn noted that after the surgery, Petitioner reported that his pain was well controlled with only some mild burning feeling. (PX 3).

The Arbitrator notes that after the surgery, Petitioner's symptoms significantly improved. Petitioner was able to return to work. Petitioner testified that his radicular pain is gone and the he only experiences occasional pain which is tolerable. Petitioner further testified that he only takes Tylenol and Advil for pain. The Arbitrator finds the opinions of Dr. McNally and Dr. Glenn to be more persuasive than the opinions of Dr. Butler.

Dr. Butler opined that Petitioner only sustained a back sprain. Dr. Butler also opined that Petitioner had findings of symptom magnification because has Petitioner had no objective pathology on the MRI. The Arbitrator notes that Petitioner was not diagnosed with nerve root impingement. Despite the presence of a 3-4 mm disk herniation at L5-S1, Dr. McNally diagnosed lumbar disc displacement and discogenic low back pain. Dr. McNally noted that the EMG showed evidence of mild acute left L5-S1 radiculopathy without nerve entrapment. The Arbitrator notes that Dr. Butler's causation opinions were primarily based upon the lack of compression on the nerve root at L5-S1 which, Dr. Butler, believes was inconsistent with Petitioner's radicular complaints. The Arbitrator finds that Dr. Butler fails to sufficiently address Dr. McNally's diagnosis of lumbar disc displacement and discogenic low back pain, the postoperative diagnosis and the discogram findings of (1) intractable chronic lower back pain syndrome, (2) chronic intractable lumbar discogenic radiculopathy, (3) chronic lumbar discogenic pain syndrome and (4) L5-S1 herniated disk with associated central and neuroforaminal stenosis. The

Arbitrator finds that Dr. McNally's diagnosis was consistent with the postoperative diagnosis and the discogram findings.

With respect to issues "J"; Whether the medical services provided were reasonable, the Arbitrator concludes the following:

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

Petitioner introduced into evidence medical treatment records from Concentra Medical Centers, Suburban Orthopedics, Alexian Brother's Hospital and Nuestra Clinica of Aurora. (PX 1,2,3,4). Petitioner submitted into evidence medical bills from RNS Physical Therapy[1], Accredited Ambulatory and Alvio Medical Center. The medical treatment records from Accredited Ambulatory and Alvio Medical Center were included with the Suburban Orthopedics medical records. (PX 2). Petitioner did not submit into evidence the medical treatment records of several medical provides whose bills were submitted into evidence.

The Arbitrator does not find the opinions of Dr. Humberstone to be persuasive. The Arbitrator notes that Dr, Humberstone's opinions were based upon a back-strain diagnoses and Petitioner was subsequently diagnosed lumbar disc displacement and discogenic low back pain by Dr. McNally and (1) intractable chronic lower back pain syndrome, (2) chronic intractable lumbar discogenic radiculopathy, (3) chronic lumbar discogenic pain syndrome and (4) L5-S1 herniated disk with associated central and neuroforaminal stenosis by the diskogram. Dr. Humberstone did not proffer any opinions upon the appropriate treatment for Petitioner's actual condition. The Arbitrator also notes that Dr. Butler found the treatment received by Petitioner to be reasonable and necessary beyond the 6 visits Dr. Humberstone opined was reasonable and necessary. The Arbitrator further notes that Dr. McNally continued to recommend additional treatment at Nuestra beyond the initial 6 visits.

The Arbitrator finds that Petitioner has proved by the preponderance of the evidence that the medical services provided by Suburban Orthopedics, Alexian Brother's Hospital, Accredited Ambulatory, RNS Physical Therapy, and Alvio Medical Center were reasonable expenses and necessary to diagnose, relieve or cure the Petitioner from the effects of his injury. As such, the Arbitrator orders Respondent to pay to Petitioner the outstanding medical amounts contained in Petitioner's exhibits 5[2], 6, 9, 13 and 15 pursuant to sections 8(a) and

[1] The medical records submitted into evidence are from Rivera & Santiago located at 645 E. New York Street, Aurora, and RNS Physical Therapy is also located at 645 E. New York Street, Aurora which appear to be the same provider.

[2] Respondent is not liable for treatment for Petitioner's thumb which is unrelated to Petitioner's back injury of June 6, 2013.

8.2 of the Act, subject to medical fee schedule. Respondent shall receive a credit, pursuant to Section 8(j), for medical bills previously paid by Respondent.

In support of the Arbitrator's decision relating to "L," whether Petitioner is entitled to TTD benefits or maintenance benefits, Arbitrator finds as follows:

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

Petitioner claims to be due TTD benefits from June 6, 2013 through September 15, 2015 representing 118 4/7 weeks. (Arb. Ex. #1). Respondent paid Petitioner TTD benefits from June 6, 2013 through September 9, 2013, the date of Dr. Butler's IME. (Arb. Ex. #1). It is undisputed that Petitioner was kept off work by his treating physicians until he returned to work on September 15, 2015.

The Arbitrator finds that Petitioner has proven by the preponderance of the evidence that he was temporary totally disabled from June 7, 2013 through July 14, 2015, representing 109 4/7 weeks. As such the Arbitrator finds that Petitioner is entitled to receive 109 4/7 weeks of TTD benefits from June 7, 2013 through July 14, 2015. The Arbitrator finds that Respondent is entitled to a credit of $4,000.05 for TTD benefits paid from June 6, 2013 through September 9, 2013.

In support of the Arbitrator's related to issue (L), the nature and extend of Petitioner's injury, the Arbitrator makes the following conclusions:

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of

impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.* Considering these factors in light of the evidence submitted at trial, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of Section 8.1b(b), the reported level of impairment pursuant to Section 8.1b(a), the Arbitrator notes that neither party submitted into evidence an AMA impairment rating. Thus, the Arbitrator considers the parties to have waived their right to do so and assigns no weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the injured employee, the evidence established that Petitioner was a machine operator. Petitioner's job duties included moving or pushing very heavy rolls of steel. Petitioner was able returned to work as a machine operator for a different employer at a less physically demanding job. Thus, the Arbitrator assigns some weight to this factor in determining the extent of permanent partial disability;

With regard to subsection (iii) of Section 8.1b(b), the age of the employee at the time of the injury. Petitioner was 37 years old at the time of his injury. At the age of 37, a significant portion of Petitioner's work life remains. Dr. McNally indicated, in his last treatment record, that Petitioner underwent a L5-S1 laminectomy and PSF with PLIFs, right ICBG and, as such, he is at higher risk than general population for needing further intervention due to his work-related injury. The Arbitrator assigns significant weight to the factor in determining the extent of permanent partial disability;

With regards to subsection (iv) of Section 8.1b(b), employee's future earing capacity. Petitioner proffered no testimony regarding the impact of this injury upon Petitioner's future earning capacity. As such, the Arbitrator assigns no weight to this factor in determining the extent of permanent partial disability;

With regards to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records. Petitioner testified that he continues to experience some pain when standing or sitting too long and that he occasionally experiences back pain from work which Petitioner controls with over the counter medication. Petitioner was able to return to work and that he is able to tolerate his pain with the use of over the counter pain relievers. The Arbitrator finds that Petitioner's complaints are supported by Dr. McNally's medical records. As such, the assigns significant weight to this factor in determining the extent of permanent partial disability.

In consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner suffered permanent partial disability to the extent of 25% of man as a whole pursuant to § 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICTOR OWENS,

Petitioner,

20IWCC0690

vs.

NO: 13 WC 32148

AMERICAN COAL COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission notes that, having reviewed the evidence in its entirety, Petitioner failed to meet his burden of proof that an accident occurred. The application of the relation back doctrine and amendment of the date of accident would not remedy this defect. Petitioner's claim is therefore not compensable.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 18, 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.

20IWCC0690

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

DATED: DEC 1 - 2020
o: 11/10/20
SM/msb
44

Stephen Mathis

Douglas McCarthy

L.Elizabeth.Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OWENS, VICTOR
Employee/Petitioner

Case# **13WC032148**

20IWCC0690

AMERICAN COAL
Employer/Respondent

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:

2269 NEWCOMB LAW OFFICE
PAULA NEWCOMB
503 PUBLIC SQ
BENTON, IL 62812

1723 LITCHFIELD CAVO LLP
GREGORY S KELTNER
222 S CENTRAL AVE SUITE 110
CLAYTON, MO 63105

20IWCC0690

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Victor Owens
Employee/Petitioner
v.
American Coal
Employer/Respondent

Case # 13 WC 32148

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on January 14, 2020. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

20IWCC0690

FINDINGS

On August 3, 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 $50,376.16; the average weekly wage was $1,125.00.

On the date of accident, Petitioner was 35 years of age, single with 1 dependent child(ren).

ORDER

Based upon the Arbitrator's ruling on Petitioner's Motion to Conform Application for Adjustment of Claim to Evidence is denied. Accordingly, 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.

William R. Gallagher, Arbitrator

February 7, 2020
Date

ICArbDec p. 2

FEB 18 2020

Petitioner's Motion to Conform Application for Adjustment of Claim to Evidence

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 3, 2013. The Application was filed with the Workers' Compensation Commission on September 27, 2013. According to the Application, Petitioner "Jammed head on roof getting out of equipment vehicle" and sustained an injury to his "back" (Petitioner's Exhibit 1). Respondent disputed liability on the basis of accident, notice and causal relationship (Arbitrator's Exhibit 1).

It was subsequently determined that the date of alleged in the Application was not the date of Petitioner's alleged accident, but the date he began receiving medical treatment. At trial, Petitioner's attendance record was tendered into evidence and it revealed Petitioner did not work on August 3, 2013 (Respondent's Exhibit 1). Petitioner never filed an Amended Application for Adjustment of Claim alleging a different date of accident.

Petitioner's motion alleged that the evidence was likely to show an earlier injury date than what was stated in the Application. Petitioner sought to have the Application amended to an earlier date based upon the relation back doctrine (Arbitrator's Exhibit 2).

Petitioner's motion initially sought to have the date of accident changed to June 26, 2013. According to the proof of service in the motion, it was hand delivered to Respondent's counsel on July 19, 2019. Obviously, this was over six years after the date of the alleged accident.

When the case was set for trial on January 14, 2020, Respondent's counsel provided Petitioner's counsel with copies of exhibits including Petitioner's attendance record for 2013 which noted Petitioner was not working on June 26, 2013 (Respondent's Exhibit 1). At that time, Petitioner's counsel changed the date of accident alleged in the motion to June 25, 2013, which was a date Petitioner was working (Arbitrator's Exhibit 2). Respondent's counsel opposed Petitioner's counsel's motion on the basis that Petitioner was attempting to allege a new date of accident which was barred by the statute of limitations and the relation back doctrine was not applicable.

The Arbitrator notes that the first time Respondent became aware Petitioner was seeking to change the date of accident from August 3, 2013, to June 26, 2013, was on July 19, 2019, over six years later. Petitioner again tried to change the date of accident to June 25, 2013, on January 14, 2020, again in excess of six years after the date of alleged accident. There was no question that either date of accident would be barred by the statute of limitations.

Generally, the Illinois Code of Civil Procedure does not apply to workers' compensation cases; however, when the Act or Commission rules do not regulate a topic, provisions of the Code of Civil Procedure have been applied to workers' compensation cases *Illinois Institute of Technology v. Industrial Commission*, 731 N.E.2d 795, 800 (1st Dist. 2000).

Amendment of complaints is governed by Section 2-616 of the Illinois Code of Civil Procedure. Whether a litigant may amend a complaint is within the discretion of the court which should consider (1) whether the amendment would cure a defect in the pleading; (2) whether the other party would be surprised are prejudiced by the amendment; (3) the timeliness of the proposed

amendment; and (4) whether there were prior opportunities to amend *Lee v. Chicago Transit Authority*, 605 N.E.2d 493, 509 (Ill. 1992).

In this case, permitting Petitioner to change the date of accident would clearly prejudice the rights of Respondent. As noted herein, Respondent first learned of the alleged corrected date of accident was over six years after it allegedly occurred. Obviously, the amendment is not timely because it alleges a date of accident clearly barred by the statute of limitations. Finally, Petitioner filed the Application on September 27, 2013, and could have subsequently filed an Amended Application alleging a different date of accident, but did not do so.

Based upon the preceding, Petitioner's Motion to Conform Application for Adjustment of Claim to Evidence is hereby denied. Accordingly, Petitioner's claim for compensation is hereby denied. The Arbitrator also finds there is no need to address the other disputed issues in the case because they are rendered moot given the Arbitrator's ruling in respect to Petitioner's motion.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PETRA JACOBO,

Petitioner,

20IWCC0691

vs.

NO: 17 WC 10246

METRO STAFF, INC., and
JOHN B. SANFILIPPO & SON, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §§ 19(b) and 8(a) having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, medical expenses, prospective medical care, 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, with the changes made 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).

While affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of causal connection. The Commission agrees with Respondent that Petitioner's right hip reached maximum medical improvement by July 19, 2017. Dr. Ted Suchy, one of Petitioner's treating physicians, found that Petitioner's right hip strain had resolved as of April 2017 and Petitioner provided no testimony to the contrary. The Commission notes that this determination does not affect the calculation of Petitioner's temporary total disability benefits or medical expenses.

The Commission also corrects the calculation of the time period for temporary total disability benefits to reflect a period of 148 and 3/7ths weeks, rather than 148 and 2/7ths weeks.

20 IWCC0691

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

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner proved that she sustained an accident on January 16, 2017, which arose out of and in the course of her employment.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner proved her current condition of ill-being related to her left shoulder is causally connected to the accident in this case.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $301.03 per week for the period from January 17, 2017 through November 21, 2019, for a period of 148 and 3/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall receive a credit of $9,881.40 for benefits already paid.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay Petitioner's reasonable and necessary outstanding medical bills for the services provided by Hinsdale Orthopedics in the amount of $5,310.00 and Access Neurocare in the amount of $175.05, pursuant to the fee schedule and §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the surgery recommended by Dr. Steven Chudik, including but not limited to any pre-operative testing, diagnostics, appointments or other medical services, and any hospital, surgical or future medical visits related to the surgery.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties and Attorney Fees is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 9, 2020 is hereby affirmed and adopted with the changes stated herein.

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

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

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

20IWCC0691

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $40,400.00. 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: DEC 1 - 2020
o: 11/19/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

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

JACOBO, PETRA
Employee/Petitioner

Case# **17WC010246**

20IWCC0691

METRO STAFF INC AND JOHN B SANFILIPPO & SON INC
Employer/Respondent

On 3/9/2020, 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 1.01% 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:

5317 CASTANEDA LAW OFFICES
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GENEVA, IL 60134

0560 WIEDNER & McAULIFFE LTD
COURTNEY R CRONIN
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

2284 LAWRENCE COZZI - LAW OFFICE
MARK ZAPF
27201 BELL VISTA PKWY #401
WARRENVILLE, IL 60555

0159 FRANCIS J DISCIPIO LAW OFFICE
JACK M SHAPIRO
1200 HARGER RD
OAK BROOK, IL 60523

20IWCC0691

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Petra Jacobo
Employee/Petitioner

v.

Metro Staff Inc. and John B. Sanfilippo & Son, Inc.
Employer/Respondent

Case # 17 WC 010246

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Frank Soto, Arbitrator of the Commission, in the city of GENEVA, on NOVEMBER 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. ☒ 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 16, 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 36 WEEKS preceding the injury, Petitioner earned $16,255.80; the average weekly wage was $451.55.

On the date of accident, Petitioner was 61 years of age, married, with 0 dependent children.

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

Respondent shall be given a credit of $9,881.40 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $9,881.40.

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 $301.03/week for 148 2/7th weeks, commencing 01/17/2017 through 11/21/2019, as provided in Section 8(b) of the Act, subject to the credit for TTD benefits previously paid, as set forth in the attached Conclusions of Law;

Medical benefits

Respondent shall pay to the Petitioner reasonable and necessary medical services of $5,485.02 or lesser amount as provided in Sections 8(a) and 8.2 of the Act, as set forth in the attached Conclusions of law;

Penalties

Petitioner's petition for penalties and fees is denied, as set forth in the attached Conclusions of Law;

Prospective Medical Care

The Arbitrator orders Respondent to authorize the surgery recommended by Dr. Steven Chudik, including but not limited to any pre-operative testing, diagnostics, appointments or other medical services and any hospital, surgical or future medical visits related to the surgery, as set forth in the attached Conclusions of Law.

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

3/6/2020
Date

ICArbDec19(b)

MAR 9 - 2020

Procedural History

This matter proceeded to trial on November 21, 2019 pursuant to Sections 19(b) and 8(a) of the Act. The disputed issues were whether Petitioner sustained an accidental injury that arose out of and in the course of employment; whether Petitioner's current condition of ill-being is causally related to her injury; whether the medical services provided were reasonable and necessary; whether Petitioner is entitled to prospective medical care and whether Petitioner is entitled to TTD benefits. Petitioner also seeks penalties and fees.

Findings of Fact

1. Petitioner's testimony regarding accident:

Petra Jacobo (hereafter referred to as "Petitioner") testified via a Spanish translator that, on January 16, 2017, she was an employee of Metro Staff, Inc. (hereafter referred to as "Respondent-Metro") and she had been loaned to John B. Sanfilippo & Son, Inc. (hereinafter referred to as "Respondent-Sanfilippo") for several years as a packer. (T. 12).

Petitioner testified that, on January 16, 2017, she arrived at parking lot before starting her 6 a.m. shift. (T. 15-16). Petitioner testified she drove her vehicle into the parking lot where the employees park. (T. 16). Petitioner testified only people who work at Respondent-Sanfilippo park in the parking lot and it is not used by the public. (T. 16-17). Petitioner testified the general public uses a different parking lot located on the other side of the building in front the company store entrance. (T. 17). Petitioner testified since working at that location she has always parked in the same parking lot. (T. 18).

Petitioner testified that when she exited her vehicle, she noticed snow on the ground and the snow looked like a crystal. (T. 18). Petitioner testified that as she walked to the entrance of the building she slipped and fell to the ground. (T. 18). Petitioner testified that she fell backwards striking her whole body on the ground. (T. 18, 19). Petitioner testified she got up and went to work but after three hours of work she started to notice symptoms. Petitioner testified that her back, head and neck were hurting. (T. 20-21).

Petitioner testified that she continued to work and completed her shift but when she got home, she had her daughter rub alcohol on her back, neck and left shoulder. (T. 20-21). Petitioner testified the following day she reported the accident and Respondent transported her to Physicians Immediate Care. (T. 21-22).

2. Medical treatment received by Petitioner:

The Physicians Immediate Care records, dated January 17, 2017, state the following:

> . . . pt states she slipped on ice and fell yesterday walking into work states that she fell backwards hitting the back on (sic) her head and is now feeling a headache and neck pain also abdominal pain. Pt. denies loss of consciousness. . . . She was helped up and finished her shift. She slept fine, but when she awoke, her lateral neck muscles were tight, patient denies any pain to bones in the neck. Denies any numbness or tingling. The patient also reports muscle pain, abdominal pain and back pain as abnormal symptoms related to the complaint. (PX 1, p. 4).

Petitioner was diagnosed with a cervical sprain and head injury. (PX 1, p. 7). Petitioner was prescribed medication and issued light duty work restrictions of no lifting over 10lbs over the shoulder, waist to shoulder or below the waist and no pushing or pulling over 10lbs. (PX, p. 8).

Petitioner testified that she advised "Sorarda", who works for Respondent, of her light duty work restrictions and that "Sorarda" told her no work was available. (T. 25). Petitioner testified that since that day, neither Respondent-Metro nor Respondent-Sanfilippo asked her to return to work light duty. (T: 25).

On January 20, 2017, Petitioner returned to Physicians Immediate Care. The medical records state:

> "Patient came in for a follow up of pain in the head, neck and abdomen which was originally seen on 1/17/2017. Original onset was Mon. Jan 16, 2017. The patient describes the severity as 8/10, with 10 being the worst imaginable which has worsened since last visit when it was 5/10. The patient also reports muscle pain as an abnormal symptom related to the complaint. . . . pt states she's still having headaches not feeling any better also has left shoulder pain and right buttocks pain." (PX 1, p. 23)

Petitioner was examined which noted left shoulder posterior tenderness. (PX 1, p. 24). The records state that Petitioner's left shoulder pain was located in the "back of the left shoulder." (PX 1, p. 28). Petitioner was diagnosed with left shoulder pain. (PX 1, p. 27).

On January 26, 2017 Petitioner returned to Physicians Immediate Care and she was prescribed physical therapy. On February 21, 2017 an MRI was ordered which showed: (1) rotator cuff tendinopathy, focus of high-grade interstitial noted at the distal attachment of the

infraspinatus tendon with no tendon retraction identified; (2) mild to moderate arthritic changes; and (3) no evidence of fracture. (PX 1, pgs. 100-101). After receiving the MRI findings, Petitioner was referred to Dr. Theodore Suchy. (PX1: 106).

On February 27, 2017, Petitioner was examined by Dr. Theodore Suchy and his records state as follows:

> "Petra presents for evaluation of work related injuries to her left shoulder, neck and right hip. She had been working for Fisher Nuts for about six months. She slipped and fell in the parking on 1/16/17. She has not worked since then. She complains mostly of left shoulder pain but also has neck pain without any sort of radiculopathy and right hip pain. She was going into work when this occurred. She worked that day but had increased pain. She was seen at Physicians Immediate Care and referred by Dr. Wolin. She has been given a course of physical therapy. Her main complaint is the left shoulder pain. It wakes her at nighttime and she has difficulty working. She denies numbness or tingling. She has generalized neck pain, but again denies any radicular symptomatology. The right hip is tender over the lateral aspect. There is no groin pain." (PX 2, p. 7).

Dr. Suchy reviewed the MRI of the left shoulder and opined that Petitioner had a rotator cuff tear and impingement syndrome with mild arthritic changes of the AC joint. (PX 2, p. 8). Dr. Suchy administered a cortisone injection into the left shoulder, prescribed physical therapy and maintained Petitioner's light duty restrictions. (PX 2, p. 8).

Petitioner attended physical therapy at Midwest Physical therapy. (T. 28). Dr. Suchy administered a second cortisone injection and prescribed a right hip MRI. (T. 28), (PX 2, p. 12). After undergoing the right hip MRI, Petitioner returned to Dr. Suchy on April 27, 2017. At that visit, Dr. Suchy diagnosed "mild gluteal tendonitis," but he did not recommend any additional treatment for the right hip, however, Dr. Suchy recommended surgery for the left shoulder. (PX 2, pgs. 1-2). In his records Dr. Suchy noted that Petitioner's left shoulder injury was work-related. (PX 2 pgs. 2, 18).

On November 15, 2017, Petitioner consulted with Dr. Steven Chudik of Hinsdale Orthopaedics. (T. 33). Dr. Chudik performed a physical examination and diagnosed cervical radiculopathy and left shoulder pain with concern for rotator cuff tear. (PX 5, p. 4). Dr. Chudik ordered a "better quality" MRI of the left shoulder and cervical spine. (PX 5, p. 4). Dr. Chudik opined that Petitioner's conditions were causally related to her injury of January 16, 2017 and, at that time, Dr. Chudik took Petitioner off all work. (PX 5, p. 4).

On November 29, 2017, Petitioner underwent an MRI of the left shoulder and neck. (T. 34). Petitioner returned to Dr. Chudik, on November 29, 2017, who, after reviewing the new MRI, diagnosed a rotator cuff tear and recommended surgery. (PX 5, p. 7).

3. Section 12 examinations:

Petitioner underwent a Section 12 examination with Ms. Nancy Landre, a licensed clinical psychologist. (RX 6). Ms. Landre performed a neuropsychological evaluation on June 21 and June 27, 2017. (RX 6, p. 93). Ms. Landre opined that Petitioner "sustained, at worst, an uncomplicated concussion as a result of her work-related head injury on 1/16/17, from which full recovery would normally be expected by this point post-injury." (RX 6, p. 97). Ms. Landre further opined that "(f)rom a neuropsychological standpoint, Ms. Jacobo would be capable of returning to work at this time without restrictions." (RX 6, p. 97). Ms. Landre concluded that ". . . Ms. Jacobo is of advanced age . . . (m)y best estimate is that she should be at MMI on or around 7/16/17." (RX 6p. 97).

On August 7, 2017, Petitioner also underwent a Section 12 examination with Dr. Ajay K. Balaram. (RX 3). Dr. Balaram diagnosed Petitioner with "left shoulder degenerative rotator cuff tendinopathy with a partial thickness rotator cuff tear and impingement." (RX 6, p. 12). Dr. Balaram opined that Petitioner's left shoulder condition was unrelated to the injury of January 16, 2017. (RX 6, p. 13).

4. Deposition of Dr. Ajay Balaram, Section 12 examiner:

Dr. Balaram testified that he attended Creighton University for his undergraduate degree and for medical school. Dr. Balaram performed his residency at Loyola University and he is board certified in orthopedic surgery. (RX 5).

Dr. Balaram testified that Petitioner reported leaving work and was in a parking lot when she slipped on an icy patch and fell backward onto her back. Dr. Balaram testified that Petitioner reported experiencing pain in her neck, back, hip, shoulder and arm and over the next day her pain increased. (RX 5).

Dr. Balaram's examination showed mild tenderness to palpation over the paracervical muscle of the neck, tenderness to palpation over the trapezius and the deltoid of the left shoulder. Dr. Belaram noted mild tenderness to palpation over the distal triceps. Dr. Balaram testified that Petitioner reported pain with range of motion past 90 degrees, and she had limited range of motion with external rotation. Dr. Balaram testified that there was some evidence of symptom

magnification because some of Petitioner's symptoms were outside the norm he would normally see with an anatomic injury of a certain body part. (RX 5, p. 14).

Dr. Belaram testified that he reviewed the MRI, dated February 2, 2017, and found insertional tendinosis or inflammation associated with the tendon and a well-seated bicep tendon with no evidence of acute retracted supraspinatus or subscapularis rotation cuff injury. (RX 5, p. 13-15). Dr. Belaram opined the MRI showed a degenerate tear because he did not see any bleeding in the shoulder joint or evidence of a retracted acute tear. (RX 5, p. 21). Dr. Belaram diagnosed insertional tendinopathy which is a partial tear or fraying.

Dr. Belaram testified that based upon Petitioner's report of mechanism of injury he did not believe Petitioner sustained a left shoulder injury. Dr. Belaram testified Petitioner reported slipping and falling onto her back without falling with her arm outstretched. Dr. Belaram testified there was no brunt force being transmitted through the arm into the shoulder since it did not appear that Petitioner used her arm to brace herself from the fall. (RX 5, p. 15-16). Dr. Belaram further testified that Petitioner did not report shoulder pain on the first day of treatment and that, in his experience, if a patient had an acute rotator cuff tear, the patient would have complained of pain at the time of the accident. (RX 5, p. 21).

Dr. Belaram agreed that Petitioner needs surgery, but the surgery was due to her degenerative shoulder condition. Dr. Belaram recommended debridement surgery. (RX 5, pg. 22). Dr. Belaram opined that Petitioner should have restrictions consisting of 5 pounds with no overhead lifting which are unrelated to a work accident. Dr. Belaram also opined that Petitioner reached MMI because she had no acute injury associated with her fall. (RX 5, p. 22).

Dr. Belaram testified that examined Petitioner a second time on February 14, 2018 and that he also reviewed the November 24, 2017 MRI. Dr. Belaram testified the MRI showed signal changes within the distal supraspinatus tendon and some superior labral fluid up-take without evidence of a large rotator cuff tear. Dr Belaram further testified that he did not see any significant changes between the two MRIs. Dr. Belaram diagnosed a degenerate rotator cuff partial thickness tear with impingement which, he opined, is a degenerative condition. (RX 5, p. 26-27).

On cross-examination Dr. Belaram testified that he was aware of but did not receive or review Petitioner's initial treatment records from Physician's Immediate Care. Dr. Belaram testified the records he reviewed were provided by the case manager. Dr. Belaram testified he

was not aware that, at the first date of treatment, Petitioner reported headaches, neck pain, back pain or abdominal wall soreness. (RX 5, p. 27-37).

5. Deposition of Dr. Steven Chudik:

Dr. Steven Chudik testified he attended the University of Chicago for his undergraduate degree and for medical school. Dr. Chudik performed his residency at University of North Carolina and completed a fellowship in shoulder and sports medicine at the Hospital for Special Surgery which is affiliated with Cornell University. Dr. Chudik is board certified in orthopedic surgery and orthopedic sports medicine. Dr. Chudik's practice specializes in the treatment of shoulder, knees and sports medicine. (PX 7).

Dr. Chudik testified that Petitioner reported a history of falling on January 16, 2017 injuring her neck, hip and left shoulder. Petitioner reported that she was not experiencing any problems with her left shoulder nor had she ever received medical treatment for her left shoulder prior to January 16, 2017. At that visit, Petitioner reported constant pain that occurs particularly with moving, reaching and lifting. Dr. Chudik noted that Petitioner reported shoulder pain to her treating physician and an MRI of the left shoulder was ordered. Dr. Chudik also noted that Petitioner underwent physical therapy and cortisone injections in the left shoulder before receiving a surgical recommendation. (PX 7).

Dr. Chudik testified that reviewed the February 8, 2017 MRI which showed a mild signal at the edge of the supraspinatus and an increased density of fluid. Dr. Chudik testified that the MRI finding was only suggestive of a tear because the MRI was an open MRI which is a limited study. To obtain a better image, Dr. Chudik ordered another MRI. Dr. Chudik diagnosed a possible rotator cuff tear and cervical radiculopathy. Dr. Chudik testified that he took Petitioner off all work until he had a definite diagnosis regarding Petitioner's left shoulder. (PX 7).

Dr. Chudik testified that, on November 29, 2017, Petitioner returned to review the results of the November 24, 2017 MRI. Dr. Chudik testified the MRI showed a bursal sided rotator cuff tear and an abnormality in the superior labrum which was consistent with a tear. Dr. Chudik diagnosed a supraspinatus tear of the left shoulder and he recommended arthroscopic surgery of the left shoulder. Dr. Chudik testified that Petitioner's MRI results were consistent with Petitioner's clinical findings. (PX 7).

Dr. Chudik opined that Petitioner's left rotator cuff tear is casually related to Petitioner's work injury of January 16, 2017. Dr. Chudik testified from his review of the records the fall was a competent mechanism of Petitioner's injury. (PX 7, p. 18). Dr. Chudik opined the need for surgery was related to Petitioner's work accident. (PX 7, p. 28). Dr. Chudik further opined that Petitioner should remain off work until Petitioner's shoulder is repaired. (PX 7, p. 26).

Dr. Chudik testified that Petitioner was experiencing overlapping of symptoms caused by the cervical radiculopathy with the left shoulder injury. Dr. Chudik testified that Petitioner initially reported mostly cervical symptoms because there was a lot of overlap with the cervical symptoms which are similar to the symptoms associated with small tears, as in the Petitioner's case. Dr. Chudik testified that with small tears the shoulder becomes more painful and more noticeable days after the injury as the swelling sets up. Dr. Chudik testified that maximum swelling usually occurs within a few days of the injury. (PX 7, p. 20).

Dr. Chudik agreed with Dr. Balaram's opinion that the first MRI did not demonstrate an acute retracted supraspinatus or subscapularis rotator cuff tear. Dr Chudik testified the first MRI did not show an obvious significant retracted tear because the first MRI was an open MRI which is limited. Dr. Chudik testified that it was difficult to interpret the MRI because of the limited aspect of an open MRI. (PX 7, p. 26). Dr. Chudik testified the MRI did show pathology of the rotator cuff which was suspicious of a tear. Dr. Chudik testified that based upon the Petitioner's age, mechanism of injury, correct symptoms and failure of conservative treatment indicates that it is more likely a rotator cuff tear as presented in the MRI. (PX 7).

6. Additional testimony of Petitioner:

On cross-examination, Petitioner testified Respondent-Sanfilippo has a store which is located on the other side of the building from the employee entrance. (T. 41-42). Petitioner testified the parking spaces are not assigned. (T. 42). Petitioner testified the parking lot where she fell does not have key card to access. (T. 44). Petitioner testified that trucks use a separate entrance for deliveries. (T. pgs. 41-42). Petitioner testified she is not aware if people use the lot where she fell if the store's parking lot is full. (T. 44).

Petitioner testified that her signature is on RX1 but that her daughter wrote something down on that document requested by Sorarda. (T. 49). Petitioner testified the original document was ripped so Sorarda wrote down a second account based upon the information provided by Petitioner's daughter. (T. 50). Petitioner testified that she cannot read well and that RX1 was

written in Spanish. (T. 50). Petitioner testified that she did not finish secondary school or complete a GED. (T. 65). Petitioner also testified that she informed Sorarda that her left shoulder was hurting but it wasn't mentioned in the report. (T. pgs. 52-53). Petitioner testified that Sorarada did not ask any clarifying questions about the accident. (T. 54). Petitioner testified that Sorarada did not read the report back to Petitioner to confirm its accuracy. (T. pgs. 54-55). Petitioner testified that she signed the document without reading it. (T. 55).

Petitioner testified that she signed RX2 on or about January 28, 2017. (T. 55). The document contains the following passage: "I was getting out of my vehicle to go in to work. I fell because they have not salted the parking lot, and it was very slippery." (RX 2), (T. 58). The document describes Petitioner's injured body parts as the "Neck, hip, shoulder, head." (RX2). Petitioner admitted that she did not recall whether she put her arm down to stop herself at the time of her fall. (T. 72).

On re-direct examination Petitioner testified that she nor her daughter completed any part of the document identified as RX2. (T. 78). Petitioner also testified to go from the employee parking lot to the store's parking lot you must drive around the factory because the store is located on the other side of the building. (T. 76). Petitioner testified that her highest level of education was the second grade. (T. 77).

Petitioner testified that prior to January 16, 2017, she did not suffer any prior accidents or injuries to her left shoulder. (T. 34). Petitioner denied any prior symptoms/problems to her left shoulder prior to January 16, 2017. (T. 35). Petitioner testified that her left shoulder "hurts a lot" and she is "not able to hold not even a plate because it will fall from my hand." (T. 35-36). Petitioner also testified that she is unable able to sleep or mop "due to the pain." (T. 36). Petitioner testified that she takes 500 milligrams of Naprosyn for her symptoms. (T. 38). Petitioner testified that she would like to proceed with the recommended surgery because she wants to be "okay health-wise." (T. 38).

Petitioner testified she received temporary total disability benefits from January 17, 2017 through August 14, 2017. (T. 39), (Arb. Ex.# 1). Petitioner testified that she has not received temporary total disability benefits from August 14, 2017. (T. 39). Petitioner testified that her son-in-law help paying her bills and necessities. (T. 39-40). Petitioner testified that her son-in-law had to move in with her. (T. 40).

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). To obtain compensation under the Act, the 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).

With respect to issue (C) Did Petitioner sustain an accident that arose out of and in the course of his employment, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, (she) suffered a disabling injury that arose out of and in the course of (her) employment. *Baggett v. Industrial Commission,* 201 Ill. 2d 187, 194 (2002). 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." *Joiner v. Industrial Commission*, 337 Ill. App. 3rd 812, 815 (2003). However, the Illinois Supreme Court had noted an exception to this general rule occurs "when an employer 'provides' a parking lot to its employees." *De Hoyos v. Industrial Commission*, 26 Ill. 2d 110, 113 (1962). The Supreme Court explained:

> "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." *De Hoyos* at 113-114 (emphasis added).

In *Walker Brothers v. Illinois Workers' Compensation Commission,* 2019 Ill. App. LEXIS 812, (1st D. 2019), the Appellate Court explained that whether or not the employer "provided" the parking lot in question to its employees requires a determination of one of the following: (1) whether the parking lot was owned by the employer, or; (2) whether the employer exercised control or dominion over the parking lot, or; (3) whether

the parking lot was a route required by the employer. *Walker Brothers v. Illinois Workers' Compensation Commission,* 2019 Ill. App. LEXIS 812, p. 23 (1st D. 2019). Here, the Arbitrator notes, no evidence was presented that Respondent-Sanfilippo owned the parking lot. The issue in this case is whether Respondent-Sanfilippo exercised control or dominion over the parking lot. To this issue the Petitioner testified as follows:

Q. And were other employees of John B. Sanfilippo if you know parking in the same lot?
A. Yes.
Q. Were there other employees such as yourself working for Metro Staffing parking there as well?
A. Yes.
Q. Who else would park there besides the employees?
A. The people from the office.
Q. Would anyone of the general public park in that lot?
A. No. (T: 16-17).

Petitioner further testified as follows:

Q. Is there anything in between the parking lot where the employees are parking and where the customers - - - where the store is? Is there anything in between those lots?
A. Yes. Yes. Let's say there is a parking - - let's say this is the parking lot. The other one, you have to go around the factory.
Q. Around the building?
A. Yes.
Q. So it's on the other —
A. As you turn on the other side, that's the parking lot for the people that are going in the store.
Q. On the other side of the building?
A. Yes. (T: 76).

Respondent-Sanfilippo did not proffer any evidence contradicting Petitioner's testimony and, as such, Petitioner's testimony is unrebutted. The Arbitrator finds that it is a reasonable inference from Petitioner's unrebutted testimony that Respondent-Sanfilippo exercised control or dominion over the parking lots by having different parking lots for the employees, general public and deliveries. The employee parking was located on one end of the building or factory, near the employee entrance, while the general public used the parking lot located on the other end of the building or factory near the company store. The record established that the general public would have no reasonable basis to park near the employee entrance when the store was located on the other side of the building

or factory. The Arbitrator notes that Respondent did not proffer testimony, from an employee of Respondent-Sanfilippo, they did not designate the location for employee parking or they did not exercise control over the parking lot or the general public used the portion of the parking lot near the employee entrance. As such , the Arbitrator finds that Respondent-Sanfilippo exercised control and dominion over the parking lot located near the employee entrance where Petitioner fell.

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

When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *Sisbro v. Indust. Com'n*, 207 Ill.2d 193, 205 (2003). Workers need only prove that some act or phase of employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Indust. Com'n*, 359 Ill.App.3d 582, 592 (2005). The work-related task need not even be the sole or principal causative factor of the injury, as long the work is a causative factor. *See Sisbro*, 207 Ill.2d at 205. Even if the claimant has a preexisting degenerative condition which makes him more vulnerable to injury, recovery for an accidental injury will not be denied as long as she can show that her employment was also a causative factor. *Id.* At 205. Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982).

Causal connection between work duties and an injured condition may be established by a chain of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (First Dist. 1988). A claimant's prior condition need not be a of good health prior to the accident, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting deterioration from whatever the previous condition had been. *Schroeder v. Illinois Worker's Compensation Comm'n*, 4-16-0192WC (Fourth Dist. 2017).

The Arbitrator has carefully reviewed and considered all medical evidence along with the testimony. The Arbitrator finds that Petitioner has proven by the preponderance

of the evidence that her current condition of ill-being, including the left shoulder, head, right hip and neck, are causally related to her injury.

Prior to January 16, 2017, Petitioner was able to work, and she was not experiencing any left shoulder symptoms, nor had she received any medical care for her left shoulder. The following day the fall, Petitioner was taken to Physicians Immediate Care by Respondent. Petitioner was assessed with a sprain of the ligaments of the cervical spine, injury to the head and issued light duty restrictions which Respondent failed to accommodate. Eventually, Petitioner was diagnosed with a partial rotator cuff tear with impingement syndrome, surgery was recommended, and Petitioner was taken off all work. Petitioner has been unable to return to work since her fall of January 16, 2017.

On November 15, 2017, Petitioner sought her own opinion with Dr. Steven Chudik. (T. 33). Dr. Steven Chudik testified in his evidence deposition that he is a board-certified orthopedic surgeon with a fellowship in shoulder and sports medicine and treats shoulder issues in 50% of his patient practice. (PX 7, pgs. 6-7). At the initial examination, Dr. Chudik noted that Petitioner had a slip and fall on January 16, 2017 and also noted Petitioner "injured her shoulder when she slipped on the ice in the parking lot at work and fell backwards onto her back." (PX 7, pgs. 9-10). Dr. Chudik opined the Petitioner's torn rotator cuff of the left shoulder was causally related to her fall of January 16, 2017. (PX 7, p. 19). Dr. Chudik explained the basis of his opinion as follows:

> ". . . she had a fall which is a competent mechanism for this type of tear and injury. - - - there was proximate reporting of the injury to the shoulder at the time. She had an initial visit, I believe, on the 17th, the day following, where she reported mostly cervical symptoms, but we know very well from our experience that there's a lot of overlap with cervical symptoms and their presentation as they radiate down the arm and things. And even when we see these injuries to the cuff, especially a smaller tear like this, functionally, sometimes they become more painful and noticeable days later after the injury as swelling sets up. So she reported an approximate time on the 20th of that same month days just following the accident where – which is often the case, where there was a more complete history and did reveal that she had left shoulder pain at that time. So there was a proximate reporting of injury, competent mechanism." (PX7: 19-20).

Dr. Ajay Balaram, of Hand Surgery & Associates, performed two Section 12 examinations. Dr. Balaram testified that he is a board-certified orthopedic surgeon with added qualification of the hand. (RX 5, pgs. 27-28). Dr. Balaram opined that "(b)ased

on the patient's reported mechanism of injury, I did not see that a left shoulder injury was sustained based on what the patient had reported her mechanism of injury was." (RX 5, p. 37). Dr. Balaram explained that the mechanism of injury indicated "she slipped and fell onto her back without her arm out-stretched. Dr. Balaram testified that Petitioner did not report shoulder pain on the first day of treatment and, in his experience, if a patent had an acute rotator cuff tear, they would have complained of pain at the time of the accident. ((RX 5, p. 21). Dr. Balaram opined that Petitioner has insertional tendinopathy or a partial tear or fraying of the rotator cuff which is a degenerative condition. (RX 5, p. 22).

The Arbitrator finds the opinions of Dr. Chudik to be more persuasive than the opinions of Dr. Balaram. The Arbitrator notes that Dr. Balaram did not review the medical records from Physicians Immediate Care. Dr. Belaram testified he was aware of but did not receive or review Petitioner's initial treatment records. Dr. Belaram testified that he only reviewed the records provided by the case manager. Dr. Belaram testified he was not aware that on the first date of treatment, Petitioner reported headaches, neck pain, back pain or abdominal wall soreness. (RX 5, p. 27-37).

The Arbitrator notes that Dr. Belaram did not review Petitioner's initial treatment records from Physicians Immediate Care which showed that Petitioner was complaining of left shoulder pain and right hip pain at her second date of treatment. The Arbitrator notes that Dr. Belaram's opinions were based, in part, upon the length of time between the accident and Petitioner's first report of symptoms. The Arbitrator finds that Dr. Belaram's opinions were undermined by not reviewing the initial treatment records since the onset of Petitioner's shoulder symptoms were a part of the basis used to form his opinion. It is axiomatic that the weight accorded an expert opinion is measured by the facts supporting it and the reasons given for it; an expert opinion cannot be based on guess, surmise or conjecture. *Wilfert v. Retirement Board*, 318 Ill.App.3d 507, 514-15 (First Dist. 2000). Regarding the delays in reporting of left shoulder symptoms, Dr. Chudik testified that Petitioner initial reported mostly cervical symptoms but there is a lot of overlap between cervical symptoms when you also have small tears in the shoulder, as in Petitioner's case, because the shoulder becomes more painful days after the injury as the swelling sets up and the maximum swelling usually occurs within a few days of the injury. (PX 7, p. 20). The Arbitrator finds Dr. Chudik"s testimony consistent with the onset of Petitioner's

symptoms, MRI results and clinical findings. As such, the Arbitrator finds that after Petitioner's work accident of January 16, 2017 her condition deteriorated and her work accident caused the deterioration.

With respect to issues "J"; Whether the medical services provided were reasonable, the Arbitrator concludes the following:

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

The Arbitrator notes that Respondent's dispute regarding the medical services provided were based upon liability and not the reasonable or necessity of the medical services. The Arbitrator finds that Petitioner proved by the preponderance of the evidence the medical expenses provided were causally related to her work accident and were necessary to diagnose, relieve or cure Petitioner from the effects of her injury. As such, the Arbitrator finds that Respondent shall be liable to pay to Petitioner for the services provided by Hinsdale Orthopaedics, in the amount of $5,310.00, and Access Neurocare, in the amount of $175.05, as contained in Petitioner's Exhibit 6. The Arbitrator orders Respondent shall pay Petitioner those medical expenses pursuant to the Illinois Medical Fee Schedule to Petitioner.

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

The Arbitrator finds and concludes the left shoulder surgery prescribed by Dr. Steven Chudik is reasonable and medically necessary to alleviate Petitioner's condition of ill-being and causally related to her accidental injury of January 16, 2017. The Arbitrator notes that both Dr. Chudik and Dr. Balaram agreed that surgical intervention is reasonable and appropriate for the Petitioner's condition of ill-being. Petitioner testified that she would like to undergo the surgical procedure. (T 38). After reviewed the medical evidence and considering Petitioner's testimony, the Arbitrator orders Respondent to authorize and pay for the surgery recommended by Dr. Steven Chudik including all related reasonable and necessary medical charges pertaining to such

medical treatment. *See, Bennett Auto Rebuilders v. Industrial Commission*, 306 Ill.App.3d 650 (1st D. 1999).

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

Petitioner is seeking TTD benefits from August 10, 2017 through the date of trial, November 21, 2019. (Arb. Ex. #1).

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

The Arbitrator finds that Petitioner's condition of ill-being has not stabilized. Both Dr. Chudik and Dr. Balaram, the Section 12 examiner, agree that surgical intervention is reasonable and medically necessary. (PX 7, pgs. 27-28), (RX 5, pgs. 43-44). At the initial evaluation with Petitioner, on November 15, 2017, Dr. Chudik opined that he prescribed Petitioner off work and indicated that "(b)ecause of pain and symptoms. She's got cervical radiculopathy symptoms. She's got significant pain. She's got limitations with movement of the shoulder. Any kind of repetitive reaching or activity with the shoulder would be inappropriate." (PX 7, p. 14). On November 29, 2017, Dr. Chudik continued to prescribe Petitioner off work. (PX 7, p. 27). Dr. Chudik testified that he continues to keep Petitioner off work, stating:

Q. Okay. And do you still hold – would you still hold the opinion today that she is s till unable to return to work?
A. Yes. My opinion wouldn't have changed.
Q. Okay.
A. It was pending having surgery and repairing her injury. (PX 7, p. 27).

Dr. Balaram testified that he "would limit the patient to five pounds lifting, pushing, pulling and no overheard work." (RX 5, p. 45). Dr. Balaram testified that Petitioner should be restricted from performing her regular work activities. (RX 5, p. 63).

Petitioner testified that she provided the work restrictions, issued by Physicians Immediate Care, to Respondent who refused to accommodate the restrictions. Respondent did not proffer any evidence rebutting Petitioner's testimony. Petitioner testified that neither Respondent-Metro nor Respondent-Sanfilippo contacted her regarding returning to light duty work. (T: 25-26).

Based upon Petitioner's unrebutted testimony and the medical evidence, the Arbitrator finds that Petitioner is entitled to receive temporary total disability benefits because her condition has not stabilized. As such, the Arbitrator finds that Petitioner is entitled to receive temporary total disability benefits from August 10, 2017 November 21, 2019 at a rate of $301.03 per week.[1]

With respect to issue (M) penalties and fees, the Arbitrator finds as follows:

Illinois courts have refused to assess penalties under sections 19(k) and (l) of the Act where the evidence indicates that the employer reasonably could have believed that the employee was not entitled to the compensation withheld. *See, Board of Education v. Industrial Commission*, 93 Ill.2d 1, 442 N.E.2d 861 (1982); S*ee also, Avon Products, Inc. v. Industrial Commission,* 82 Ill. 2d 297 (1980) and *Brinkmann v. Industrial Commission*, 82 Ill. 2d 462 (1980). "Where a delay has occurred in payment of workmen's compensation benefits, the employer bears the burden of justifying the delay, and the standard we hold him to is one of objective reasonableness in his belief." *Id. See also, City of Chicago v. Industrial Commission*, 63 Ill. 2d 99 (1976). An employer's reasonable and good faith challenge to liability ordinarily will not subject it to penalties under the Act. *Matlock v. Industrial Commission*, 321 Ill.App.3d 167 (1st D. 2001). Further, penalties are generally not imposed when there are conflicting medical opinions or when an employer acts in reliance upon responsible medical opinion. *Matlock v. Industrial Commission*, 321 Ill.App.3d at 173.

[1] The Arbitrator notes that Petitioner was entitled to receive TTD benefits from January 17, 2017 through November 21, 2018 but, based upon the Request for Hearing and stipulations, Respondent paid TTD benefits from January 17, 2017 through August 9, 2017 and so Petitioner was only seeking TTD benefits from August 10, 2017 through the date of the trial. *See Arb. Ex. #1.*

The Arbitrator finds that Petitioner failed to prove that Respondent did not act reasonable or have a good faith challenge to liability. Cases involving parking lot falls occurring before or after work are generally not compensable and, as such, Respondent dispute regarding liability was reasonable. Respondent also disputed the claim based upon the opinions of the Section 12 examiner, Dr. Balaram. The Arbitrator finds that Respondent acted reasonably in relying upon the opinions of Dr. Balaram. The Arbitrator notes that Dr. Balaram was not provided the initial treatment records and he did not review those records prior to rendering his opinions. The Arbitrator finds that the failure to review the initial treatment records involved an issue of the weight to afford Dr. Balaram's opinions and does not, in of itself, support a finding of bad faith. The Arbitrator notes that no evidence of bad faith was presented at trial such as the withholding of the records by the case nurse was purposeful. As such, Petitioner's claim for penalties and fees is hereby denied.

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

David Gentry,

Petitioner,

20IWCC0692

vs.

NO: 18 WC 26026

JBS,

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 February 18, 2020, is hereby affirmed and adopted.

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

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

20IWCC0692

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $52,500.00. 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: DEC 1 - 2020
o: 11/19/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GENTRY, DAVID
Employee/Petitioner

Case# **18WC026026**

20IWCC0692

JBS USA
Employer/Respondent

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:

2427 KANOSKI & ASSOCIATES
KATHY A OLIVERO
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

2461 NYHAN BAMBRICK KINZIE & LOWRY
JASON H PAYNE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602-4195

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

20IWCC0692

☐ 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

DAVID GENTRY,
Employee/Petitioner

v.

JBS USA,
Employer/Respondent

Case # **18** WC **26026**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **1/28/20**. By stipulation, the parties agree:

On the date of accident, **5/15/17**, 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 $**36,313.01**, and the average weekly wage was $**698.33**.

At the time of injury, Petitioner was **59** years of age, ***single*** with **no** dependent children.

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

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**.

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 **$419.00**/week for a further period of **125** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **petitioner a 25% loss of use of his person as a whole**.

Respondent shall pay Petitioner compensation that has accrued from **5/15/17** through **1/28/20**, 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.

Kaureen D. Pulia

Signature of Arbitrator

2/16/2020
Date

ICArbDecN&E p.2

FEB 18 2020

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 59 year old rib bagger, sustained an accidental injury to his left arm that arose out of and in the course of his employment by respondent on 5/15/17. Petitioner has worked for respondent since 1997. Respondent's business is a pork plant where hogs are butchered into various pork products.

Prior to 5/15/17 petitioner was examined at MOHA by Dr. Clem for left shoulder pain on 3/14/17. He noted that he was planning on retiring sometime in the near future. He reported that repetitive motion with his left shoulder as a rib bagger had caused him left shoulder pain. He reported that he was unable to sleep on the left shoulder for three months because of pain. He was assessed with left shoulder tendonitis with some notable pain over the AC joint. He was prescribed Ibuprofen and x-rays were ordered that showed moderate to severe degenerative changes. He rated his pain at 6/10. On 3/21/17 Dr. Clem switched petitioner from Ibuprofen to Aleve and recommended injections into the AC joint. On 4/6/17 petitioner returned and still had complaints in his left shoulder. However, they were no longer in the AC joint, but rather in the anterior aspect of the left shoulder. He was assessed with left shoulder pain most consistent with rotator cuff tendonitis/bicipital tendonitis. Petitioner was prescribed prednisone. On 4/2717 he reported that the prednisone was not of much benefit. Dr. Gordon performed a left shoulder subacromial corticosteroid injection. He was released to full duty with caution. On 5/9/17 petitioner reported that his left shoulder was doing well. He also reported that he was doing regular work and having no problems doing his job. He noted that he takes Naproxen on an as needed basis. He was released from care. He rated his pain at a 4/10.

On 5/15/17 petitioner was working on the line packing ribs. He would pack the ribs in bags weighing 6-12 pounds, or in boxes that could weigh anywhere from 30-40 pounds. Petitioner would use both arms to perform these duties. While placing boxes of ribs on the racks above his head petitioner felt a pop in his left shoulder. Petitioner completed a Report of Employee Incident.

On 5/30/17 petitioner reported to MOHA for his left shoulder complaints. He gave a consistent history of the accident on 5/15/17. He was examined and continued on regular duty with cautions. He was prescribed Nabumetone and referred to physical therapy. On 6/15/17 petitioner had significantly limited range of motion of the left shoulder. He was assessed with an acute onset of left shoulder pain in 5/15/17. An MRI was performed on 6/21/17. The impression was full-thickness tear involving the entire supraspinatus and infraspinatus with a large amount of retraction; moderate acromioclavicular and mild glenohumeral joint osteoarthritis; and glenohumeral joint effusion. On 6/29/17 Dr. Gordon reviewed the results of the MRI and referred petitioner to orthopedics for further evaluation. He was given a new job assignment.

On 7/10/17 petitioner presented to Dr. Leo Ludwig, an orthopedic specialist at Orthopedic Center of Illinois. Petitioner described the onset of his pain as sudden. Following a history, an examination and review of the MRI Dr. Ludwig assessed left shoulder pain and a complete tear of the left rotator cuff. Surgery was recommended.

On 8/15/17 petitioner underwent a diagnostic arthroscopy of the left shoulder and an open rotator cuff reconstruction with acromioplasty performed by Dr. Ludwig. Post-operatively petitioner followed up with Dr. Ludwig and underwent a course of physical therapy. Post-operatively he was allowed to do one hand work.

On 2/12/18 petitioner reported to Dr. Ludwig that his pain was 0/10. He also reported that he was concerned he could only lift about 2 pounds with his left arm in front of him. Besides that he stated that he was doing great. Dr. Ludwig was of the opinion that petitioner still had fairly significant external rotation weakness on physical examination. He indicated that petitioner could now use his left arm. He allowed petitioner to lift up to 10 pounds from floor to waist, and could lift 2 pounds from waist to above his head. On 3/19/18 petitioner had some improvement in his strength but he was still weak. His restrictions were maintained.

On 5/21/18 petitioner last followed-up with Dr. Ludwig. He rated his pain at 2/10, but noted that it was more stiff than painful. His active forward flexion on the left was 135 as compared to 140 on the right; his external rotation on the left was to 30 as compared to 45 on the right; his abduction was to 90 on the left as compared to 145 on the right, and his internal rotation on the left was to T10 on the left, and to T9 on the right. Petitioner's left shoulder strength was supraspinatus 5/-5, external rotation 3+ to 4/5, and biceps 5/5. Dr. Ludwig was of the opinion that petitioner had some residual loss of motion and some weakness that was permanent. He noted that petitioner could tolerate his current job without difficulty as tolerated. He released petitioner on an as needed basis.

On 11/12/18 petitioner returned to Dr. Ludwig. His active forward flexion on the left was 130 as compared to 160 on the right; his external rotation on the left was to 25 as compared to 50 on the right; his abduction was to 140 on the left as compared to 160 on the right, and his internal rotation on the left was to T12 on the left, and to T12 on the right. Petitioner's left shoulder strength was supraspinatus 5/-5, external rotation 3+ to 4/5, and biceps 5/5. Dr. Ludwig noted that petitioner had come in for clarification on his permanent restrictions. Based on the physical examination Dr. Ludwig was of the opinion that petitioner still had significant restriction of motion and external rotation weakness. Dr. Ludwig gave petitioner permanent restrictions of no lifting above 10 pounds from floor to waist level, and 2 pounds from waist level to overhead. He was of the opinion that the current job petitioner was doing where he slides fatbacks is something that he is capable of doing. He recommended that the petitioner stay with this job permanently. He again released petitioner on an as needed basis.

Petitioner completed a QuickDASH an indicated that he had severe difficulty opening a tight or new jar, and use a knife to cut food; and mild difficulty carrying a shopping bag or briefcase, and washing his back.

On 5/28/19 petitioner presented to Dr. Alpert at the request of the respondent for an Impairment Rating. Petitioner's current complaints were left shoulder stiffness, pain and weakness. He stated that he felt like it was tearing again. He stated that he uses pulleys at home. He noted that he was working and using his right upper extremity mainly. Dr. Alpert's examination of petitioner's left arm revealed passive and active forward elevation to 110, abduction to 140, external rotation to 30, and internal rotation to L3. He had 4/5 rotator cuff strength testing with pain. Petitioner completed a QuickDASH form and got a score of 56. Dr. Alpert reviewed petitioner's medical records. Using the Sixth Edition Guides to the Evaluation of Permanent Impairment Dr. Alpert determined petitioner had an 8% upper extremity impairment, or a 5% whole person impairment.

On 12/6/19 the evidence deposition of Dr. Alpert, an orthopedic surgeon, was taken on behalf of respondent. Dr. Alpert was certified to perform impairment ratings under the Sixth Edition of the Guides 5 years ago.

On cross examination Dr. Alpert testified that he did not examine petitioner's range of motion as it relates to extension or adduction. Dr. Alpert agreed that the QuickDASH form petitioner completed did not ask anything about placing an object on a shelf overhead, changing a light bulb overhead, washing his back, or putting on a pullover sweater. Dr. Alpert was not sure if he reviewed the actual MRI films, the physical therapy records, or records from the employer's nursing department. Dr. Alpert agreed that there are four factors and he did not put anywhere in his report that he did not take into consideration an adjustment for functional history.

Petitioner testified that currently he has stiffness in his left shoulder in the morning and takes a hot shower to loosen it up. He also uses Salon Pas, and takes 6 Aleve a day. Petitioner reported that he has pain with lifting in the incision area. He reported that he no longer has any noises coming from his left shoulder. He noted that his left shoulder strength is decreased. He reported difficulty hunting as it relates to holding and lifting a gun or bow. He also reported stiffness and pain when sleeping on his left shoulder. He stated that he cuts a "V" in his Tshirt necks and cuts off the sleeves so that they are easier to get in and out of. He also reported that lifting pots can be difficult.

Petitioner testified that he has a home exercise program that includes bicep curls with 10 pound weights. He also uses pulleys and rubberbands when exercising. Petitioner testified that he would like to work until he is 70. He stated that he cannot get social security retirement benefits until he reaches 66 ½ years old.

Petitioner testified that the job he is currently doing is the job he was doing on light duty after the injury. He testified that this job is a Base Pay position, and the job he was in at the time of the injury was a Grade 2 Pay

position. Petitioner testified that he must bid for any jobs he wants. He reported that he can work any job with a 10 pound lift from floor to waist, and 2 pounds overhead. He testified that each week open positions with their pay grades are posted, but the duties are not on that sheet. The rib line job petitioner was working on the date of injury does not fit into his restrictions. Other jobs that meet his restrictions are the Hocksaw and Split Foot Saw positions. These positions are Grade 2 positions, and petitioner can bid on them if they are posted. Petitioner testified that he checks the board each week for jobs. He testified that no one from respondent has ever come to him and offered him a position within his restrictions that is a Grade 2 pay position. He also admitted that he never went to Human Resources to view the duties of a job to see if they were within his restrictions.

Petitioner testified that he is making now more than he did at the time of the injury due to the union raises he has gotten since the injury. Petitioner earns $16.45 in his current base pay position.

The nature and extent of petitioner's injury, consistent with 820 ILCS 305/8.1b, permanent partial disability, shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 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. No single enumerated factor shall be the sole determinant of disability. Id.

Respondent submitted an AMA rating pursuant to Section 8.1b of the Act into evidence. Using the Sixth Edition Guides to the Evaluation of Permanent Impairment Dr. Alpert determined petitioner had an 8% upper extremity impairment, or a 5% whole person impairment. The arbitrator notes that as part of this Impairment Rating analysis Dr. Alpert testified that he did not examine petitioner's range of motion as it relates to extension or adduction. Dr. Alpert also agreed that the QuickDASH form petitioner completed did not ask anything about placing an object on a shelf overhead, changing a light bulb overhead, washing his back, or putting on a pullover sweater. Dr. Alpert also testified that he was not sure if he reviewed the actual MRI films, the physical therapy records, or records from the employer's nursing department. Lastly, Dr. Alpert agreed that although there are four factors, he did not put anywhere in his report that he did not take into consideration an adjustment for functional history. Therefore, the Arbitrator gives some weight to this factor.

With respect to factor (ii), the occupation of the injured employee, petitioner was a rib bagger at the time of the injury. Following his surgery and post operative treatment petitioner was released from care with permanent restrictions of no lifting more than 10 pounds from floor to waist level, and 2 pounds from waist level to overhead. As a result of these restrictions, petitioner was unable to return to work as a rib bagger. While petitioner was on light duty he was working a job where he slides fatbacks. Dr. Ludwig, upon

petitioner's release from care, was of the opinion that this job was something petitioner was capable of performing within his restrictions. Petitioner is currently working this job. For these reasons the arbitrator gives greater weight to this factor.

With respect to factor (iii), the age of the employee. Petitioner was 59 years old at the time of the injury. Petitioner is likely to be in the work force no more than a decade. Given the physical nature of portions of petitioner's job, the Arbitrator gives greater weight to this factor.

With respect to factor (iv), the future earnings of the petitioner, the petitioner was 59 years old on the date of injury. Petitioner is currently 62 ½ years old. On 3/14/17, prior to the injury, while he was treating for his left shoulder, petitioner told Dr. Clem that he was planning on retiring sometime in the near future. However, at trial, petitioner testified that he could not collect social security retirement benefits until he is 66 ½ years old. He also testified that he would like to work until he is 70 years old.

The job the petitioner is currently working is a Base Pay position, that pays less than the Grade 2 Pay position was working in on the date of injury. Petitioner began working this position when he was on light duty following the injury. When he was released from care following the injury with permanent restrictions, Dr. Ludwig was of the opinion that he could continue in this position. There was some discussion at trial as to whether or not petitioner has looked for any work in a Grade 2 Pay position since reaching maximum medical improvement. Petitioner testified that he looks at the open positions postings each week and sees what are positions are available for bid. Petitioner testified that although the Pay Grade is on the list, the duties are not. He testified that respondent has never attempted to offer him any other job within his restrictions at a Grade 2 Pay level. Petitioner testified that his current job pays $16.45 an hour, and is more than he was earning in his Grade 2 Pay position on the date of injury. For these reasons, the Arbitrator gives greater weight to this factor.

With respect to factor (v), evidence of disability corroborated by the treating medical records, the Arbitrator notes that petitioner underwent a diagnostic arthroscopy of the left shoulder and an open rotator cuff reconstruction with acromioplasty performed by Dr. Ludwig. When petitioner last followed-up with Dr. Ludwig on 11/12/18 his active forward flexion on the left was 130 as compared to 160 on the right; his external rotation on the left was to 25 as compared to 50 on the right; his abduction was to 140 on the left as compared to 160 on the right, and his internal rotation on the left was to T12 on the left, and to T12 on the right. Petitioner's left shoulder strength was supraspinatus 5/-5, external rotation 3+ to 4/5, and biceps 5/5. Based on the physical examination Dr. Ludwig was of the opinion that petitioner still had significant restriction of motion and external rotation weakness. Dr. Ludwig gave petitioner permanent restrictions of no lifting above 10 pounds from floor to waist level, and 2 pounds from waist level to overhead.

Petitioner testified that currently he has stiffness in his left shoulder in the morning and takes a hot shower to loosen it up. He also uses Salon Pas, and takes 6 Aleve a day. Petitioner reported that he has pain with lifting in the incision area. He reported that he no longer has any noises coming from his left shoulder. He noted that his left shoulder strength is decreased. He reported difficulty hunting as it relates to holding and lifting a gun or bow. He also reported stiffness and pain when sleeping on his left shoulder. He stated that he cuts a "V" in his Tshirt necks and cuts off the sleeves so that they are easier to get in and out of. He also reported that lifting pots can be difficult.

The Arbitrator gives greater weight to this factor.

Based on the above as well as the credible evidence, the arbitrator finds the petitioner sustained a 25% loss of use of his person as a whole pursuant to Section 8(d)2 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

Ronald Swintek,

Petitioner,

vs.

No. 17 WC 31986

Cook County Sheriff's Department,

20IWCC0693

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 17, 2018, is hereby affirmed and adopted.

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

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

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

DEC 3 - 2020

DATED:
o-11/19/2020
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

SWINTEK, RONALD
Employee/Petitioner

Case# **17WC031986**

COOK COUNTY
Employer/Respondent

20IWCC0693

On 9/17/2018, 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 2.26% 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:

6122 CELSO FUENTES JR & ASSOC LTD
111 W WASHINGTON ST
SUITE 1521
CHICAGO, IL 60602

0132 COOK COUNTY STATE'S ATTORNEY
CYNTHIA ASHFORD-HOLLIS
500 RICHARD J DALEY CTR 5TH FL
CHICAGO, IL 60602

20 IWCC0693

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)

RONALD SWINTEK
Employee/Petitioner

v.

COOK COUNTY
Employer/Respondent

Case # **17** WC **31986**

Consolidated cases: **D/N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **04/10/18 and 7/19/18**. 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. ☒ 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 the claimed accident, **09/28/17**, 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.

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

In the year preceding the injury, Petitioner earned $**76,460.08**; the average weekly wage was $**1,470.40**.

On the date of accident, Petitioner was **51** years of age, ***single*** with **3** dependent children.

Based on the Arbitrator's findings as to credibility, accident and causation, the Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $**5,068.97** for other benefits, for a total credit of $**5,068.97**. Arb Exh 1.

ORDER

Per the parties' stipulation, Respondent shall be given a Section 8(j) credit of $5,068.97 for medical benefits that have been paid. Arb Exh 1.

For the reasons set forth in the attached decision, the Arbitrator finds Petitioner was not credible and failed to meet his burden of proof on the issues of accident and causation. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues.

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.

Molly C Mason

Signature of Arbitrator

9/17/18
Date

ICArbDec19(b)

SEP 17 2018

Ronald Swintek v. Cook County Department of Corrections
17 WC 31986

20IWCC0693

Summary of Disputed Issues

Petitioner, a longtime correctional officer, claims a work accident of September 28, 2017. He acknowledged five prior work accidents, with the fifth resulting in seven years of lost time and the need for a lumbar discectomy and fusion in 2013 and a cervical fusion in 2015. He returned to work, albeit in a warehouse rather than correctional setting, about eight months before September 28, 2017, the date he claims he tripped over a box and fell. Two other officers, called by Respondent, took issue with Petitioner's testimony, indicating they were working across from Petitioner when they saw him sit back onto a box and then slowly roll over onto the floor. The warehouse director, also called by Respondent, testified she spoke with Petitioner very shortly before the accident, to ensure he would respond to an E-mail from Respondent's Office of Professional Review notifying him he was the subject of an investigation and might be subject to disciplinary action. She also testified she inspected Petitioner's work area shortly after the accident and found no tripping hazards.

The parties agreed to bifurcate the hearing due to the unavailability of various medical records and bills. They also agreed that testimony at the continued hearing would be limited to Petitioner's rebuttal testimony and medical issues. At the continued hearing of July 19, 2018, the Request for Hearing form was amended to take permanency out of dispute, based on Petitioner's testimony that he remained off work and was seeking prospective care, including back surgery. Arb Exh 1.

The disputed issues include accident, causal connection, medical expenses, temporary total disability and prospective care. Arb Exh 1.

Arbitrator's Summary of Testimony Taken on April 10, 2018

Petitioner and five Respondent witnesses testified at the initial hearing of April 10, 2018.

Petitioner testified he lives in Des Plaines, Illinois with his girlfriend and six children. T. 4/10/18, p. 15.

Petitioner testified he has worked for Respondent for 25 years. T. 4/10/18, pp. 14-15. He started working in a Respondent warehouse about eight months before his claimed accident of September 28, 2017. T. 4/10/18, p. 22. Before that, he was off work for seven years secondary to an earlier work-related back injury requiring a fusion at L4-L5. T. 4/10/18, p. 22. He has had about five work accidents over the years and has previously filed workers' compensation claims against Respondent. T. 4/10/18, p. 15.

Petitioner testified his duties as of September 28, 2017 involved assembling personal care kits for prisoners. Essentially, he put items such as toothpaste and toilet paper in boxes. He worked from 7 AM to 3 PM. T. 4/10/18, pp. 15-16.

Petitioner testified that, shortly before the accident, he was working with a female individual whose name he could not recall. This individual was doing "County time," per a court order, and had been assigned to work with him. T. 4/10/18, pp. 19-20. He and she were standing at a 6-foot by 3-foot table that was stocked with supplies. There was a box to his right. At around 8 AM, he decided to get

more soap from another area. He turned to his right, tripped over the box and fell, striking his right shoulder and head. T. 4/10/18, p. 19. Petitioner testified he is "not sure if [he] went unconscious or not." He felt pain in his head and shoulder. T. 4/10/18, pp. 20-21.

Petitioner testified a female director arrived at his work area after the accident. T. 4/10/18, p. 21. An ambulance showed up and paramedics took him to the Emergency Room at Mt. Sinai Hospital. At the hospital, he provided a history of the accident and complained of headaches and blurred vision. He underwent some X-rays. Halfway through his visit, there was a "rush" of patients and he was discharged, with instructions to follow up with his primary care physician. T. 4/10/18, pp. 23-24.

Petitioner testified that, the following day, he woke up "in more pain" and unable to see "because of the bright light." He went to Alexian Brothers Medical Center and was diagnosed with a concussion and a tear in his right shoulder. T. 4/10/18, p. 24. Hospital personnel gave him pain medication and instructed him to seek additional care. He saw Dr. Ramona Zak, his primary care physician, a day or two later. He complained of headaches and light sensitivity. Dr. Zak took him off work and referred him to a specialist for his back. T. 4/10/18, pp. 26-27.

Petitioner testified he then saw a back specialist whose name he could not recall. At the specialist's recommendation, he underwent a lower back MRI scan to check the status of his prior fusion. T. 4/10/18, p. 28.

Petitioner testified he returned to Dr. Zak after undergoing both back and shoulder MRIs. He last saw Dr. Zak the day before the hearing, at which point she recommended he see a shoulder specialist. He has not seen a shoulder specialist to date. T. 4/10/18, pp. 29-30.

Petitioner testified he continues to experience headaches, light sensitivity, pain in his shoulder with reaching or washing his hair and pain in his hip while walking. T. 4/10/18, p. 31.

Petitioner testified he also saw a "hip doctor" who released him to light duty, at his request. He asked to be released to light duty because he wanted to get back to work. T. 4/10/18, pp. 31-32. Three weeks before the hearing, he went to Respondent's human resources department and requested light duty. He was told nothing was available. He has called the department on about ten subsequent occasions but has not been given light duty. T. 4/10/18, p. 33.

Petitioner testified he has had no income since the accident. T. 4/10/18, p. 32.

Under cross-examination, Petitioner testified he started work at 7 AM on September 28, 2017. T. 4/10/18, p. 34. He does not recall speaking with Pat Horne that morning, before the accident. T. 4/10/18, p. 35. He received an E-mail a couple of days earlier, instructing him to contact Investigator Barker of Respondent's professional responsibility department. He followed this directive and talked with Barker before the accident. T. 4/10/18, p. 35.

Petitioner testified he started his workday by going to his assigned table inside the warehouse. A female, who was "doing County time," worked nearby. She was off to his left, on the other side of the table. There were three or four other individuals in the general vicinity but no one else at the table. T. 4/10/18, p. 36. There was a box underneath the table. At about 7:30 or 8:00 AM, he took a step to his right and tripped over a box that was 1' x 1 ½' x 8" in size. The box contained soap or toothpaste. He fell onto the floor, not onto an object. Director Pat Horne came over after he fell and said "don't move

him." T. 4/10/18, p. 39. When asked whether Officer Roach was present, he indicated he does not know this officer. He did not offer Officer Roach any money to substantiate his claim. T. 4/10/18, pp. 39-40. Horne was still present when the paramedics arrived. When asked whether Officer Roach was also present at that time, he stated: "I'm not sure who Mr. Roach is." T. 4/10/18, p. 40. He was transported to Mt. Sinai, where he complained of his head, shoulder and back. T. 4/10/18, p. 41.

Petitioner testified his first workers' compensation claim involved a head injury that required 100 stitches. His second claim involved an abdominal wound. He got "sliced" in his stomach. The third claim involved a hand injury. A female prisoner bit him. The fourth claim involved a back injury. The fifth accident involved his neck, back and right shoulder. He underwent a cervical fusion, a lumbar fusion and two right shoulder surgeries following this accident. He "sort of" received compensation for these injuries. T. 4/10/18, pp. 42-43.

On redirect, Petitioner testified he probably went to work on September 27, 2017, the day before the accident. T. 4/10/18, pp. 43-44. He felt good that day. T. 4/10/18, p. 44. Someone called an ambulance after the accident. He does not believe Horne stayed with him until the paramedics arrived. T. 4/10/18, p. 44. An officer accompanied him to the hospital. Some of the people who were in the vicinity before the accident were civilians. Others were officers. T. 4/10/18, p. 45.

Under re-cross, Petitioner testified he believes he worked on September 27, 2017. He does not remember calling in sick that day. T. 4/10/18, p. 46.

On further redirect, Petitioner denied having any physical complaints when he arrived at work on September 28, 2017. T. 4/10/18, p. 46.

Reginald Barker, Respondent's first witness, testified he worked as an officer for Respondent for five years and then began working as an investigator. He has been an investigator with Respondent's Office of Professional Review, or "OPR," for the last three years. This office investigates alleged misconduct of officers. T. 4/10/18, p. 54.

Barker testified he knows Petitioner. He worked with Petitioner in the past. In early September 2017, he received an assignment involving Petitioner and began conducting an investigation. On September 27, 2017, he sent Petitioner an E-mail directing him to appear for an "accused" interview on October 2nd. T. 4/10/18, p. 51. An "order to appear" provides three to five days' notice of a required appearance. He received no response from Petitioner on September 27th. T. 4/10/18, p. 52. On September 28th, sometime between 7 and 8 AM, Petitioner called him and asked what he was being accused of. He explained the accusation to Petitioner. T. 4/10/18, p. 52. The E-mail he sent to Petitioner also described the allegations. The E-mail did not state that discipline would be involved but, as an officer, Petitioner would have known this. T. 4/10/18, pp. 54-55. He had no additional contact with Petitioner on September 28th. T. 4/10/18, p. 55.

Under cross-examination, Barker testified he receives investigation assignments randomly. T. 4/10/18, p. 56. An investigation begins after a complainant turns in a complaint to "OPR." Patricia Horne told him she would advise Petitioner of the investigation and then E-mailed him, saying Petitioner "just fell." T. 4/10/18, pp. 59-60. The allegation brought against Petitioner does not relate to a work accident. T. 4/10/18, p. 60. The E-mail he sent to Petitioner indicated that disciplinary action was possible, depending on the outcome of the investigation. T. 4/10/18, p. 60. He does not work in the warehouse and did not witness the claimed accident. T. 4/10/18, pp. 60-61.

Ricky Frazier, Respondent's second witness, testified he has worked as an officer for Respondent for twelve years. During the last four years, he has worked in the warehouse. He worked with Petitioner at the jail and the warehouse. He is on a management team at the warehouse. T. 4/10/18, pp. 63-64.

Frazier testified he normally works from 7 AM to 3 PM, Monday through Friday. He started work at 7 AM on September 28, 2017. T. 4/10/18, p. 65. He and five other officers, including Petitioner, were working at a table, taking turns packaging personal care items. A box of toothpaste was in the middle of the table. He was standing across the table from Petitioner. Roach was next to Petitioner. Officer Lee was also present. T. 4/10/18, pp. 65-66.

Frazier testified that, while he and the other officers were discussing something, he saw Petitioner stand up. He then heard Petitioner say "whoa" five or six times. By then, Petitioner had everyone's attention. T. 4/10/18, pp. 66-67. Petitioner then fell back over a box of tissue that was 3 feet high. Petitioner landed in a seated position on the box. Petitioner then turned to his right and rolled over to the floor. T. 4/10/18, pp. 66-68. He asked Petitioner if he was okay. Initially, Petitioner made no response. After two or three minutes, Petitioner "seemed to be crying and saying that he was hurt." Someone called an ambulance. Paramedics arrived. They put Petitioner on a stretcher and took him away. Lee, Roach and Davis were still present at this point. He did not see Petitioner again after the paramedics took him away. T. 4/10/18, p. 71.

Under cross-examination, Frazier testified he has known Petitioner for a little more than five years. T. 4/10/18, p. 71. There are about 10 to 15 tables inside the warehouse. Two of these tables were in the vicinity of the accident. Soap, toilet paper and other supplies were on the table where he and Petitioner were working. T. 4/10/18, p. 72. If the supplies ran out, someone would have to leave the table to get more boxes. T. 4/10/18, p. 72. He does not know why Petitioner said "whoa." He has no medical training. He did not assist Petitioner after the accident. T. 4/10/18, p. 73.

Alan Lee, Respondent's third witness, testified he is going on his thirteenth year at Respondent. T. 4/10/18, p. 75. He has worked at the warehouse for the last 3 ½ to 4 years. T. 4/10/18, p. 76. He knows Petitioner from the warehouse, where they worked together for four or five months. T. 4/10/18, p. 76. He worked from 7 AM to 3 PM as of the day of the accident. T. 4/10/18, p. 77. When he arrived at work that day, he went to a work station and began assembling "bed rolls" for prisoners. The rolls consisted of tissue, soap and toothpaste. These items were on top of a long desk that was between him and Petitioner. He was sitting on one side of this desk and Petitioner was on the other side. T. 4/10/18, p. 78. Roach and Officer Frazier were also present. They were all "talking and working." T. 4/10/18, p. 79. He was directly facing Petitioner when he saw Petitioner step back. Petitioner then said "whoa." He sat down on a box and then rolled onto his right side. At first, he thought Petitioner was "playing." After Petitioner complained of his back, he left and went to get supervisor Pat Horne. T. 4/10/18, p. 80. Petitioner was lying on the ground when he and Horne arrived. Officers Frazier and Davis were present. Lee testified he put a blanket under Petitioner's head. Paramedics arrived and took Petitioner to a hospital. He did not accompany Petitioner to the hospital. He has not seen Petitioner since that day. T. 4/10/18, pp. 80-82.

Under cross-examination, Lee testified no prisoner was working at the table. T. 4/10/18, p. 82. Petitioner was standing before he stepped back and sat on a box. He did not see Petitioner trip over anything. There was nothing on the floor that he knows of. It did not appear as if Petitioner tripped but

he was not looking at Petitioner's feet. T. 4/10/18, p. 83. It took three to four minutes for the paramedics to arrive. He has no recollection of Petitioner conversing with anyone after the event. T. 4/10/18, p. 84.

Howard Davis, Respondent's fourth witness, testified he has worked for Respondent for sixteen and a half years. He has worked at the warehouse for the last four years. He worked with Petitioner but only at the warehouse. T. 4/10/18, p. 87. His shift at the warehouse runs from 8:30 AM to 4:30 PM. He "runs lead" and takes care of recycling but also helps assemble "bed rolls." T. 4/10/18, p. 88. On September 28, 2017, he arrived at work at 8:30 AM and went to the table to see what was going on. T. 4/10/18, p. 89. He observed Petitioner, a civilian named "Stan," another civilian named "Roach" and Officers Lee and Frazier working at a table, assembling "bed rolls." A box containing 96 rolls of tissue paper was on top of the table. Petitioner was on one side of the table. The other men were on the opposite side. His back was toward Petitioner when he noticed that people were looking in Petitioner's direction. He turned and saw Petitioner on the floor. T. 4/10/18, p. 90. He went over to Petitioner and asked if he wanted help getting up. Petitioner said "don't pick me up." Petitioner was complaining about his back. He (Davis) told someone to "go tell Pat [Horne] to call 911." After an ambulance arrived, he went outside and showed the paramedics where to go. Director Pat Horne came to the scene, as did "Deputy Jason." After the paramedics put Petitioner in the ambulance, he noticed Roach approach the back of the ambulance and speak with Petitioner. He (Davis) rode in the ambulance with Petitioner and stayed with him at the hospital until a doctor cleared him to leave. T. 4/10/18, p. 92. He has not seen Petitioner since that day. T. 4/10/18, p. 92.

Under cross-examination, Davis testified he only knew Petitioner through the warehouse. He has never known Petitioner to be a discipline problem. T. 4/10/18, p. 93. Before the accident, Petitioner was on one side of the table and all the other men were on the opposite side. "Stan" was not an officer but he worked for Respondent. T. 4/10/18, p. 95. Davis acknowledged he did not witness the accident. Roach is also a civilian. He (Davis) saw Roach at the back of the ambulance. T. 4/10/18, p. 94. He did not hear the conversation between Roach and Petitioner. T. 4/10/18, p. 95. Bullets, vests and handcuffs are stored at the warehouse. T. 4/10/18, p. 95. There are surveillance cameras inside the warehouse. He is not sure where these cameras are located. T. 4/10/18, p. 96. He rode with Petitioner to Mt. Sinai Hospital and stayed with him at the Emergency Room until Petitioner was discharged. T. 4/10/18, pp. 96-97.

Patricia Horne, Respondent's fifth witness, testified she has worked for Respondent since 2006. For the last eight years, she has worked at Respondent's warehouse on South Rockwell in Chicago. She is the Director of Support Services. She oversees personnel and operations at the Sheriff's warehouse. T. 4/10/18, p. 99. She was Petitioner's supervisor as of September 28, 2017. T. 4/10/18, p. 100. Petitioner worked that day but did not work the previous day. She cannot recall whether he worked on September 26th. T. 4/10/18, p. 101. His shift ran from 7 AM to 3 PM. On the morning of September 28th, before the incident, she spoke with Petitioner and told him he needed to respond to the investigation-related E-mail. T. 4/10/18, pp. 101-102. She learned of the incident around 10 AM, at which point she was at her desk. She was notified that Petitioner had fallen. She went to Petitioner's work area and saw him lying on the ground. T. 4/10/18, p. 103. She and Officer Lee tried to make Petitioner more comfortable by placing a towel under his head. T. 4/10/18, p. 105. Earlier that day, she assigned Petitioner to assemble "hygiene rolls." Petitioner had been similarly assigned on many prior occasions. The assembly took place at two different tables. Cases of soap and other items were stored near the tables. Anthony Roach was Petitioner's immediate supervisor. T. 4/10/18, p. 104. When she arrived at the scene, after learning of the accident, she observed Officers Lee, Davis and Frazier in the

area. She asked Petitioner "how did this happen?" Petitioner told her his feet got twisted under the table, causing him to fall backward. T. 4/10/18, p. 105. She inspected the area and saw no loose materials or carpeting. The boxes of supplies were generally stored near the ends of the tables. She saw paramedics take Petitioner to the ambulance. T. 4/10/18, p. 106. She instructed Howard Davis, the safety officer, to ride with Petitioner to the hospital. She observed Roach speaking with Petitioner. After the ambulance left, she further inspected the area and prepared an "IOD" [injury on duty] report. She found nothing irregular about the flooring or lighting in the area. Roach came back into the warehouse, from the ambulance area, and made a comment about a conversation he had had with Petitioner. T. 4/10/18, p. 107.

Under cross-examination, Horne acknowledged she did not witness the accident. T. 4/10/18, p. 111. There were no boxes near where Petitioner was lying. She is not aware of whether other officers or civilians moved boxes. T. 4/10/18, p. 108. If the ambulance report indicates the paramedics were at the warehouse at 8:45 AM, she has no reason to dispute this. Roach is a civilian, not an officer. He is in charge of the hygiene roll preparation. T. 4/10/18, p. 109. She is in charge of the warehouse. There are security cameras in the warehouse entryway and dock door area. There are no cameras in the vicinity of the accident. All the footage captured by the cameras is destroyed after 90 days. T. 4/10/18, pp. 110-111.

Petitioner was then recalled to the stand. He testified the OPR investigation had to do with something he posted on Facebook. It was not related to the accident. The investigation is ongoing. T. 4/10/18, p. 114. Due to injuries, he was off work for seven years before the accident. He later learned of a memo concerning Facebook posts. T. 4/10/18, p. 113.

As noted earlier, the hearing was bifurcated, with the parties agreeing to limit the testimony at the continued hearing to rebuttal and issues relating to the histories Petitioner gave and his medical care. T. 4/10/18, pp. 119-120.

At the continued hearing of July 19, 2018, Petitioner testified he was lying on his right shoulder when the paramedics arrived at Respondent's warehouse. He could not sit up on his own. T. 7/19/18, pp. 7-8. He had to be transferred to the ambulance via a wheelchair. At Mt. Sinai's Emergency Room, he complained of a headache, dizziness and pain in his right hip, right shoulder and lower back. He underwent X-rays and scans. He was directed to follow up with his personal care physician. He went to a different hospital, Alexian Brothers, the next day and complained of headaches and light sensitivity. He underwent more tests and was diagnosed with a concussion. He saw his primary care physician, Dr. Zak, a week later and complained of hand numbness and pain in his right hip, right shoulder and lower back. Dr. Zak prescribed pain medication and referred him to a surgeon. Dr. Zak also recommended he see a doctor for his headaches. He underwent MRIs at the surgeon's recommendation. The surgeon recommended right shoulder and lower back surgery. T. 7/19/18, pp. 11-13.

Petitioner testified he remains symptomatic. He is still seeing Dr. Zak and an orthopedic surgeon. He will be starting right shoulder therapy. T. 7/19/18, p. 13.

Petitioner testified he has not returned to work since the accident. T. 7/19/18, p. 15. He was released to light duty about two to three months before the hearing. He presented his restrictions to Teresa, a Respondent human resources employee. He has called Respondent several times since presenting the restrictions. Respondent has not offered him light duty. He has been employed by Respondent for 26 years. T. 7/19/18, pp. 16-18.

Under cross-examination, Petitioner acknowledged signing RX 2, an accident report. T. 7/19/18, p. 23. [The Arbitrator sustained Petitioner's objection to this report, marked the report as a rejected exhibit and did not consider the report in rendering this decision.]

Petitioner testified he tells the truth to the doctors he sees. He has no recollection of telling a Loyola provider on October 5, 2017 that he was unconscious when he lifted a box and fell. T. 7/19/18, pp. 26-27. Dr. Zak has not recommended surgery. He cannot recall the name of the physician who has recommended back surgery. T. 7/19/18, p. 28. He is taking pain medication for his headaches and other symptoms. He has not yet started physical therapy. He is functioning but with difficulty. T. 7/19/18, pp. 28-29.

On redirect, Petitioner testified he has difficulty walking, mopping and sweeping. He will be getting married in one week but will not be able to dance at the wedding. It is difficult for him to get dressed due to hand numbness. His fiancée has to help him. He falls frequently. T. 7/19/18, pp. 30-32. Bright sunlight bothers him. He is "not really sure" whether he told medical personnel he lost consciousness and then fell over. He can remember falling but does not recall hitting the ground. T. 7/19/18, p. 32.

Arbitrator's Summary of Documentary Evidence

The City of Chicago Fire Department "run sheet" dated September 28, 2017 (PX 2) reflects that paramedics arrived at the warehouse at 8:45 AM and encountered Petitioner in a seated position. They described Petitioner as alert, oriented and complaining of lower back pain "traveling up to his upper back and neck." They indicated Petitioner denied any other complaints. They further indicated that Petitioner "was working and tripped over a box in the warehouse," initially falling onto his right side. They noted Petitioner's medications included Insulin, Vicodin and a medicine for hypertension. They documented a blood sugar level of 345.

Petitioner also offered into evidence a City of Chicago ambulance bill in the amount of $1,017.00 relating to the services provided on September 28, 2017. PX 3.

The Mt. Sinai Emergency Room records of September 28, 2017 (PX 1) describe Petitioner's past medical history as "significant for diabetes and hypertension." One note reflects Petitioner complained of midline and left-sided neck tenderness after tripping and falling, striking his head. This note also reflects that Petitioner reported a "mild loss of consciousness." Emergency Room personnel recorded a blood pressure of 168/102 and a glucose level of 346. Dr. Debruin ordered CT scans of the head and cervical spine. The head CT scan showed "no acute intracranial findings" and the cervical spine CT scan showed "no acute fracture or subluxation." Lumbar spine X-rays showed evidence of "prior laminectomy defect L4 level" and mild degenerative changes.

Another note reflects that Petitioner arrived from work, via paramedics, and reported tripping and falling. Petitioner complained of "l leg/arm numbness" and bilateral hip pain, rated 4/10. Personnel also noted a "history of chronic back problems." They described Petitioner as moving all extremities and exhibiting no signs of obvious trauma.

Petitioner was discharged from the Emergency Room later the same day with directions to seek follow-up care. The records reflect two diagnoses: "hyperglycemia due to Type 1 diabetes mellitus" and neck pain.

The Alexian Brothers Medical Center Emergency Room records of September 30, 2017 (PX 5) set forth a somewhat different account of the claimed accident:

> "Pt is a 50 y/o M with h/o IDDM, HLD, HTN, GERD, neck and back fusion, right shoulder rotator cuff repair x 2 who presents to the ED c/o dizziness onset 2 days prior s/p mechanical fall when pt was at work lifting a box and tripped, falling to the right and hitting the right lateral head. Pt is unsure of any LOC with fall. Pt also c/o constantly waxing and waning HA rated 6/10, maxilla pain, diffuse neck pain which is greater than pt's baseline pain s/p neck fusion surgery, photophobia, nausea and progressively worsening left leg pain which radiates from the foot proximally. Pt uses a cane with ambulation daily at baseline, however, he reports increased difficulty with ambulation s/p fall. Pt was seen at Mt. Sinai ER s/p fall 2 days prior with a negative head CT scan. Pt has taken ASA for pain. NDKA. Pt denies fever, chills, emesis, diarrhea, abd pain, CP, SOB, back pain or any other sx at this time."

On October 5, 2017, a certified medical assistant at Loyola University Medical Center described the claimed accident in an entirely different fashion. She indicated Petitioner reported losing consciousness and falling on the floor after lifting a box. She did not indicate that Petitioner tripped over anything. RX 4, p. A 310.

On October 26, 2017, Dr. Zak noted that Petitioner tripped over a box at work on September 28, 2017, injuring his right shoulder and right side. She also noted complaints of left leg numbness, low back pain, residual headaches, nausea and light sensitivity. She recommended right shoulder and lumbar spine MRIs, no driving and Tylenol for the headaches. RX 4, p. A 324.

Petitioner filed an Application for Adjustment of Claim on October 31, 2017, alleging an accident of September 28, 2017. Arb Exh 2.

A right shoulder MRI, performed without contrast on February 2, 2018, showed mild to moderate supraspinatus and infraspinatus tendinopathy with a small partial-thickness supraspinatus tear. The radiologist described the biceps tendon and anchor as intact. He saw no evidence of labral tearing. PX 7.

A lumbar spine MRI, performed without contrast on February 2, 2018, showed post-operative changes consistent with the prior L5-L5 laminectomy and multi-level spondylosis, most pronounced at L3-L4. PX 7.

On February 8, 2018, Dr. Zak noted complaints of photosensitivity, memory issues, worsening "nerve damage" in the legs, left leg numbness and left hand "issues – from the neck." She indicated that Petitioner "feels this is all work related." She noted Petitioner "was having issues prior to the work-related fall but not as bad" and denied having memory issues before the fall. RX 4, p. A 365.

At Dr. Zak's referral, Petitioner saw Dr. Espinosa, a neurosurgeon, on February 14, 2018. In his lengthy note of that date, Dr. Espinosa documented a history of a May 2013 lumbar laminectomy and fusion at L4-L5 and an October 2015 cervical discectomy and fusion at C6-C7. He also noted that Petitioner complained of low back pain radiating to both hips, right shoulder pain, headaches, photosensitivity and memory loss secondary to a fall at work in October 2017. He indicated that Petitioner described tripping over a box and falling, striking his right hip, right shoulder and head in the process. He described Petitioner's gait as "a little slow but otherwise normal." He described straight leg raising as negative. He noted decreased sensation over the distribution of the lateral femoral cutaneous nerve on the left.

Dr. Espinosa interpreted the February 2, 2018 lumbar spine MRI as showing post-surgical changes at L4-L5, likely with a previous posterior fusion and evidence of screws that were removed and significant lateral recess stenosis at L3-L4.

Dr. Espinosa recommended bilateral hip X-rays, noting that Petitioner seemed to be most symptomatic in his hips, right worse than left. He also recommended weight loss to reduce pressure on the inguinal canal where the lateral femoral cutaneous nerve runs. He directed Petitioner to return to him after undergoing the hip X-rays.

A lumbar spine CT scan, performed without contrast on February 27, 2018, showed post-surgical changes of L4-L5 laminectomy, with screw tracks at that level, consistent with a fusion, and mixed degenerative facet arthritic, degenerative disc and ligamentum flavum hypertrophic changes, "most substantive" at L3-L4. PX 7.

Petitioner underwent hip X-rays on February 28, 2018. The radiologist interpreted the X-rays as showing "mild arthritic changes of both hips." PX 7.

Petitioner returned to Dr. Espinosa on March 20, 2018. After reviewing the radiographic studies, the doctor described the prior lumbar fusion as solid. He indicated the hip X-rays showed "asymmetry of the joints and degenerative changes of the left hip." He recommended that Petitioner ask his primary care physician for a referral to an orthopedic surgeon for a hip evaluation. He did not comment on causation. He found Petitioner capable of light duty as of March 22, 2018 with no lifting over 10 pounds, no bending or twisting at waist level and no prolonged walking. He found Petitioner capable of interacting with inmates.

On April 9, 2018 (the day before the initial hearing), Dr. Zak noted complaints of right shoulder and left eye pain. She also noted that Petitioner had fallen down stairs at his home two to three weeks earlier and was taking Oxycodone and muscle relaxants. RX 4, p. A379.

Respondent offered into evidence a print-out of payments it made to various medical providers, including the City of Chicago, Mt. Sinai Hospital, Alexian Brothers Medical Center, Elk Grove Radiology, Loyola University Medical Center. RX 1. Respondent also offered into evidence extensive pre-accident records from Loyola/Dr. Zak, including: 1) records from October 2013 and May 2014 which reflect complaints of hip pain; 2) records from September 29, 2015 which reflect a history of a right shoulder injury and a right rotator cuff tear; 3) records from January 26, 2017 which reflect complaints of "consistent neck pain and headaches," for which Petitioner was taking Norco, and worsening bilateral

carpal tunnel syndrome; and 4) records from February 1, 2017 which reflect complaints of neck pain radiating down the left arm, right shoulder pain, bilateral hip pain and hand pain.

Arbitrator's Credibility Assessment

Simply put, Petitioner was not believable.

Petitioner and Respondent's witnesses offered significantly different accounts of the events of September 28, 2017. Petitioner testified he was working at a table with only one person, a female who was "doing County time" per a work program. He provided no further description of this person and could not identify her by name. He testified he left the table to retrieve more soap, tripped over a box and fell, landing on his right side. The officers who testified for Respondent made no mention of any civilian worker. Officer Lee specifically denied the presence of a prisoner. T. 4/10/18, p. 82. Officers Frazier and Lee testified they were working at a table directly across from Petitioner when they heard Petitioner say "whoa" and saw him move backward, sit on a box and roll onto his side. The warehouse director, Patricia Horne, did not witness this incident but testified Petitioner told her he twisted his feet underneath the table and fell. Petitioner did not rebut this. Horne also confirmed the testimony of another Respondent witness, Reginald Barker, that, on September 27, 2017, Petitioner learned he was the subject of an internal conduct-related investigation that could lead to disciplinary action. Petitioner acknowledged learning this. Horne and Officer Davis testified they observed Petitioner speaking with Roach near the ambulance, after the incident. Horne described Roach as Petitioner's immediate supervisor but Petitioner claimed to have no knowledge of anyone named Roach. T. 4/10/18, pp. 39-40.

While the paramedic run sheet and Mt. Sinai Emergency Room records reflect a history of a trip and fall at work, other records contain conflicting histories. The Alexian Brothers Medical Center Emergency Room records of September 30, 2017 describe Petitioner as tripping while carrying a box. The Loyola records of October 5, 2017 reflect Petitioner was "unconscious when he fell after he lifted a box and just fell on floor." PX 9. RX 4, p. A 310.

The paramedics who evaluated Petitioner at Respondent's warehouse on September 28, 2017 noted complaints of back and neck pain. They indicated Petitioner denied other complaints. They noted no evidence of a head injury. Later the same day, however, Emergency Room personnel at Mt. Sinai Hospital indicated Petitioner reported striking his head and experiencing a mild loss of consciousness. Two days later, personnel at Alexian Brothers Medical Center noted that Petitioner was unsure whether he lost consciousness. They also noted that Petitioner used a cane when walking "at baseline," i.e., before the claimed accident.

The Arbitrator finds Respondent's witnesses credible as to the events of September 28, 2017. Officers Frazier and Lee testified they were working at the same table with Petitioner on the morning of September 28, 2017, and were positioned across from him. Neither of them backed up Petitioner's testimony that a female worker was present. They both described Petitioner as abruptly saying "whoa," moving backward, sitting on a box and rolling to the right. Reginald Barker and Patricia Horne testified that, on September 27, 2017, Petitioner learned he was the subject of an investigation that could lead to disciplinary action. Petitioner did not refute this. Horne also testified that 1) Petitioner told her he fell because his feet got twisted; and 2) she inspected Petitioner's work area shortly after the claimed accident and found no tripping hazards.

Did Petitioner sustain an accident arising out of and in the course of his employment on September 28, 2017? Did Petitioner establish causal connection?

Based on the foregoing credibility assessment, the Arbitrator finds that Petitioner failed to prove a compensable work accident of September 28, 2017. None of Respondent's witnesses supported Petitioner's testimony as to who he was working with that day. Nor did they support his testimony that he fell due to tripping over a box. Petitioner claimed he struck his head when he landed but the paramedics who came to the scene did not document any head injury. One history, recorded about a week after September 28, 2017, reflects that Petitioner reported losing consciousness before landing on the floor.

The issue of causation is as problematic as that of accident. Petitioner acknowledged being off work for seven years before he began working in Respondent's warehouse, about eight months before his claimed accident. During that seven-year interval, Petitioner underwent extensive medical care, including surgeries involving some of the same body parts he claims to have injured on September 28, 2017. Those surgeries included lumbar and cervical spine fusions, in 2013 and 2015, and a rotator cuff repair. The records from Alexian Brothers Medical Center reflect Petitioner was using a cane to walk "at baseline," i.e., before the accident. The lumbar spine MRI and CT scan performed in February 2018 showed abnormalities consistent with the pre-accident lumbar fusion. The bilateral hip X-rays performed the same month showed degenerative, not acute, changes. PX 7. Dr. Zak, Petitioner's primary care physician, noted that Petitioner "felt" his various orthopedic problems worsened after the claimed work accident but no physician rendered an opinion to this effect.

Petitioner was not credible and failed to meet his burden of proof on the issues of accident and causation. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues. Compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Natasha Waddy,

Petitioner,

vs. No. 18 WC 14697

Choate Mental Health Center,

20IWCC0694

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care 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 March 16, 2020, is hereby affirmed and adopted.

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

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

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: DEC 3 - 2020
o-10/08/20
MP/mcp
68

Marc Parker

Barbara N. Flores

CONCUR IN PART, DISSENT IN PART

I concur in part with, and respectfully dissent in part from, the Decision of the majority. The majority affirmed and adopted the Decision of the Arbitrator who found that Petitioner sustained her burden of proving a repetitive traumatic accident which caused conditions of ill-being of bilateral CTS. I would have affirmed the Decision of the Arbitrator regarding Petitioner's right-sided CTS but I would have reversed part of the Decision of the Arbitrator and found that Petitioner did not sustain her burden of proving that she had left-sided CTS caused by her work activities. Therefore, I concur in part with, and dissent in part from, the Decision of the Majority.

Petitioner was a Cook II for Respondent. She had been promoted from being a Cook I, who actually prepared the food. The duties of a Cook II included food preparation duties as Cook I as needed, and also includes other functions such as paperwork and computer activities. In 2018, Petitioner was performing Cook I duties due to shortage of personnel. Her kitchen prepared meals for 300 residents of Respondent's facility. Petitioner is right-hand dominant and indicated that she used her right hand to perform the majority of her work duties. Petitioner testified that she used her left hand on occasion when stirring large vats of food, carrying the vats of food, and occasionally shifting to her left hand to scoop biscuit dough when her right hand became tired. She noted she had particular issues while preparing and serving items such as oatmeal and mashed potatoes because they had to be stirred often, were of thick consistency, and required ladling the food into serving portions. However, Petitioner testified that she could not estimate the amount of time she spent using both hands to stir large pots of food, *etc.*

Petitioner testified that she first noticed symptoms only in her right hand and that she initially reported only right-hand issues when she first saw a doctor for her condition. She did not notice left-sided symptoms until sometime thereafter. While Petitioner's orthopedic surgeon, Dr. Mirly, diagnosed bilateral CTS and performed CTS release on Petitioner's left wrist, there

20IWCC0694

was no EMG/NCV performed on the left side. In contrast an EMG/NCV performed on the right side, after the left CTS release surgery, confirmed the diagnosis of right-sided CTS.

I agree with the opinions or Dr. Mirly, the Arbitrator, and the Majority that the type of activities about which Petitioner testified can contribute to the development of CTS. However, because Petitioner performed the majority of her work tasks with her right hand, because she initially developed symptoms in only her right hand, because she could not quantify the amount of time she used her left hand in performing particularly arduous work tasks, and because there was no objective evidence that she actually had left-sided CTS, I do not believe Petitioner sustained her burden of proving that she had left-sided CTS that was causally related to her work activities.

Based on the entire record before us, I would have affirmed the Decision of the Arbitrator regarding Petitioner's right-sided CTS but I would have reversed part of the Decision of the Arbitrator and found that Petitioner did not sustain her burden of proving that she had left-sided CTS caused by her work activities. Therefore, I concur in part with, and respectfully dissent in part from, the Decision of the Majority.

Deborah L. Simpson

Deborah L. Simpson

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

WADDY, NATASHA
Employee/Petitioner

Case# **18WC014697**

CHOATE MENTAL HEALTH
Employer/Respondent

20IWCC0694

On 3/16/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% 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:

1580 BECKER SCHROADER & CHAPMAN
TODD J SCHROEDER
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

0558 ASSISTANT ATTORNEY GENERAL
NATALIE N SHASTEEN
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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

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

MAR 16 2020

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

20IWCC0694

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

NATASHA WADDY
Employee/Petitioner

v.

CHOATE MENTAL HEALTH
Employer/Respondent

Case # **18** WC **14697**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Herrin**, on **February 13, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

On this date, an employee-employer relationship ***did*** exist between 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 $**49,917.96**; the average weekly wage was $**959.96**.

On the date of accident, Petitioner was **46** years of age, **married** with **0** children under 18.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling **$10,341.81**, equating to **$704.00** due and owing to St. Francis Medical Center/Dr. Joy Johnson, **$1,096.00** due and owing to Dr. Harvey Mirly, and **$8,541.81** due and owing to Memorial Hospital Belleville, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act, and further hold Petitioner harmless for any and all payments made by Healthlink. The Arbitrator specifically finds Respondent is not liable for payment of any medical expenses listed on Petitioner's Exhibit 7 medical bill summary for which a bill was not offered into evidence, specifically $390.00 due and owing Dr. Harvey Mirly and $1,337.77 due and owing Memorial Hospital-Belleville.

Respondent shall authorize and pay for prospective medical care as recommended by Dr. Mirly, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay temporary total disability benefits of $**639.97**/week for **1-1/7th** weeks, as provided in Section 8(b) of the Act, for the period March 11, 2019 through March 18, 2019.

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

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

3/11/20
Date

MAR 16 2020

20 IWCC0694

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

NATASHA WADDY,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18 WC 14697
	)	
CHOATE MENTAL HEALTH,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on February 13, 2020, pursuant to Section 19(b) of the Act. The parties agree that on April 3, 2018, Petitioner was employed as a Cook II at Choate Mental Health. The issues in dispute are accident, causal connection, medical expenses, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Natasha Waddy testified she is a cook at Choate Mental Health for approximately 8 years. Petitioner testified that at the time of the accident she worked as a Cook I due to a shortage of staff, although her official position is a Cook II. Her job duties included preparing meals, dipping food into pans, lifting and carrying pans, and cleaning. Petitioner testified she cooked for approximately 300 patients at Respondent's facility. Petitioner testified that she prepared breakfast from 4:30 a.m. until 6:30 a.m., followed by a 15-minute break which she often did not take because of clean up. She then began preparing lunch.

Petitioner was required to prepare pans of eggs and oatmeal for each of the nine units. The eggs came in cartons that she poured into pans to cook. Petitioner testified the pans were two and four inches deep and 21 inches long. After the eggs were cooked, Petitioner used a spoon to fluff them up and then lifted each pan to place them in a Cambro for transporting. Petitioner testified she prepares an extra pan of eggs that has to be put in a purator for those patients on a puree diet.

Petitioner testified that while she cooks the oatmeal she has to stir in ingredients. Petitioner testified the oatmeal is cooked in a steam kettle measuring approximately 3 feet high and 1 ½ feet wide. All of the steam kettles that Petitioner described are attached to the floor and cannot be moved. She utilized a stainless steel paddle with a long handle on it to stir the oatmeal. Petitioner testified that most of the time she had to use two hands to stir and it was almost impossible to use one hand because the paddle was so big. She then used a pot to scoop the oatmeal into pans and lifted and carried the pans to the Cambro for transporting.

Petitioner testified she prepares 22 pans of food at breakfast each shift. Petitioner testified that her hands hurt while performing these job duties. She said the oatmeal is really heavy because you have to put 4 to 5 scoops of oatmeal in each pan and lift and carry the pans. She used gloves because the pans were hot. The pans had a very tiny lip, about one-half inch, around the top edge for which to carry. Petitioner testified that there have been times when she dropped the pans and had to remake food.

Petitioner testified she cleaned the pots by hand. Once cleanup was completed Petitioner would begin preparing lunch. Petitioner described making biscuits and cake mix, which all come in 50-pound bags. Petitioner testified she poured the 50-pound bags into a big cannister on wheels. She then scooped dry and wet material into a mixer. She lifted and carried the 60-quart mixer which she stated was very heavy. Petitioner also assisted with cooking in a steam kettle, hand cutting chicken patties, and grinding meat which was done manually by hand.

Petitioner testified she made 24 pans of biscuits, 12 biscuits per pan. She used an ice cream scooper to scoop each biscuit. Petitioner stated she has had to switch hands while using the scooper because her hands would cramp. Petitioner estimated it took about one to 1 ½ hours to make the biscuits. When she prepared cakes, she had to ladle the dry mix and wet mix. When preparing meat for lunch, Petitioner had to use a big paddle to scrape the bottom of the steam kettle. She stated the kettles were so large you could fit two people inside of them.

Petitioner testified she sometimes had to request help from support service to stir because her arms and hands were hurting. Petitioner testified that as a Cook II she had to write and type menu orders for the following week for all patients. She also had to put food away when it was delivered. Petitioner indicated the food cans were industrial sized. She used a manual crank can-opener to open the cans. Petitioner testified she would open about 30-32 cans per day. Petitioner testified she spent all work day using her hands.

Petitioner testified she wants to undergo the surgery recommended by Dr. Harvey Mirly. That Dr. Milry performed surgery on Petitioner's left hand on 3/11/19 and she no longer has any symptoms.

On cross-examination, Petitioner testified she became a Cook I around 2014 and was promoted to a Cook II, a more supervisory role, in 2016. However, Petitioner stated she continued to perform Cook I duties primarily cooking. Petitioner testified that when she reported her symptoms to Respondent, she was only having symptoms in her right hand and the symptoms in her left hand started one month later. She has pain and numbness in her left thumb and first finger. She is currently working full-duty and not taking medication or wearing a brace. She testified she drops a lot of things at work and she has difficulty using her hand when she wakes in the morning.

Dr. Harvey Mirly testified by way of evidence deposition. Dr. Mirly's testimony was consistent with his medical records. Dr. Mirly testified he reviewed Petitioner's previous medical records from Dr. Johnson and Petitioner described her job duties as a cook. Dr. Mirly opined Petitioner did not have non-occupational risk factors such as diabetes or hyperthyroidism and she did not smoke. Dr. Mirly stated body mass index is a non-occupational factor that is considered a risk factor; however, he did not opine as to Petitioner's BMI. Dr. Mirly opined within a reasonable degree of medical and surgical certainty, Petitioner's work duties were a contributing factor to her development of bilateral carpal tunnel syndrome.

Petitioner was evaluated by Dr. Evan Crandall for a Section 12 examination on July 23, 2019. Dr. Crandall testified by way of evidence deposition. Petitioner told Dr. Crandall she had problems in her hands for several years and her current problem was in her right hand because she already had left-handed surgery. Petitioner stated she had numbness in her thumb, index, and long fingers and some in her ring finger. She has numbness when she drives and she drops things. Dr. Crandall testified Petitioner had morbid obesity requiring a gastric sleeve and a hysterectomy that could cause hormonal issues leading to carpal tunnel. He noted Petitioner was a cook at Choate for seventeen years. Dr. Crandall reviewed Petitioner's job description as a Cook I and II. He testified she would have to have good functioning hands to do food preparation and her duties were not out of the ordinary of any other food preparation position.

Dr. Crandall testified he reviewed records from Memorial Medical Group, an IME authored by Dr. Sudekum and Dr. Mirly's records. Dr. Crandall noted a positive Phalen's test on the right, with negative Tinel's and provocative test. Dr. Crandall testified Petitioner's subjective complaints were supported by his objective findings and she had signs consistent with carpal tunnel which was confirmed by EMG/NVC study. Dr. Crandall opined that a job with cooking and cleaning, if it's heavy enough, could be considered a risk factor for carpal tunnel.

Dr. Crandall explained the NIOSH and OSHA guidelines for causing carpal tunnel. Based on the information Dr. Crandall had about Petitioner's job, he did not believe she would meet the threshold for repetitive carpal tunnel unless she lifted 10,000 pounds per day, or if she was cooking everything from scratch. Dr. Crandall opined is was probably unlikely Petitioner would exceed the threshold weight based on her cooking duties and the amount of people she was cooking for. Therefore, Dr. Crandall opined Petitioner's job was not a causative factor in her carpal tunnel syndrome. Dr. Crandall testified he had only seen carpal tunnel in a school cook position when the cook had prepared meals from scratch for 750 individuals. He further opined carpal tunnel syndrome in cook positions were very rare.

MEDICAL HISTORY

On April 5, 2018, Petitioner presented to Convenient Care Clinic complaining of right hand numbness and pain. She reported night pain, stiffness in the morning, and frequently dropping things for the past four months. Petitioner's pain radiated into the right elbow making it difficult to carry items. She reported mild symptoms in her left wrist and that she works as a cook. Petitioner was diagnosed with paresthesia of the hand, bilateral hand numbness, right worse than left.

On April 5, 2018, Petitioner was seen at St. Francis Medical Center by Dr. Joy Johnson for a follow up of unrelated conditions. Dr. Johnson noted Petitioner had developed hand/arm pain with numbness over the past three months. Petitioner reported it had been mild with mainly symptoms in the morning, numbness, tingling in the hands but has progressed to more pain, especially in the right hand, forearm and elbow. She works as a cook in food service.

Petitioner was evaluated by Dr. Harvey Mirly on July 17, 2018. Dr. Mirly recommended an EMG/NCS to confirm his impression of bilateral carpal tunnel syndrome. Dr. Mirly provided bilateral wrist cock up splints. On March 11, 2019, Dr. Mirly performed a left open carpal tunnel release. On March 18, 2019, Dr. Mirly released Petitioner to light duty work with restrictions of no forceful pulling, lifting or impact. On July 22, 2019, Petitioner complained of left index finger and thumb numbness. On August 29, 2019, Petitioner called Dr. Mirly's office complaining of problems with her right hand and that she was already approved for a nerve conduction study. Respondent approved a one-time evaluation with Dr. Mirly. Dr. Mirly diagnosed carpal tunnel syndrome of the right wrist with positive carpal tunnel

provocative testing and some subjective complaints of numbness in the median nerve distribution on the right hand.

A right EMG/NCS was performed on December 2, 2019 that revealed mild right carpal tunnel syndrome. Dr. Mirly recommended a right carpal tunnel release. It was noted Petitioner was right-handed.

CONCLUSIONS OF LAW

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

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

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 used her hands and arms extensively during the performance of her job duties for Respondent. Further, the Arbitrator finds the opinions and testimony of Dr. Mirley much more persuasive than those of Dr. Crandall 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(s) of ill-being with respect her left and right hands are causally related to the employment.

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

Based on the above findings regarding causal connection, the Arbitrator finds that Petitioner is entitled to medical benefits related to her left and right hands. The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care. As a result, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling **$10,341.81**, equating to **$704.00** due and owing to St. Francis Medical Center/Dr. Joy Johnson, **$1,096.00** due and owing to Dr. Harvey Mirly, and **$8,541.81** due and owing to Memorial Hospital Belleville, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act, and further hold Petitioner harmless for any and all payments made by Healthlink. The Arbitrator specifically finds Respondent is not liable for payment of any medical expenses listed on Petitioner's Exhibit 7 medical bill summary for which a bill was not offered into evidence, specifically $390.00 due and owing Dr. Harvey Mirly and $1,337.77 due and owing Memorial Hospital-Belleville.

Based upon the above findings as to causal connection, Respondent shall authorize and pay for the necessary treatment recommended by Dr. Mirly.

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

To be entitled to TTD benefits, it is a claimant's burden to prove not only that he did not work, but also that he was unable to work. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1, 13. The record establishes that Petitioner was taken off work on March 11, 2018 for a left carpal tunnel release and on March 18, 2019, Dr. Mirly released Petitioner to return to light duty.

Respondent shall pay temporary total disability benefits of **$639.97**/per week for the disputed **1-1/7th weeks** of disability from March 11, 2019 through March 18, 2019. Respondent shall have credit for $0.00 paid in TTD benefits.

Arbitrator Linda J. Cantrell

3/11/20
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 Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Adaline Seitz,
Petitioner,

vs.

No. 17 WC 1383
(consolidated with 17 WC 37948)

JBS,
Respondent.

20IWCC0695

DECISION AND OPINION ON REVIEW

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

Prior to arbitration, Petitioner's attorney explained that there are two case numbers but only one accident date and one accident being alleged. An earlier Application for Adjustment of Claim had been filed by Petitioner's prior attorney. Respondent obtained a consolidation without objection.

I. FINDINGS OF FACT

Petitioner testified that on January 20, 2015, she was 45 years old and had been employed by Respondent as a full-time operator of a box-making machine called a tray-former for the preceding 12 months, after completing four months in a different position. She testified that she worked as many as 60 hours per week, processing approximately 10,000 boxes per day. Petitioner estimated she was required to unjam her machine and smash and stomp over 1000 boxes per day, to flatten them for recycling. Respondent disputed the number of boxes that needed to be flattened and disputed Petitioner's testimony that she was required to stomp on the boxes to flatten them. Petitioner admitted that she could use her hands or feet to break down the jammed boxes.

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Petitioner testified that her feet began tingling and became sore around her ankles. She testified that she notified her supervisors, Bob Schultz and Stacy Rayus, that she was having foot problems, but she did not specify a date for providing this notice and did not testify that she told her supervisors that she believed her foot complaints were related to her work duties. She further testified that Schultz directed her to the on-site nursing department. According to Petitioner, the nurse told her there was nothing she could do to help and suggested she invest in new, more expensive work boots to ease her foot pain.

On March 23, 2015, Petitioner sought treatment at Prompt Care at the Springfield Clinic. She reported to Dr. Srinivasan that she had suffered from a burning sensation in both feet for five weeks. She did not mention her work duties.

On April 1, 2015, Petitioner saw dermatologist, Dr. Stealey, at the Springfield Clinic for her psoriasis, which had been diagnosed in 2012. Although Petitioner testified that she told the doctor that her job activities were what led to her psoriatic arthritis flare ups, no such information appears in Dr. Stealey's records. Petitioner also saw Dr. Western at the Springfield Clinic on May 19, 2015. She testified that she told Dr. Western's nurse about her work duties but did not mention them to Dr. Western. Nothing related to Petitioner's work appears in Dr. Western's office note for that date of service.

On June 2, 2015, Petitioner saw Dr. Horvath at the Springfield Clinic and recalled telling the doctor that her feet hurt, like walking on rocks, but there is no mention of job duties in the office note. On June 8, 19, and 25, 2015, the nurse practitioner at Springfield Clinic noted that Petitioner's feet were swelling with her worsening psoriasis. She noted that the psoriatic arthritis was likely affecting Petitioner's feet the most and that Petitioner felt like she was walking on broken glass.

On July 25, 2015, Petitioner was evaluated by Dr. Sigle, a foot specialist at the Foot & Ankle Center of Illinois. He performed x-rays and blood tests for diabetes and administered steroid injections, which relieved Petitioner's complaints for a couple of months. After the steroid injections, Dr. Sigle attempted to restore the nerves in Petitioner's feet by administering alcohol injections. These, too, failed to provide lasting relief, and Dr. Sigle planned bilateral foot surgery to remove Petitioner's bilateral neuromas.

Petitioner returned to Dr. Western's office for pre-op clearance on November 30, 2016. There she asked Dr. Western if her step down of approximately two feet from her machine platform to the floor could be exacerbating her foot condition. He agreed that it might and suggested that she request a stepstool from her employer.

Eventually, Dr. Sigle performed three foot surgeries: the first surgery was performed on December 8, 2016 to remove Petitioner's bilateral neuromas, the second surgery was performed on March 8, 2018, and the third surgery was performed on May 3, 2018 for tarsal tunnel releases. Petitioner missed about six weeks of work after each surgery.

Petitioner was questioned about her pre-existing foot and leg complaints. In 2000 she had varicose veins ligation on her right leg. She did not recall reporting to doctors at Capital

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Community Health Center that her legs hurt and her toes had numbness and tingling in 2004. Petitioner also did not recall reporting that she felt like she was walking on pins and needles when she treated with osteopath Dr. Albrecht in 2006. In 2012, she was diagnosed with plantar fasciitis, and in 2013-14, she continued to treat for psoriasis and bilateral leg pain, all prior to beginning work for Respondent.

Petitioner testified that stress and pain cause her to have psoriasis flare ups during which she was unable to work as a tray former. She took intermittent FMLA during her employment with Respondent for these flare ups and also following her foot surgeries.

Foreman James Kunkel testified for Respondent. He was Petitioner's supervisor's supervisor and observed Petitioner about once a day. He described the tray former job as requiring the worker to use a forklift to load boxes into the machine, then monitor the machine and remove jams. If the machine were working properly, jams would occur infrequently. The worker would take the jammed box out of the machine and pull it apart and put it on the recycle pallet. If the worker chose to use his feet to break up the box, he would just step on it. Stomping was not required. Mr. Kunkel noted that not all boxes needed to be flattened. He estimated the number of boxes that needed to be removed due to jamming to be 130 boxes a day, divided among two or three workers. According to Mr. Kunkel, the tray former position is primarily a monitoring position. It doesn't require climbing on the machine or hopping down off the platform, but if necessary, there is a staircase next to the machine.

Michelle Ellis, the current workers' compensation manager, testified that she worked at a desk in the nursing department at the time of Petitioner's alleged accident. She was the first medical person to whom an injured worker would report an injury. She would assist the worker in completing an accident report. She recalled that Petitioner had reported to nursing on three occasions: (1) on January 30, 2015, she reported an abrasion on her nose where she had fallen the day before, but that was superficial and the case resolved that day without any mention of job duties; (2) on June 22, 2015, there was a personal return to work slip noting she had been off work due to foot pain, but there was no mention of work injury; (3) on July 27, 2015, Petitioner submitted a doctor's note showing restrictions to allow her to sit as needed due to her medical condition. Again, no mention was made of a work accident or of her job duties causing her foot complaints. She noted that nothing in Petitioner's FMLA paperwork suggested that her condition was work-related. Ms. Ellis testified that she was unaware that Petitioner was claiming a work injury until she received the Application for Adjustment of Claim in January 2018.

Regarding her current condition of ill-being, Petitioner testified that her foot pain resolved after her surgeries, but she still has numbness and tingling in her left foot and sometimes trips and stumbles over her left toes. However, she remained happy with outcome of the surgeries.

II. CONCLUSIONS OF LAW

The Arbitrator found that Petitioner had proved accident, notice, and causal connection between Petitioner's job duties and her neuromas and tarsal tunnel condition. He awarded Petitioner medical expenses, temporary total disability and permanent partial disability, and Respondent appealed to the Commission on all issues. After reviewing the record, including

Petitioner's pre-accident medical history, the Commission finds that Petitioner failed to prove accident, timely notice and that all remaining issues are moot.

A. Accident

The Arbitrator concluded that an accident did occur arising out of and in the course of Petitioner's employment on January 20, 2015 and that her "repetitive actions of stomping on boxes, getting up and down off of the machine that she worked on and climbing up and down the staircase next to the machine would provide sufficient force to result in an accident leading to injury to Petitioner's bilateral feet." Arb. Dec. (not paginated). However, the issue of the date of accident was not addressed. The Commission views the evidence differently than did the Arbitrator.

The scarcity of any reference to Petitioner's work activities in her medical records is particularly telling on the issue of accident. Although Petitioner asked Dr. Western at Springfield Clinic on November 30, 2016 whether jumping off a two-foot high platform at work was exacerbating her foot condition, this did not occur until nearly two years after her alleged date of accident. PX2, p. 60. A year later, on November 1, 2017, Petitioner told Dr. Sigle that her foot symptoms were worse while at work, where she had "to jump up and down on boxes on a daily basis." With those exceptions, nothing about her job duties appears in any of her medical records.

Further, the record is devoid of evidence of any acute accident or repetitive stress injury on the alleged date of accident or date of manifestation. Petitioner testified that she notified her supervisors of her injury but she did not provide any information regarding the time or date of the injury or notice, she never completed an accident report, and she did not seek treatment for her alleged foot injury until March 23, 2015, two months later. This lack of evidence supporting the alleged date of accident or manifestation date, together with the absence of any description of Petitioner's alleged repetitive job activities in the records of her treating physicians, leads the Commission to conclude that Petitioner did not sustain an accident as claimed.

Moreover, Dr. Sigle opined that if part of Petitioner's job was to repetitively smash large cardboard boxes with her feet, her job could cause nerve injury or it could make an asymptomatic condition symptomatic. Wearing steel-toed boots all day while standing on concrete and climbing ladders could also aggravate her condition. However, Dr. Sigle testified that during the years Petitioner treated with him, she did not mention jumping on boxes or any other job duties that would affect her foot condition until November 1, 2017, almost three years after her alleged date of accident. Although he admitted he had not reviewed any of Petitioner's prior medical records, he agreed that her prior symptoms would be relevant in diagnosing her condition and in providing a causation opinion.

B. Notice

Additionally, the Commission further finds that Petitioner's claim would fail on the issue of notice.

Respondent's witnesses testified that they were unaware that Petitioner was alleging that her chronic foot complaints were causally related to her work activities until Petitioner filed her

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Application for Adjustment of Claim on December 29, 2017, shortly before the statute of limitations for the selected date of manifestation would have run. Petitioner testified that she complained of foot pain to Bob Schultz and Stacy Rayus. However, she did not testify that she told Schultz and Rayus that her complaints were work related or provide a date when she made the complaints. Foreman Kunkel and Nurse Ellis testified for Respondent that they were aware of Petitioner's chronic psoriatic arthritis complaints, for which she periodically took FMLA leave during flare ups, but neither was aware that Petitioner causally related her foot complaints to her work activities until shortly before the hearing, thereby prejudicing Respondent. Thus, the Commission finds Petitioner failed to provide notice to Respondent within 45 days of her alleged accident.

In conclusion, as Petitioner has failed to prove that an accident arising out of and in the course of her employment with Respondent occurred on January 20, 2015, and failed to prove that she provided timely notice of the accident to Respondent, the Commission reverses the Decision of the Arbitrator and denies Petitioner all benefits under the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 29, 2020 is hereby reversed.

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

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

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

DATED: DEC 3 - 2020

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Marc Parker

Barbara N. Flores

Deborah L. Simpson

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Guy Martin,

Petitioner,

vs. No. 17 WC 18743

20 IWCC0696

Holland Trucking,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, average weekly wage, medical expenses, temporary disability, prospective medical care and credit to Respondent, and being advised of the facts and law, reverses the Decision of the Arbitrator 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 Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner, a 46-year-old truck driver, testified that he has worked for Respondent as a city and road truck driver for 21 years. He usually worked 10-12 hours per shift, driving for around 8 hours, and then loading trailers on the docks for 2-3 hours. His duties included pulling up dock plates that weighed 50-75 lbs., and sometimes restacking 25-50 lb. freight pieces which had fallen over.

Prior to 2017, Petitioner would sometimes drive older tractors. Although the newer ones he had driven more recently were equipped with air ride seats to provide more cushioning, some of those worked better than others, and some would still "bottom out" on rough roads. Petitioner

testified that 2-4 times per month, the trucks he operated would bottom out. When that happened, his back would hurt, his legs would go numb and his feet would tingle. While driving, the truck's vibrations would also cause those symptoms.

Petitioner did have spinal stenosis and degenerative disc disease prior to his accident date. However, he had not experienced problems with his back until about a year before April 2017. Petitioner testified he began experiencing back pain on an occasional basis, but once he started experiencing numbness and tingling, he sought medical treatment. Petitioner first began seeing Dr. McAskill in April 2017. On May 15, 2017, his doctor told him that his back condition was related to his job activities.

Petitioner's initial back treatment from Dr. McAskill, and providers at Carle Clinic, did not provide lasting relief. In October 2017, Petitioner saw Dr. Sasso, a board certified spine surgeon who had performed over 12,000 operations. Petitioner complained to him of low back and bilateral leg pain. Based upon Petitioner's history, exam findings and image studies, Dr. Sasso diagnosed Petitioner with a likely L5 radiculopathy, and prescribed lumbar nerve root injections, which Petitioner underwent.

In October 2018, Dr. Sasso reported Petitioner's symptoms were essentially unchanged. Dr. Sasso offered surgery to Petitioner: a decompression of his L5 nerves, along with either a fusion or a non-FDA approved device which limits motion. Petitioner testified at arbitration that his pain, numbness and tingling had been getting worse, and that he wished to undergo the surgery recommended by Dr. Sasso to alleviate those symptoms.

The Arbitrator found Petitioner failed to prove he sustained a repetitive accident, and failed to prove any causal connection of his current condition to his work activities. Although the Arbitrator found Petitioner truthful in most respects, he found that Petitioner's testimony regarding the problems with the trucks' air ride seats and air suspensions was not corroborated by written documentation – specifically, that Petitioner's daily Driver Vehicle Inspection Reports ("DVIR's") did not mention problems with the seats or air suspensions.

The Arbitrator also found that the causation opinion of Respondent's Section 12 expert, Dr. Van Fleet, was more persuasive than the opinions of Dr. McAskill and Dr. Sasso. The Arbitrator noted that Dr. Van Fleet had more personal knowledge of the physical requirements of driving a truck because of his own prior truck driving experience. The Arbitrator found Dr. Sasso's opinions were, "quite limited," because he did not obtain a history from Petitioner of the specific work duties he performed, and was unaware of Petitioner's claims regarding inadequate air cushioning or air suspensions.

The Commission views the evidence somewhat differently than the Arbitrator, and finds Petitioner did prove he sustained repetitive injuries from his job duties, which manifested on May 15, 2017. The Commission does not consider the lack of written documentation of seat or suspension problems to be conclusive proof that Petitioner never experienced those problems.

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Petitioner did testify he gave verbal and written notice of such issues to his employer. He also testified that even in the newer trucks he recently drove, the vibration and bouncing of the seats would still irritate his back, cause his legs to go numb and his feet to tingle.

Respondent's witness, Samuel Hogue, testified that through 2016, only about 75% to 85% of Respondent's vehicles had air ride seats – leaving 15% to 25% without them. Mr. Hogue admitted that even in the newer trucks with airbag systems and air-cushioned seats, up and down movement still occurs. He admitted that even trucks equipped with air bag suspensions could still bottom out if the air level in them was not right.

The Commission finds the causation opinions of Petitioner's treating physicians, Drs. McAskill and Sasso, credible. Dr. McAskill had knowledge of Petitioner's job duties, and testified that Petitioner's duties contributed to and aggravated his current spine condition. Contrary to the Arbitrator's finding, Dr. McAskill did not testify that he would defer his causal connection opinion to a spine surgeon; only that he would consider doing so.

Dr. Sasso did obtain a history from Petitioner. He also had experience treating long-haul delivery drivers who developed low back conditions. Dr. Sasso testified that Petitioner's repetitive work as a long-haul driver exacerbated his symptoms and contributed to his need for low back surgery. He found Petitioner's complaints were consistent with L4-5 stenosis, and that while his job duties did not cause his degenerative conditions, they did exacerbate them. Under Illinois law, an injury need not be the sole factor, or even the primary factor of an injury, as long as it is "a" causative factor. *Sisbro Inc. v. Industrial Commission,* 207 Ill.2d 193, 205 (2003). Dr. Sasso testified that the treatment Petitioner received was reasonable and related to his condition, and that surgery would improve his function and reduce his pain.

Dr. Van Fleet only examined Petitioner once, on September 6, 2017. Then, he noted Petitioner's difficulty walking and standing up straight. Dr. Van Fleet did not believe Petitioner exaggerated his symptoms, and he found Petitioner credible. Dr. Van Fleet agreed Petitioner would likely need surgery to decompress at L4-5 and likely L5-S1, though he did not believe that would be related to Petitioner's job duties.

However, Dr. Van Fleet admitted that Petitioner's duties could have exacerbated his preexisting degenerative disc disease, and that repetitive trauma can aggravate spinal stenosis. Dr. Van Fleet acknowledged that he did not know what type of seats Petitioner sat on while driving during the 20 years prior to his accident. He did not know how often Petitioner drove trucks with a bad suspension systems, or how much bouncing Petitioner experienced while driving his trucks. Dr. Van Fleet admitted he was not a truck expert. The Commission does not find his prior experience driving trucks – admittedly not the semi-trailers which Petitioner operated on a daily basis – made his causation opinion more credible than Dr. McAskill's or Dr. Sasso's, which the Commission adopts.

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With regard to Petitioner's average weekly wage, the Commission agrees with the Arbitrator that neither party presented sufficient evidence to allow a proper computation of it pursuant to §10 of the Act. Respondent did not agree to the average weekly wage alleged by Petitioner on the Request for Hearing sheet offered in evidence at arbitration (Arb. Ex. #1). Instead, Respondent alleged that Petitioner's average weekly wage was $1,344.17. Although Respondent did not offer adequate evidence to prove that figure to be Petitioner's average weekly wage, the Commission considers that figure to be Respondent's stipulation that $1,344.17 was Petitioner's average weekly wage, and it adopts that figure as Petitioner's average weekly wage in this claim.

Having found that Petitioner did prove accident and causal connection of his current condition, the Commission finds that the care and treatment Petitioner received for his low back since May 15, 2017 was reasonable and necessary. Petitioner is in need of further medical care for his low back, and the Commission finds Petitioner entitled to the prospective low back treatment and surgery recommended by Dr. Sasso.

Finally, the Commission finds Petitioner proved that, as a result of his work injuries, he was unable to work his usual job between May 16, 2017 and October 29. 2017. Dr. McAskill released Petitioner to return to work on October 30, 2017. Accordingly, the Commission finds Petitioner entitled to TTD benefits of $896.11 for 23-6/7 weeks, from May 16, 2017 through October 30, 2017.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 27, 2020, is hereby reversed, as indicated above. Petitioner has proven his current low back condition is causally related to the accidental work injuries of May 15, 2017.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's average weekly wage for this claim is $1,344.17.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $896.11 per week for a period of 23-6/7 weeks, for the period of May 16, 2017 through October 30, 2017, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the outstanding reasonable and necessary medical expenses incurred in treating Petitioner's low back condition between May 15, 2017 and January 17, 2020, as provided by §8(a) and §8.2 of the Act. Respondent shall hold Petitioner harmless for any payments made by Petitioner's health insurance for that treatment.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for the prospective care recommended by Dr. Sasso for Petitioner's low back condition.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $28,000.00. 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: DEC 3 - 2020
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Marc Parker

Barbara N. Flores

DISSENT

I respectfully dissent from the Decision of the majority and would have affirmed and adopted the well-reasoned Decision of the Arbitrator. I found Dr. Van Fleet's opinion to be more persuasive due to his clear understanding of Petitioner's job duties and personal experience as a truck driver. Dr. Van Fleet reviewed Petitioner's job description and had a thorough discussion with Petitioner regarding his job duties and the trucks he drove. Moreover, as a former truck driver himself, Dr. Van Fleet displayed personal knowledge of the profession as well as the suspension systems and dampening mechanisms used in trucks. He testified that trucks today have gone through great lengths to minimize the trauma endured from potholes and vibration.

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On the other hand, Dr. Sasso and Dr. McAskill lacked personal truck driving experience, did not show any awareness of truck seating or air suspension systems, and did not convey as thorough an understanding of Petitioner's job duties. Dr. Sasso did not recall whether Petitioner provided him with any information about the trucks he drove or whether the seats were defective. He did not know how often Petitioner was loading or unloading objects, nor did he recall reading any of the material regarding the truck driving job that was sent to him by Petitioner's counsel. Although Dr. Sasso had experience treating long-haul delivery drivers, he indicated that their risk factors for low back conditions were the same as everyone else. Dr. McAskill's opinion also lost some persuasiveness, because he testified that he would certainly consider deferring his opinion regarding the causation of Petitioner's condition to a spine surgeon.

For these reasons, I would have relied on Dr. Van Fleet's opinion that Petitioner's current condition was not causally related to his truck driving job and his congenital stenosis was not related to, nor aggravated by, any work activity.

Additionally, Petitioner's testimony focused more heavily on the rough ride he experienced driving his truck, such as "bottoming out" from the poor air ride seats and air suspension system, than his actual job. However, despite a gap in the DVIR reports, none of the over 200 pages of DVIR reports submitted into evidence documented any problems or complaints with a rough ride due to defective truck suspension or seating. Petitioner could not recall when or how many times he had reported such complaints in the time he worked for Respondent. There was a lack of evidence within the admitted DVIRs, which included Petitioner's own mandatory inspection of his trucks, corroborating the claim that the trucks had bad seating or suspension systems.

Mr. Hogue also testified that anything wrong with the seats or suspension should have been noted on the post-trip inspection report. He testified that seat issues would normally be repaired within a day, or two to three days if a new seat needed to be ordered. Mr. Hogue further explained that if an older truck had suspension issues, it would be taken out of commission. Mr. Hogue's testimony suggests that if Petitioner had in fact reported a defect with his truck's seats or suspension, the issue would have been promptly addressed. The testimony supports the finding that what Petitioner was driving did not cause, aggravate, or accelerate his condition.

For these reasons, I respectfully dissent from the Decision of the majority and would have found that Petitioner failed to prove his current conditions were causally related to an accident that arose out of and in the course of his employment with Respondent.

Deborah L. Simpson

Deborah L. Simpson

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lazaro Alanis,

Petitioner,

vs. No. 16 WC 22445

20IWCC0697

Peet Frate Line, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §19(B) AND §8(A)

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, prospective medical care, evidentiary issues, TTD credit and nature and extent, and being advised of the facts and law, supplements the Decision of the Arbitrator as stated below with the following findings, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

At arbitration, the parties stipulated that Respondent owed Petitioner 18-1/7 weeks of TTD, and that Respondent paid Petitioner $9,511.44 in TTD benefits. Neither of those stipulations were mentioned in the Arbitrator's decision. The Commission finds that the TTD which the parties stipulated Respondent owes to Petitioner comes to $8,216.54, and that Respondent is entitled to a credit of $1,294.90 for its overpayment of TTD benefits. All else in the Arbitration decision is affirmed.

20IWCC0697

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 24, 2019, is hereby affirmed and adopted, with the supplemental findings stated herein.

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

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

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: DEC 3 - 2020
o-11/18/2020
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Marc Parker

Deborah L. Simpson

Barbara N. Flores

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

ALANIS, LAZARO
Employee/Petitioner

Case# **16WC022445**

PEET FRATE LINE INC
Employer/Respondent

20IWCC0697

On 5/24/2019, 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 2.34% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1315 DWORKIN AND MACIARIELLO
JONATHAN WILLIAMS
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

3150 JAMES KELLY LAW FIRM
7817 N KNOXVILLE AVE
PEORIA, IL 61614

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STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Lazaro Alanis
Employee/Petitioner

v.

Peet Frate Line, Inc.
Employer/Respondent

Case # **16** WC **22445**

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 **Hegarty**, Arbitrator of the Commission, in the city of **Waukegan**, on **12/17/18**. 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. ☒ 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 _____

20IWCC0697

FINDINGS

On the date of accident, **5/12/16**, 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 $**35,324.64**; the average weekly wage was $**679.32**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

RESPONDENT IS ORDERED TO PROVIDE PROSPECTIVE TREATMENT FOR PETITIONER'S LEFT HIP INJURY AS PRESCRIBED BY DR. BASRAN.

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.

Jessica C. Hagerty

Signature of Arbitrator

5/14/19
Date

ICArbDec19(b)

MAY 24 2019

20 IWCC0697

ILLINOIS WORKERS' COMPENSATION COMMISSSION

STATE OF ILLINOIS)
)
COUNTY OF LAKE)

LAZARO ALANIS)
Employee/Petitioner)
) 16 WC 22445
v.)
)
PEET FRATE LINE, INC.)
Employer/Respondent)

ADDENDUM TO THE DECISION OF THE ARBITRATOR

Respondent disputes causal connection and whether prospective surgery recommended by Petitioner's physician is casually related to the May 20, 2016 work injury.

FINDINGS OF FACT

On May 12, 2016, Petitioner had been employed by Respondent as a truck driver for approximately four years. Petitioner's job required him to pick up freight which he unloaded at different stores.

There is no dispute that on May 12, 2016, as Petitioner was delivering Weber grills to an Ace Hardware store, he sustained accidental injuries while attempting to catch a grill that was falling off the top of a stack of grills. Petitioner testified as he performed this maneuver, he twisted his body and felt immediate pain in his low back, left hip, and left knee. Petitioner finished the job with the help of an Ace Hardware employee, reported his injury to dispatch, and presented to Centegra Hospital.

Records from Centegra note a history of low back and left hip pain radiating into Petitioner's left knee following an injury at work. (Px. 1). CT scan of the lumbar spine revealed multilevel degenerative disc and bilateral facet arthropathy most pronounced at L4-L5. X-ray of the left hip and left knee was normal. (Id.).

On May 27, 2016, MRI of Petitioner's left knee revealed chondromalacia, proximal patellar tendinosis, and mild iliotibial bursitis.

MRI of Petitioner's left hip revealed:

1. Complex tearing throughout the anterior superior, superior and posterior superior labrum on the left;

2. Bilateral CAM type morphologies of femoroacetabular impingement;

3. Mild left hip joint chondromalacia;

4. Mild right trochanteric bursitis and;

5. Moderate to severe intervertebral disc space narrowing at L5-S1.

A course of physical therapy was recommended. (Id.).

On June 9, 2016, Petitioner presented to McHenry County Orthopedics where Dr. Harpreet Basran noted complaints of left hip, groin and pain following a work injury on May 12, 2016 when Petitioner was bringing down a 180-pound box in a loading truck and twisted his body. Petitioner reported a slight improvement from physical therapy although sharp, left hip-groin pain persisted. (Px. 2). Dr. Basran diagnosed a left hip labral tear, cam impingement, and left knee chondromalacia/chondral injuries after examining Petitioner and reviewing the MRI's. A cortisone injection was administered to Petitioner's left knee and Dr. Basran recommended a left hip arthroscopy due to Petitioner's ongoing limitations despite undergoing physical therapy. (Px. 2). Additional physical therapy was prescribed, and Petitioner was limited Petitioner to desk-duty at work. (Id.).

On July 19, 2016, Dr. Basran noted Petitioner's report of ongoing hip pain at 8/10. On exam, left hip pain with axial rotation and positive impingement was noted. The plan was to obtain authorization for a left hip arthroscopy pending a recent independent medical examination. Dr. Basran recommended continued physical therapy, continued Petitioner's work restrictions and recommended a follow-up exam in six weeks. (Id.).

On July 28, 2016, Petitioner followed up with Dr. Basran with complaints of persistent left hip pain. At this time, Respondent had approved physical therapy for the lumbar spine only. Petitioner was again limited to desk duty work and instructed to follow up in six weeks. (Px. 2).

On October 21, 2016, Dr. Basran continued to recommend left hip arthroscopic surgery. (Px. 2).

Petitioner testified he had no pain in his low back, left hip, or left knee prior to his work-related injury on May 12, 2016.

Petitioner testified he was injured in a motorcycle accident in August 2011, after which, he underwent a few weeks of physical therapy and returned to work without issue.

Petitioner testified his hip pain, currently, is at a 2-3/10 on a good day, and 5/10 on a bad day. He takes Advil 2-3 times per day for his pain. He is still employed in the same position with Respondent but is no longer required to unload grills.

Petitioner testified he still wishes to undergo the recommended hip surgery.

Narrative report & deposition of Dr. Harpreet Basran

Dr. Basran drafted a narrative report on April 13, 2017 in which he noted Petitioner's left hip MRI demonstrated a tear of the superior labrum and morphology of the hip consistent with cam impingement. He opined "[t]he mechanism of injury certainly would be consistent with sustaining a left hip labral tear. I do believe that his cam impingement, which is anatomic changes around the femoral neck/hip joint area, were pre-existing, but his labral tear could certainly be related to that mechanism of injury. [Petitioner's] work injury based on this mechanism certainly could aggravate his cam impingement affecting the hip in sustaining or aggravating a labral tear." (Px. 4).

The deposition of Dr. Basran was conducted on October 30, 2017. (Px. 5). Dr. Basran testified that Petitioner was referred to him because he specializes in hip arthroscopy. (Px. 5, p. 6). On examination, Petitioner had left hip pain with positive impingement. (Px. 5, p. 7). Petitioner's left hip x-ray demonstrated cam

impingement, and left hip MRI demonstrated a tear of his labrum and cam impingement. (Px. 5, p. 8). Dr. Basran diagnosed Petitioner with a left hip labral tear with cam impingement and left knee chondromalacia with chondro injuries. (Px. 5, p. 8).

Petitioner's injuries, in his opinion, were casually related to the work-related accident. (Px. 5, p. 8-9).

He recommended the Petitioner undergo left hip arthroscopic surgery with either debridement or repair of the labrum and a cam decompression. (Px. 5, p. 9-10). Recovery typically requires two weeks on crutches, six weeks of brace mobilization, and physical therapy for four and a half to six months.

Regarding the cam impingement, that it is a bony change that Petitioner had for years, which could have remained asymptomatic and then became symptomatic upon a traumatic event. (Px. 5, p. 17).

On cross examination, Dr. Basran testified that a cam impingement is a small prominence of bone on the ball in the hip socket that can pinch on labrum cartilage when flexed and rotated, which can cause tearing. (Px. 5, p. 20-21). Based upon Petitioner's mechanism of a twisting injury, Dr. Basran opined that the cam impingement alone could have caused the labral tear. (Px. 5, p. 17).

Should the recommended surgery be approved, Dr. Basran testified he would recommend an updated set of x-rays of the hip, and if they are essentially unchanged with regards to narrowing of the joint, he would continue recommending arthroscopic surgery. (Px. 5, p. 18).

Dr. Basran also testified that Petitioner suffered an exacerbation of a preexisting degenerative disease in the lumbar spine as a result of the work accident. (Px. 5, p. 34).

Deposition of Dr. Klaud Miller

The deposition of orthopedic surgeon, Dr. Klaud Miller was taken on December 15, 2017. (Rx. 3). Dr. Miller examined Petitioner on June 29, 2016 and dictated his report on July 14, 2018. (Rx. 3, p. 19). Dr. Miller testified Petitioner's left hip MRI revealed a cam impingement with degeneration of the superior labrum and a subchondral cyst formation on the left hip, thinning of the articular cartilage of the trochlea and subchondral edema with "early" cyst formation. (Rx. 3, p. 20-21). Upon physical examination, Dr. Miller noted motion limitations and pain in the left knee and range of motion limitations in the left hip but not the right hip. (Rx. 3, p. 22-23).

With regard to Petitioner's lumbar spine, the CT scan revealed a diffuse disc herniation at L4-L5, and loss of disc height at that level, along with L5-S1. (Rx. 3, p. 30). Dr. Miller testified that Petitioner suffered a lumbar sprain as a result of the work injury. (Rx. 3, p. 37).

Dr. Miller diagnosed Petitioner with chondromalacia of the left knee and indicated that Petitioner suffered a left hip sprain as a result of the work injury. (Rx. 3, p. 32, 39).

Dr. Miller testified the Petitioner suffered from a degenerative tear of the superior labrum and cyst formation of the left hip with cam impingement of the left hip, and indicated that Petitioner suffered a left hip sprain as a result of the work injury. (Rx. 3, p. 32, 39). Dr. Miller testified he cannot determine whether labral tears occur at a greater frequency in someone with a cam impingement than someone without. (Rx. 3, p. 33-34).

Dr. Miller testified that a person can have an asymptomatic cam impingement without a labral tear. (Rx. 3, p. 34-35). Dr. Miller also testified that there is no medical test to prove that the labrum is the specific pain source. (Rx. 3, p. 41-42).

On cross examination, Dr. Miller testified that a cam impingement could aggravate a labrum upon a traumatic event, causing it to tear, noting this is the most common way a labrum is torn. (Rx. 3, p. 56).).

Regarding further treatment regardless of causation, Dr. Miller testified he would recommend an arthrogram with anesthesia, and if the hip pain is eliminated, then it would be reasonable and appropriate to perform a labral arthroscopy. (Rx. 3, p. 61).

Finally, based upon Petitioner's reported mechanism of injury and acute onset of left-sided low back, hip, and leg pain, Dr. Miller testified that it is *possible* that a labral tear could have occurred as a result of the injury. (Rx. 3, p. 70-75).

CONCLUSIONS OF LAW

Causal connection

Petitioner testified he worked full duty for Respondent with no prior complaints or treatment for his lumbar spine, hip, or knee prior to the uncontested accident at issue in which he was injured while attempting to stop a 180-pound Weber grill box from falling to the floor of a trailer. In performing this maneuver, Petitioner twisted his body and felt immediate pain in his low back, left hip and left knee. Petitioner immediately reported the injury, sought treatment, and gave a consistent history of injury throughout treatment and on the date of trial.

The Arbitrator found Petitioner to be a credible witness at the hearing. His overall demeanor left the Arbitrator with the impression that he was sincere and honest. His testimony concerning the accident at issue and injuries that followed was corroborated by the medical records in evidence.

The Arbitrator finds that any injuries relating to the 2011 motorcycle accident were resolved in close proximity to the accident.

The narrative report and testimony of Dr. Basran indicate the mechanism of Petitioner's injury could have, alone, caused the labral tear, or in the alternative, the mechanism of injury could have aggravated Petitioner's cam impingement to the point that it caused the labral tear. (Px. 4), (Px. 5, p. 20-21).

Dr. Miller, Respondent's IME physician, testified that a cam impingement could aggravate a labrum upon a traumatic event and cause it to tear (Rx. 3, p. 56), that Petitioner could have suffered a traumatic complex labral tear regardless of the degenerative changes in his hip (Rx. 3, p. 58), and that it is possible that Petitioner's mechanism of injury and acute onset of pain could have resulted in an acute labral tear. (Rx. 3, p. 70-75).

Regarding the lumbar spine and left knee, the Arbitrator recognizes that both doctors opined that Petitioner suffered injuries to each body part that were casually related to the work injury.

Based upon Petitioner's unrebutted and credible testimony, and by applying the "chain of event" theory, the Arbitrator finds that the preponderance of the evidence establishes that Petitioner's current condition of ill-being with regard to his left hip, left knee, and lumbar spine are causally related to the injury of May 12, 2016.

Prospective medical care

Petitioner suffers from a complex labral tear in his left hip that is causally related to the uncontested work accident at issue. Dr. Basran, Petitioner's treating physician, recommended arthroscopic repair of Petitioner's left hip labral tear. (Px. 2). Dr. Basran further testified that, should the surgery be approved, he would recommend an updated set of x-rays. Should those x-rays reveal no further degenerative changes in the hip

than what was seen on the original x-rays, Dr. Basran would continue to recommend an arthroscopic repair of Petitioner's labral tear. (Px. 5, p. 18). It is Respondent's IME physician, Dr. Miller's opinion that Petitioner suffered no more than a sprain of his lumbar spine, left hip, and left knee. (Rx. 3, p. 37, 39). Nonetheless, Dr. Miller testified that he would generally recommend an arthrogram with anesthesia, and if the hip pain was eliminated, it would be reasonable and appropriate to perform a labral arthroscopy. (Rx. 3, p. 61).

Based upon Dr. Basran's testimony, in conjunction with his narrative report, the medical records, and Petitioner's credible testimony regarding the mechanism of injury and continued pain, the Arbitrator finds that Petitioner has met his burden of proof that the prospective medical treatment is reasonable and necessary for his left hip injury.

Accordingly, the Arbitrator orders that Respondent provide prospective treatment for Petitioner's left hip injury as prescribed by Dr. Basran.

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

Donna Fletcher,

Petitioner,

vs.

NO: 18 WC 36888

20 IWCC0698

Nascote Industries,

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, medical expenses and prospective medical treatment, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Commission affirms and adopts the Arbitrator's decision, with the addition of noting that the extent of Respondent's liability for medical expenses is the negotiated rate paid by the group health insurance carrier, if applicable.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 12/16/19 is affirmed and adopted as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $440.65 per week for a period of 61-4/7 weeks, from 8/24/18 through 10/29/19, that

20IWCC0698

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 reasonable and necessary medical expenses in the amount of $223,838.63, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act, and that the extent of Respondent's liability for same is the negotiated rate paid by the group health insurance carrier, if applicable.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to prospective medical treatment as recommended by Dr. Raskas, and that Respondent shall pay to Petitioner the reasonable and necessary medical expenses associated therewith, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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.

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: DEC 3 - 2020
o: 10/6/20
TJT: pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

FLETCHER, DONNA
Employee/Petitioner

Case# **18WC036888**

NASCOTE INDUSTRIES
Employer/Respondent

20IWCC0698

On 12/16/2019, 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 1.52% 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:

0384 NELSON & NELSON ATTY AT LAW
ROBERT C NELSON
420 N HIGH ST PO BOX Y
BELLEVILLE, IL 62222

5354 STEPHEN P KELLY LAW OFFICE
PATRICK JENNETTEN
316 S W WASHINGTON UNIT 1A
PEORIA, IL 61602

20 IWCC0698

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
CORRECTED ARBITRATION DECISION
19(b)

Donna Fletcher
Employee/Petitioner

v.

Nascote Industries
Employer/Respondent

Case # **18** WC **36888**

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 **10/29/19**. 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, **8/23/18**, 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 $**34,370.44**; the average weekly wage was $**660.97**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **1** dependent child.

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

Respondent shall be given a credit of $**10,847.15** for TTD, $**0** for TPD, $**0** for maintenance, and $**4,234.04** for other benefits, for a total credit of $**15,081.55**.

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 $223,838.63, as set forth in Petitioner's exhibit 8, 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 as recommended by Dr. Raskas, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $440.65/week for 61 4/7 weeks, commencing 8/24/18 through 10/29/19, 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.

Michael K. Nowak, Arbitrator

12/14/19
Date

DEC 16 2019

PETITIONER'S PRIOR MEDICAL HISTORY

The Petitioner testified that she had undergone cervical fusion in March of 2016 by Dr. Mark Fleming a physician in Carbondale, Illinois. Thereafter, she was off work for approximately seven weeks and returned to her employment with the Respondent. She did not file a workers' compensation claim for that condition. Before being allowed to return to work, the Respondent required that she undergo a medical evaluation at its facility by a physician it chose. She passed the first examination and returned to work in the Respondent's quality department. She later transferred to a production position and was again required to undergo a physical examination by a therapist at the Respondent's therapy department.

Respondent's Exhibit 1 contains records of treatment with Brain and Spine Institute, and the surgeon, Dr. Fleming including her surgery on March 14th, 2017 for anterior cervical discectomy and fusion at C6-7 with allograph and instrumentation at C6-7. She was released to return to work on May 10th, 2017.

Petitioner's Exhibit 1 includes Dr. Fleming's record of his last visit prior to the incident complained of on June 19th, 2017. He then noted that "she continues to do well with minimal neck pain and much improved arm issues." Respondent's Exhibit 9, records from Petitioner's family doctor, Dr. Reyes, also discusses Petitioner's condition between the date of her release by Dr. Fleming and her recent incident of August 23rd, 2018. Although in those 14 months she visited the family doctor numerous times, she did not complain of or seek treatment for her cervical spine at any of those visits.

Following her cervical fusion in 2017 and before August 2018 the Petitioner did have one onset of neck problems. It occurred in April, 2018, while performing the same task as she did on the day of the accident, forcing wide awkward auto parts onto suction cups. At that earlier incident she visited the Respondent's nurse's office where she was kept until the end of her shift and given an ice pack. She returned to work the next day and worked her regular shift. She continued working her regular duties without interruption until the incident complained of.

FINDINGS OF FACT & CONCLUSIONS

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

On August 23rd, 2018 the Petitioner was attempting to attach an automobile front bumper onto suction cups allowing it to affix to a mechanical device. Respondent's Exhibit 2, a record of the Petitioner's accident description, states "After lunch between 1230 (sic) and 1 pm, I was putting a black facia into press number three. The part was warped and took more pressure to get it into the suction cups. My wing span is not as long as the others, and when I was pushing the part down, I felt pain in my neck and shoulder". Her description to medical treaters was consistent as was her testimony at arbitration. The part, while light, was 5 ½ to 6 feet long). The piece had to be set up just right for it to adhere to the suction cups. (TR 21) The Petitioner is barely five feet tall and weighs 125 pounds. (TR 25) She pushed with everything she had at an angle in order to get the part to adhere. (TR 24) She was on her tippy toes looking to her right to line up the part when she felt a pop. (TR 25-26 and 19) She was working under a time limit.

The Petitioner began working the morning of the event at 5:30 a.m. Her shift was nearly over when the pain began. She completed the shift but that evening she laid down applied ice packs as she had following the

similar incident in April. The pain did not improve. (TR 54) It shot down her right arm to her last three fingers. Later that night she went to the hospital near her physician's office. She was directed to go to the emergency room and did so the evening of the incident. (TR 29) She notified the employer of the injury from the ER by calling and leaving a message with Mary Kellerman. (TR 29) The next day she reported the incident to the Respondent's representative, Ms. Decker. (TR 30)

The Respondent disputed accident. It relied on its video recordings to show the work the Petitioner was doing between 12:30 and 1 pm on August 23rd, the day of the accident. The Arbitrator carefully considers the video admitted, Respondent's Exhibit 24, in assessing whether the accident occurred.

Exhibit 24 shows a woman, larger and taller than the Petitioner wearing a yellow shirt and blue pants. (TR 42) Her arms spread apart pushing a product in place. She then pushes several smaller parts. Occasionally a woman in pink, the Petitioner, appears to her right. Although she is working behind a structural piece separating her from her coworker, at one time Petitioner is attempting to lift a very large piece of molded plastic. The video does not show her placing it or otherwise working with it. The video is trained on the taller worker's station and does not show the Petitioner well.

The tall woman wearing yellow is working with parts of various sizes, at least one of which is five or so feet wide (Respondent's Exhibit 24 at 1 minute and thirty-eight seconds into the video). She grabs a large part with her hands far apart at approximately 4 minutes and 50 seconds in the video. She lifts a large piece roughly five feet wide putting her hands farther apart than her shoulders and pushes it onto a machine at 3 minutes 11 seconds. Both hands are widespread again at 4 minutes and 42 seconds as she pushes another piece into place.

Michelle Ledbetter, an assembly engineer for Nascote, set up the 553 line the Petitioner was working on. (TR 75) She testified that potentially workers would need to push down first on one side and then the other to insert parts (TR 77) and had watched employees doing so. (TR 77) She has visualized people actually pushing down on the job but claimed never saw someone pushing with their arms outstretched. (TR 77) She said too that she had actually seen the Petitioner working several times but did not recall the Petitioner's arms being outstretched.

Although there is a camera directly behind Petitioner's station, (some stations have even more than one (TR 56), the video is taken of another location. Respondent's environmental health and safety administrator, Natalie Bilimoria, was unable to produce a recording from the Petitioner's work location. (TR 68) She was told that the video directly over the Petitioner was out of order. (TR 61) The video shows the Petitioner only intermittently coming into view. (TR 69) It does not show the Petitioner's work clearly enough to determine what she was doing or whether she had difficulty.

The video is only 5 minutes long and shows only a fraction of the time period between 12:30 and 1 pm when the Petitioner notified the Respondent she was injured. Ms. Bilimoria was told the day after the incident that the injury happened within a 30-minute period between 12:30 p.m. and 1 p.m. (TR 60) She pulled the video of that particular time and reviewed it. (TR 60 and 62) The witness said she provided that video (taken between 12:30 p.m. and 1 p.m.) to the attorney who introduced it into evidence. (TR 62) She did not have all the work the Petitioner was doing over that half-hours' time on that video. (TR 65) The video submitted is approximately five minutes long. (TR 66) The other twenty-five minutes of video was not produced. (TR 70) The witness testified the remaining period "was not as crisp as — we just took the part that we could get a clear visual of

her." (TR 71) The witness did not really know what the Petitioner was doing during the half hour other than she was doing her job. (TR 73) She doesn't know what Petitioner was doing during the thirty minutes. (TR 73) The witness did not know, then, whether the Petitioner ever worked with a black piece or just white pieces. (TR 72) She admitted that the video, allegedly five minutes, could not have shown everything that happened between 12:30 and 1:00. (TR 67)

Ms. Ledbetter participated in an investigation of work done between 12:30 and 1:00 p.m. She pulled video showing the time period from 12:30 to 1:00 p.m. This witness said the thirty minutes of video she pulled were from an adjacent worker's station. (TR 80, 81) The Respondent did not produce the entire 30-minute video the witness reviewed. Instead it submitted the witness's recollection of all 30 minutes. (TR 83, 84) The witness admitted that the parties and Arbitrator would have a better understanding of what she claimed if allowed to look at the video she reviewed. (TR 86) The video, though, has been discarded. This witness claimed the video did not show someone else's workstation but in fact showed the Petitioner's. (TR 91) When asked if there was a reason why only a little over five minutes of video was provided to the Arbitrator the witness said no. (TR 70-71)

The video introduced has no time or date stamp, it had been erased. (TR 67) The video did have a date stamp but, the witness stated that "when we super-imposed it that date stamp does not come into the view in the video." (TR 66) The original video was time and date stamped. (TR 66) The original was not offered by the Respondent.

Petitioner testified that there would be videos of employees attempting to work with the darker pieces. (TR 56) The Petitioner explained that the color can be significant because the darker colors are frequently warped and bent so they were usually more difficult to push correctly into the machine. Her notices of accident (Respondent's Exhibits 1 and 2) both state that she was working with a black piece. Black pieces make up about 30% of the parts she works with.

The Arbitrator considers both the video, the medical records, and the Petitioner's testimony to determine whether an accident occurred. The video, Respondent's Exhibit 24 does not persuade the Arbitrator that an accident did not occur. On the other hand, he finds the Petitioner's appearance and demeanor credible. Her history of the accident has been consistent with every treater and examiner. (RX 20, page 28) After weighing Respondent's Exhibit 24, he finds it is insufficient to persuade him that the Petitioner's testimony is invalid.

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.

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

The Petitioner had had a prior cervical fusion but did not miss work for reasons associated with her cervical condition for approximately seventeen months before the accident in this case. In those seventeen months the Respondent's choice of physicians or therapists had evaluated her twice. Each released her to continue working full duty. The only time she had had a flare-up was 4 months before the date of accident when performing the exact same kinds of activities, she performed when she experienced a sudden onset of symptoms on August 23rd, 2018. The evening after the earlier aggravation, she recovered by using ice. She

returned to work the next day and was able to continue working full duty full time in her factory job until the day of the incident. She has been unable to work since. (TR 30)

The Petitioner's history has been consistent with every treater and examiner (RX 20, page 28). She had the sudden onset of symptoms while working on August 23rd, 2018. She has been unable to work ever since that time. No treating physician has released her to return to work since the accident. She has had no new injuries nor performed any fast-repetitive reaching or pulling since the incident.

Respondent's Exhibit Number 9 is a collection of medical records from Dr. Christopher Reyes. He had taken a consistent history of injury on August 27th, 2018 note. On September 13th, 2018 after restating the same history of injury, the office charted reduced range of motion and cervical spasm. On October 22nd, 2018 the doctor's office noted that Petitioner injured her neck and shoulder at work on August 23rd, 2018 when reaching to push. Dr. Reyes' note of December 12th, 2018 diagnosed central disc herniation with spinal cord compromise and noted, a consistent mechanism of injury.

Petitioner's Exhibit 5 is the deposition of Dr. David Raskas, a spinal surgeon in St. Louis for twenty-five years. He examined the Petitioner. Dr. Raskas felt that the Petitioner's prior fusion had never completely healed (PX 5, page 8) but that many people have incomplete fusions for their entire lives. The pushing activity on August 23rd, 2018 produced damage to her nerve roots, C6 & 7. (PX 5, page 8) While the piece did not weigh much the weight didn't make a difference when she was pushing on it. (PX 5, page 9) The pushing activity caused the radiculopathy she experienced thereafter. (PX 5, page 10) Pre-existing structural conditions alone did not require an operation. He confirmed the casual relationship between the work on August 23rd, 2018 and the Petitioner's condition of ill being. (PX5, pages 8, 9, 10 and 13)

The Respondent's first examining physician, Dr. Collard, reported on September 18, 2018 that he felt "this should be further determined by a spine surgeon with further diagnostic studies including potentially CT myelogram of the cervical spine." (RX 14) Dr. Collard testified that, "in my first report you can see I clearly avoided the opinion for the neck in regard to causation." In the second report he contested causation while noting that, "It is also my opinion that her symptoms occurred during the activity rather than her activity being the cause of her current condition, her symptoms or an aggravation." (RX 15) Between the first and second report there was no new visit and no further information given to the Section 12 examiner. (RX 16, page 18) All the information he needed to issue the supplemental opinions was information he had when he issued his first report. (RX 16, page 18)

The Respondent's second examining physician, Dr. Kitchens, offered testimony in a deposition marked as Respondent's Exhibit 20. He claimed that the incident complained of was not a cause of the need for surgery. He believed the need was based on her prior condition. He agreed, however, that if she were not having pain and was working as she had been until the injury, he would not have felt she needed surgery (RX 20 page 24). He understood the Petitioner did have radiating pain when she saw Dr. Raskas (RX 20, page 24). In his opinion, Dr. Raskas' surgery was reasonable and necessary. (RX 20, page 10). He believed the Petitioner was truthful in stating her pain began with the work activity ((RX 20, page 42) but believed "it just started spontaneously." (RX 20, page 45)

The Arbitrator finds that the Petitioner was not symptomatic prior to the accident. Her symptoms immediately followed her work injury on August 23rd, 2018. Her symptoms were a reason for surgery.

Therefore, the Arbitrator finds that the accident on August 23rd, 2018 is a cause of the Petitioner's condition of ill being.

In so finding, the Arbitrator is mindful of case law concerning the chain of events. The absence of symptoms prior to and event and the persistent presence after creates a chain of events sufficient to determine the event caused the symptoms and the need to treat them.

In *Schroeder v. The Illinois Workers' Compensation Commission,* 2017 IL App (4th) 160192WC, the 4th District Appellate Court set aside the McLean County Circuit Court Decision and reinstated the underlying Commission decision confirming causation. The Commission had awarded benefits for a claimant with serious pre-existing back difficulties. The difficulties were serious enough that the claimant had considered a third operation on her back shortly before beginning to work for the employer. While still under medical care for fibromyalgia, she fell on her back and thereafter claimed to have worsened her persistent back pain. The Arbitrator denied benefits. There was no objective testing confirming the change in Petitioner's condition following the accident. Furthermore, the surgeon who operated on the Petitioner after the job accident had recommended the very same surgery before the job accident. The Arbitrator therefore found that the condition "resulted in only a temporary aggravation of claimant's pre-existing low back condition". The Commission, however, reversed in light of the Petitioner's ability to work full time until the accident.

In *Shafer v. Illinois Workers' Compensation Commission*, 976 N.E.2d 1 (2011) App (4th) (quoting *International Harvester v. Industrial Commission,* 93 Ill. 2d 59 (1982)), The Court made a similar finding stating "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." The Commission observed that, just as here, the Petitioner's pain never subsided after the accident.

In *Steak N Shake v. IWCC*, 2016 IL App (3d) 150500WC, the Appellate Court considered the case of a restaurant manager who was injured by simply wiping down tables on a busy day. She had pre-existing arthritis of her thumb. The sole doctor's opinion claimed that the activity caused "manifestation of symptoms" but that her current symptoms were not related to her movement. Despite Dr. Wysocki's ultimate opinion regarding causation the Arbitrator, Commission, Circuit and Appellate Court all found for the Petitioner based on the sequence of events theory. The Commission noted she was asymptomatic before the event but had extensive symptoms and treatment thereafter. That sequence was sufficient to support a finding of causation. Her medical evidence showed an ongoing condition that began the day of the incident and therefore was inconsistent with Dr. Wysocki's opinion that the incident was not a causative factor of claimant's condition. Since she was asymptomatic before, but had immediate onset of symptoms after that was sufficient to establish a causal relationship. The Court noted it as well settled that the Commission can infer causation from a sequence of lack of symptoms prior to an industrial accident with symptom manifestation immediately following. It cited *Freeman United Coal Min. Co. v. Industrial Comm'n,* 318 Ill. App.3d 170, 175, 251 Ill. Dec. 966. The employer pointed out that Dr. Wysocki's opinion was the only medical opinion about causation, but the court disagreed with his conclusion since Wysocki admitted that she was pain free before the incident and wiping tables caused *"symptom manifestation"*.

In *Corn Belt Energy Corp v. IWCC*, 56 N.E.3d 1101, 404 Ill.Dec. 688 (2016) an employee twisted his back while exiting a truck. He denied experiencing any similar problems in the week before the injury but had seen his chiropractor eight times in the year of the injury, the last being approximately one month prior.

In *Jeffery Howard III v. St. Clair County Highway Department* (16 IWCC 0187) the Commission considered whether a claimant's need for new knee was compensable. The Petitioner had had an extensive pre-existing arthritic condition. Petitioner stepped in a hole twisted and fell injuring his knee. Thereafter he sought treatment. The medical testimony concluded that the Petitioner had additional pain that accelerated the need for surgery. The Section 12 examiner agreed the accident caused pain resulting in the Petitioner seeking medical treatment. The Petitioner had six prior orthoscopic surgeries but the last was 28 years before the accident but, despite the arthritic condition and recent treatment he was able to perform his relatively heavy labor job before the accident. The Commission felt that the work accident accelerated the need for surgery and found it compensable.

In *Taylor v. Alpha,*(16 IWCC 0170) The Petitioner was in good health relative to her knee for more than three years before the accident. After the accident the knee problems were consistent ongoing and unabated. Again, the Commission referred to a "chain of events analysis" pointing to the causal connection but really was just confirming the Arbitrator who decided that "To say that Petitioner may have sustained a knee strain as a result of the work accident which should have resolved three to four weeks after the accident and that Petitioner's present condition of ill-being is due solely to a pre-existing condition disregards the 'chain of events' analysis".

In *Navistar, Inc. v. IWCC*, 22 ILWCLB 117, Ill.App.2d (2014) the Commission found a causal relationship between the Petitioner's knee injury and his work accident. The Respondent claimed that the Petitioner had serious arthritis before the injury, but he had had no symptoms. After twisting his knee, however, the Petitioner had a medial meniscus tear and underwent total knee arthroscopy. The Commission found the claimant credible in stating that he had no symptoms prior to the work accident, worked full duty and never received treatment for his knee prior. Further he had immediate and consistent knee pain thereafter. The Petitioner's doctor said the injury was the straw that broke the camel's back; causing the underlying arthritic conditions to be symptomatic; the defendant's experts conceded that a twisting injury could have caused the preexisting tear to worsen.

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds Petitioner met her burden of establishing that her current condition of ill-being is causally related to the accident on August 23rd, 2018.

Issue (G): What were Petitioner's earnings?

The Petitioner testified that she frequently worked overtime, both voluntary and mandatory. The Respondent has introduced Exhibit Number 5, a list of hours worked. The Petitioner testified that approximately 50% of her work was mandatory and 50% voluntary. Petitioner testified that she was scheduled to work five days a week, with both voluntary and mandatory overtime. Petitioner earned a usual forty-hour work week at approximately $16.28 per hour with an additional average of 0.6 hours per week of mandatory overtime per week at time and a half, which yields an average weekly wage of $660.97.

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?**

Petitioner's Exhibit 8 is a list of medical charges related to the Petitioner's neck totaling $223,838.63.

Following her trip to the ER the night of the accident, the Petitioner began treating with her family physician, Dr. Reyes, and his physician's assistant, Mr. Priebe. She later called the physician who did her prior surgery, Dr. Fleming, and scheduled an appointment. Initially the surgeon's office referred the Petitioner for physical therapy. She performed the therapy, but the therapist determined it was not helping her. Thereafter, Dr. Fleming declined to treat her because she had a worker's compensation case. (TR 34) She continued to treat with her family doctor and her attorney referred her to Dr. Raskas.

When the Petitioner first saw Dr. Raskas she had atrophy of her triceps, limited range of motion, weak grip and no reflexes in the triceps in either arm. Her subjective complaints were consistent with the objective findings. (PX 5, page 12) Dr. Raskas performed a 2-level cervical fusion with anterior plating from C5 to C7 and vertebrectomy on 06/17/19. In the vertebrectomy he took out more than half of the C6 vertebrae. (PX 5, page 15) He harvested bone from her own iliac crest. The doctor testified, "The reason for surgery was to fix her cervical radiculopathy." (PX 5, page 25 & 27) A secondary reason was potential non-complete union at C6-7. (PX 5, page 26-27)

Following surgery, Petitioner noticed a huge difference in terms of the reduction of her radicular pain. (PX 5, page 15) The Petitioner testified that the surgery successfully relieved the numbness she had had in her right hand since the incident. (TR 31)

Initially, the need for further treatment was disputed by the Respondent's Section 12 examiner, Dr. Kitchen. He changed his mind though and agreed that the two-level fusion was reasonable and necessary. (RX 20, page 10)

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds that the treatment up until the date of arbitration was reasonable and necessary to cure the pain, atrophy, and radiating symptoms she experienced after the accident.

Respondent shall pay reasonable and necessary medical services of $223,838.63, as set forth in Petitioner's exhibit 8, 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 further authorize and pay for additional medical treatment related to Petitioner's recovery from her anterior decompression, fusion and revision at C6-7, primary at C5-6 as may be recommended by Dr. David Raskas.

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

The Petitioner complained of severe radiating pain since the day of the accident. She produced off duty slips from her family doctor's office and later her surgeon's. Respondent's Exhibit 11 is a report from Dr. Mark

Fleming dated November 28th, 2108 prescribing physical therapy and saying the Petitioner may be off work while undergoing it. She was in great pain until the day of surgery.

The Respondent's nurse, Kathy Decker, was present during the hearing as the Respondent's representative. She discussed the conditions of the light duty offered on 2 occasions.

The first offer was on August 27th, 2018. The Respondent's nurse practitioner, Nicole Vedder, provided a light duty release (TR 105) Vedder's note dated August 27th, 2018 as read by the witness, reported, "diagnosed right shoulder neck pain. Plan, PT eval, continue meds prescribed in the ER, ice, keep appointment with primary care provider today and she would like to see her ortho that has fixed her neck previously". (TR 115) The Petitioner's practitioner advised the Petitioner could not do the light duty and should be off work altogether. (TR 119) The Petitioner informed the Respondent that she was going to follow her doctor's office's advice. (TR 117) Ms. Decker would check periodically and waited "for a note to come in if they were returning her or keeping her off work." (TR 117) Between the initial offer on August 27th, 2018 and January 2019 light duty was not offered. (TR 118) There was no opinion from a doctor that the Petitioner could return to work until after Dr. Kitchen's exam. (TR 119) The witness was not critical of the Petitioner's following her doctor's advice. (TR 120)

The second offer was on January 23rd 2019. (TR 121) Following the exam by Dr. Kitchens the Petitioner called the Respondent to attempt to return work. (TR 121) The Respondent required a statement from the Petitioner's own physician that she could both take Tramadol and work without medical restrictions. (TR 122) Although Respondent's Section 12 examiner claimed Petitioner could work the Respondent would not allow her to return to work without confirmation from Petitioner's own doctor. Her family doctor, Dr. Reyes, refused to allow a return to full duty work and instead reported to the Respondent on January 24th, 2019 that the Petitioner was unable to work "due to cervical injury" pending an appointment with Dr. Raskas on February 26th, 2019. (TR 124) The second offer was conditional on the Petitioner getting a note from her doctor saying that she could take medication and work without restriction. (TR 109) The treating family doctor reported she could not work. Dr. Raskas reported the same. The Petitioner has not been released to work by a treating doctor up until the date of the hearing. No light duty was offered thereafter.

Between the first and second conditional offers of a return to work the Respondent scheduled an exam with its first choice of physicians, Dr. Collard. He testified that at the time he examined the Petitioner on September 18th, 2018 she was unable to perform her regular job because of her neck. (RX 16, page 12). After the onset of symptoms, he testified she was not able to at least until the time of his exam. (RX 16, page 15) He stated that, "I did not think that she could work in any capacity given she's – she was tearful at the time and fairly agitated. Even, I felt that her symptoms were in line with what I believed was real symptomatic pain." (RX 16, page 13) He withheld authority to return to work until an evaluation by a spine surgeon and possible CT myelogram. At the time of the exam she had limited range of motion, significant tenderness and spasm over the trapezius and paraspinal musculatures of the cervical spine. The spasm was an objective finding. (RX 16, page 16) He felt the pain was acute meaning it had gone on for less than six weeks. (RX 16, page 17) He had seen the Petitioner less than four weeks subsequent to her onset.

Dr. Raskas testified that the Petitioner was not capable of doing a sit-down job in 2018 and when asked what was preventing her, he said, "she was miserable with pain and discomfort". (PX 5, page 29-30) She could not show up on a reliable basis and be expected to be relied on to make reasonable decisions. (PX 5, page 30)

The Petitioner was required to wear a brace for the first thirteen weeks following surgery on June 17th, 2019. She is still treating with Dr. Raskas and is scheduled to return to see him on December 20th, 2019 following her last visit on September 20th, 2019. (TR 36) Currently he has prescribed her one-pound and two-pound dumbbells to do home therapy which she faithfully performs. (TR 37)

The Petitioner has ridden a motorcycle but did not find sitting on it to be a problem such as lifting, pushing, pulling or exertional activities have been. Petitioner and her husband did have a motorcycle trip to Niagara Falls planned but the trip was cancelled. She's taken no long rides. She has avoided rougher, bumpy areas. She has been unable to accompany him at Shriner's events. Petitioner rode on her husband's motorcycle a couple of times following the incident. (TR 51) The seat she sat in was large and went around her. (TR 52) The ride did not affect her more than riding in a vehicle. (TR 52) Her husband made frequent stops. (TR 52)

The Petitioner testified that she has difficulty with ordinary household chores such as picking up laundry, vacuuming or even carrying a purse. She is currently limited to lifting twenty pounds. (TR 41-42) Currently the Petitioner still has difficulty and pain towards the lower part of the back of her neck. She has, though, improved since the surgery. (TR 38) She had difficulty swallowing but that has improved. (TR 37) Her right arm is definitely better. (TR 38) She cannot sit for extended periods of time, no more than half an hour. (TR 43) She lies down periodically through each day at least three times to address discomfort in her neck and hip. (TR 44)

On Dr. September 20th, 2019 Dr. Raskas allowed the Petitioner to return to work with restrictions. She has not yet reached permanency as of his deposition on July 10th, 2019. She had been let go, though, by the Respondent in March 2019 (TR 39) and there is no showing of its offering light duty since. She has not worked anywhere since the incident. (TR 41)

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds Petitioner is entitled to TTD benefits from August 24th, 2018 through October 29th, 2019. This is a total of 61 and 4/7th weeks. Respondent will receive a credit for TTD and disability benefits previously paid. Respondent shall hold Petitioner harmless form any claims by any providers of the disability benefits for which Respondent is receiving this credit, as provided by Section 8(j) 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

Jack Daitchman,

Petitioner,

vs. NO: 19 WC 10513

Continental Express Lines LLC and
Secura Insurance Companies,

20IWCC0699

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical treatment, and temporary total disability ("TTD"), and being advised of the facts and law, partially modifies the Decision of the Arbitrator 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, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

After carefully considering the evidence, the Commission affirms the Arbitrator's conclusions regarding accident, causal connection, medical expenses, and prospective medical treatment. However, the Commission makes certain changes. As an initial matter, the Commission finds Respondent is entitled to a credit in the amount of $5,035.00 for "other benefits" it paid pursuant to Section 8(j) of the Act. Both parties agreed that Respondent paid benefits in that amount and that Respondent is entitled to the corresponding 8(j) credit. However, there is no mention of this agreed upon credit in the Arbitrator Decision. Therefore, the Commission modifies the Decision to reflect Respondent's entitlement to a credit of $5,035.00 pursuant to Section 8(j) of the Act.

The Commission also agrees with the Arbitrator's conclusion that Petitioner met his burden of proving he is entitled to TTD benefits due to the February 26, 2019, work incident. The Commission finds Petitioner is only entitled to TTD benefits from February 27, 2019, through May 14, 2019 (the date of hearing). The Commission finds the Arbitrator does not have jurisdiction

20IWCC0699

to award additional TTD benefits extending beyond the date of hearing. Thus, on page eleven (11) of the Decision, the Commission strikes the sentence that reads, "The Arbitrator orders Respondent to issue Petitioner's temporary total disability benefits until Petitioner's condition stabilizes." Additionally, in the Order section of the Arbitrator Decision Form, the Arbitrator awarded TTD benefits "...ongoing to the present until his condition stabilizes." For the reasons stated above, the Commission modifies this sentence to read as follows:

> Respondent shall pay Petitioner temporary total disability benefits of **$9,481.67** (**$861.97**/week for **11** weeks) for the period of: **2/27/2019 through 5/14/2019** (the date of hearing), as provided in Section 8(a) of the Act.

The Commission also makes the following changes to the Arbitrator Decision. On page ten (10) of the Decision, the Commission strikes the following sentence: "Therefore, Respondent is ordered to authorize and pay for the medical expenses related to the right upper extremity and future medical treatment." Finally, in the Order section of the Decision Form, the Arbitrator wrote, "Respondent shall authorize the continuing reasonable and necessary medical treatment with Dr. O'Laughlin." The Commission modifies this sentence to read as follows:

> Respondent is liable for the continuing reasonable and necessary medical treatment with Dr. O'Laughlin.

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 5, 2019, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner temporary total disability benefits of $**861.97**/week for **11** weeks, commencing **February 27, 2019,** through **May 14, 2019**, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent is liable for the continuing reasonable, necessary, and causally related medical treatment with Dr. O'Laughlin.

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. Respondent is entitled to a credit in the amount of $5,035.00 for "other benefits" paid pursuant to Section 8(j) of the Act.

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.

20IWCC0699

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: DEC 3 - 2020

o: 10/20/20
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

DAITCHMAN, JACK
Employee/Petitioner

Case# **19WC010513**

20IWCC0699

CONTINENTAL EXPRESS LINES LLC AND SECURA INSURANCE COMPANIES
Employer/Respondent

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:

5625 GRAUER & KRIEGEL LLC
KARINA B MEJIA
1300 E WOODFIELD RD SUITE 205
SCHAUMBURG, IL 60173

2912 HANSON LAW OFFICES
KURT HANSON
6040 STATE ROUTE 53 SUITE B
LISLE, IL 60532

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)

JACK DAITCHMAN
Employee/Petitioner

v.

CONTINENTAL EXPRESS LINES, LLC; and SECURA INSURANCE COMPANIES
Employer/Respondent

Case # **19** WC **010513**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **May 14, 2019.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] 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, **02/26/2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**67,200.12**; the average weekly wage was $**1,292.31**.

On the date of accident, Petitioner was **64** 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

Respondent shall pay the following unpaid reasonable and necessary medical bills: (see findings, enclosed)

Respondent shall pay Petitioner temporary total disability benefits of **$9,481.67** (**$861.97**/week for **11** weeks) for the period of: **02/26/2019 through 05/14/2019** (the date of the hearing), as provided in Section 8(a) of the Act and ongoing to the present until his condition stabilizes.

Respondent shall authorize the continuing reasonable and necessary medical treatment with Dr. O'Laughlin.

No penalties are awarded in this matter.

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

08-01-19
Date

ICArbDec19(b)

AUG 5 - 2019

FINDINGS OF FACT

Petitioner, Jack Daitchman, a 64-year old male, testified without contradiction, that he was an employee of Continental Express Lines, LLC, for approximately 27 years at the time of his February 26, 2019 work injury (Tr. pgs. 10-11). Mr. Santowski, President and owner of Continental Express Lines, testified that Petitioner had worked for him for roughly 25 years (Tr. pgs. 58 & 60). Petitioner worked 10-14 hour shifts as a CDL over-the-road truck driver (Tr. pgs. 11-12). Petitioner's job duties included driving 400-500 miles a day to deliver freight and pick up orders in Wisconsin and Ohio (Tr. pgs. 11-12). Mr. Santowski testified that Petitioner drove around 50-52 hours per week, Monday through Friday (Tr. pgs. 81-82).

Petitioner testified that he arrived to work around 3:00 or 4:00 a.m. and would park his car in his usual spot in the designated employee parking lot (Tr. pgs. 46-47). Petitioner would end his work day anywhere between 4:00 and 6:00 p.m. (Tr. pg. 12). Pursuant to the United States Department of Transportation regulations, drivers may be on duty for up to 14 hours following 10 hours off duty, but are limited to 11 hours of driving time. Section 395.3(a)(2). Petitioner drove a truck with a sleeper cab and could carry an overnight work bag with personal items in case he got stuck on the highway for exceeding the allowed driving hours (Tr. pg. 47 & 51). Mr. Santowski also testified that Petitioner would sleep in the sleeper cab (Tr. pg. 68).

Petitioner testified that Continental Express was responsible for removing snow from the parking lot (Tr. pgs. 12-13). More specifically, supervisor Gale Banter would remove the snow from the parking lot with a plow truck (Tr. pg. 13). Petitioner reported the icy conditions in the employee parking lot to Gale and Mr. Santowski (Tr. pg. 14). Mr. Santowski testified that employees did in fact report icy conditions in the parking lot during winter (Tr. pg. 80).

Mr. Santowski does not own the premises where Continental Express Lines conducts business, but as the lessee, he is responsible for maintaining the premises and provides snow removal services (Tr. pgs. 58-59). Mr. Santowski corroborated Petitioner's testimony that Gale removed snow at the Continental Express Lines premises with a plow truck owned by Mr. Santowski (Tr. pgs. 59 & 78).

On February 26, 2019, when Petitioner arrived at work, he parked in the employee designated lot and had no difficulty getting out of his vehicle that morning (Tr. pg. 93). Later on February 26, 2019 around 6:00 p.m. Petitioner walked towards his car which was parked in the employee lot in the southwest area when he slipped on ice and landed directly on his right shoulder and arm (Tr. pg. 22). Petitioner got up and walked to where Gale was to notify him of the fall (Tr. pg. 22).

Following the incident, Gale took Petitioner to the emergency room at Alexian Brothers Medical Center (Tr. pg. 29). Petitioner explained to the emergency room doctors that he injured his right shoulder and arm when he slipped on ice in the employee parking lot (Tr. pg. 30). The emergency room evaluation noted that, **"Petitioner complained of pain rated 10/10 that began after he slipped on ice and landed on his right arm."** (Px. 5). An x-ray of the right shoulder showed acute fractures of the proximal right humerus likely extending into the humerus neck and possibly the head; and a CT confirmed the fractures (Px. 5). Petitioner was given a sling, medication, was admitted and ordered to be seen by orthopedics (Px. 5).

On February 27, 2019, Petitioner was seen by orthopedic surgeon Charles O'Laughlin who noted in his records the following history:

> **"He came in for evaluation of right upper extremity pain after slipping and falling outside on ice. He states he was walking in the parking lot at work when he slipped and fell directly on his right shoulder."** (Px. 5).

After a review of the x-ray and CT scan, Dr. O'Laughlin recommended open reduction and internal fixation with a plate and screw fixation for the displaced fracture of the right humerus (Px. 5). Petitioner was told that he needed clearance from the cardiologist before undergoing surgery (Tr. pgs. 31-32). Petitioner had a history of a stent placement and was on Plavix. The cardiologist and Dr. O'Laughlin agreed that the Plavix needed to wear off before performing surgery. Meanwhile, Petitioner was monitored by the cardiologist team and by Dr. O'Laughlin; and IV pain medication was administered (Px. 5).

On March 6, 2019, Petitioner underwent surgery and had interfragmental screws and a long plate with the Biomet ALPS 11 hole humerus plate inserted in the right shoulder and arm (Px. 5). The postoperative diagnosis revealed a comminuted fracture of the shaft of the right humerus with extension into the surgical neck of the humerus and greater tuberosity of the right shoulder with marked displacement (Px. 5).

On March 8, 2019, Petitioner was discharged and instructed to follow up with Dr. O'Laughlin (Px. 5). Petitioner stayed in the hospital 11-days following the work accident (Tr. pg. 32).

On March 28, 2019, Dr. O'Laughlin took x-rays and noted that the fracture was in good position, removed the cast and the skin sutures (Px. 6). On that same day, Dr. O'Laughlin showed Petitioner the x-rays of his right shoulder and arm which was marked as Petitioner's Exhibit Group 12 (Tr. pg. 34). Dr. O'Laughlin then ordered a second cast to give Petitioner support (Px. 6). Petitioner remained with restrictions of no work and was given Norco for the pain (Px. 6).

On April 18, 2019, Dr. O'Laughlin reexamined Petitioner's right upper extremity and removed the second cast (Px. 6). Dr. O'Laughlin instructed Petitioner to limit the movement between the shoulder and arm to prevent the screws from coming loose (Tr. pg. 36). Petitioner was ordered to use a sling and the abduction pad to protect the arm from rotating and to protect

the fracture (Px. 6). Dr. O'Laughlin advised Petitioner to start some wrist exercises but to be careful and to do very minimal activity with the right upper extremity (Px. 6). Petitioner was instructed to follow up with Dr. O'Laughlin on May 26, 2019 and to remain off work (Px. 6).

On the day of the hearing, Petitioner testified to having continued symptoms of shooting pain down the right shoulder to the elbow; numbness in the pinky and ring fingers of the right hand; with limited range of motion of the right upper extremity (Tr. pgs. 37-38).

Petitioner has difficulty with everyday grooming since he has pain and limitations of his dominant right upper extremity. Petitioner has to brush his teeth using his left hand, has had to buy shoes without laces, he cannot mow his lawn, and has difficulty with other day-to-day activities (Tr. pg. 38).

Petitioner testified that he did not have difficulty performing everyday activities prior to his work accident on February 26, 2019 (Tr. pg. 38). Furthermore, Petitioner testified that he did not have any prior pain in his right shoulder, arm, elbow or hand prior to the February 26, 2019 work injury (Tr. pgs. 38-39). Petitioner testified that it was difficult for him to drive and drives as little as possible (Tr. pg. 42).

Petitioner testified that he has not received any worker's compensation benefits for the February 26, 2019 work injury (Tr. pg. 39).

CONCLUSIONS OF LAW

ISSUE C: DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT? THE ARBITRATOR FINDS AS FOLLOWS:

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that [s]he has suffered a disabling injury which arose out of and in the course of h[er] employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003).

The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 338 (1980). 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 his duties and while he is performing those duties or doing something incidental thereto, the injury is deemed to have occurred in the course of employment. Id.; see also *Sisbro*, 207 Ill.2d at 203 (ruling that an injury occurs "[i]n the course of employment" when it "occur[s] within the time and space boundaries of the employment").

In this case, the parties agree that the Petitioner's accidental injuries occurred in the course of his employment with the employer. The contested issue is whether his injuries "arose out of" his employment.

"Arising out of" the employment refers to the origin or cause of a claimant's injury. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill.App.3d 472, 478, 949 N.E.2d 1151, 1156 (2011). For an injury caused by a fall to arise out of the employment, a claimant must present evidence which supports a reasonable inference that the fall stemmed from a risk associated with her employment. *Builders Square, Inc. v. Industrial Comm'n*, 339 Ill.App.3d 1006, 1010, 791 N.E.2d 1308, 1311 (2003).

To determine whether a claimant's injury arose out of her employment, we must first determine the type of risk to which she was exposed. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill.App.3d 472, 478 (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 Comm'n*, 2013 IL App (4th) 120219WC, ¶ 27. "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.*; see also *Orsini v. Industrial Comm'n*, 117 Ill.2d 38, 45 (1987) ("For an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment."); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 59 (1989) ("[I]f the injury results from a hazard to which the employee would have been equally exposed apart from the employment, or a risk personal to the employee, it is not compensable.").

When an injury to an employee takes place in an area that is the usual route to the employer's premises, and the route is attendant with a special risk or hazard, the hazard becomes part of the employment. *Springfield Urban League v. IWCC*, 371 Ill.Dec. 384, 990 N.E.2d 284, 291 (App. Ct. 4th Dist. 2013). Illinois courts have traditionally held that snow and ice constitute a "hazardous condition" supporting compensability. *Suter v. Illinois Workers' Comp. Comm'n*, 998 N.E.2d 971 (App. Ct. 4th district 2013).

Furthermore, we acknowledge that both our Supreme Court and our Appellate Court have repeatedly held that accidental injuries sustained on property that is either owned or controlled by an employer within a reasonable time before or after work are generally deemed to arise out of and in the course of employment when the claimant's injury was sustained as a result of the hazardous condition of the employer's premises. See, e.g., *Archer Daniels Midland Co. v. Industrial Comm'n*, 91 Ill.2d 210, 216 (1982) ("Where the claimant's injury was sustained as a result of the condition of the employer's premises, this court has consistently approved an award of compensation."); see also *Hiram Walker & Sons, Inc. v. Industrial Comm'n*, 41 Ill.2d 429 (1968) (holding that claimant's fall in employer's ice-covered parking lot was compensable); *Carr v. Industrial Comm'n*, 26 Ill.2d 347 (1962) (same); *De Hoyos v. Industrial Comm'n*, 26 Ill.2d 110

(1962) (same); *Caterpillar Tractor Co.*, 129 Ill.2d at 62 (suggesting that an injury is causally related to the employment if the injury occurs "as a direct result of a hazardous condition on the employer's premises"); *Mores-Harvey*, 345 Ill.App.3d at 1040 (the presence of a "hazardous condition" on the employer's premises that causes a claimant's injury, including a hazardous condition located in a parking lot the employer provides for its employees, "supports the finding of a compensable claim"); *Suter v. Illinois Workers' Compensation Comm'n*, 998 N.E.2d 971 (4th Dist. 2013) (where the claimant slipped on ice in a parking lot furnished by her employer shortly after she arrived at work, the claimant was entitled to benefits under the Act "as a matter of law"). The presence of a "hazardous condition" on the employer's premises renders the risk of injury a risk incidental to employment; accordingly, a claimant who is injured by such a hazardous condition may recover benefits 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. *Archer Daniels Midland Co.*, 91 Ill.2d at 216; *Mores-Harvey*, 345 Ill.App.3d at 1040; *Suter*, 2013 IL App (4th) 130049WC, at 40. In other words, such injuries are not analyzed under "neutral risk" principles; rather they are deemed to be risks "distinctly associated" with the employment. It should also be noted that ice and snow in the parking lot constitutes a "hazardous condition" regardless of whether the lots were diligently plowed or shoveled. Stated another way, it is the equivalent of traces amounts of ice and/or snow being present inside the work premises.

Here, it is undisputed that Continental Express Lines was in control of the lot and was responsible for providing snow removal services on its premises, and more specifically, in the designated employee parking lot.

Petitioner indicated by circling on Petitioner's Exhibit 13 the area where the employees had to park, which is the southwest area of the parking lot (Tr. pg. 19). Mr. Santowski agreed that the southwest area that Petitioner circled on Petitioner's Exhibit 13 north of the railroad tracks was

a parking designated employee area (Tr. pgs. 62, 83). Furthermore, Mr. Santowski was required to remove snow on the premises pursuant to his lease agreement (Tr. pg. 83). Petitioner and other employees could not park in the southeast parking lot area since it was designated parking for trailers and tractors moving in and out of the area all day (Tr. pg. 16). Petitioner and other employees could also not park their vehicles in the loading dock area, northeast, because trailers would come in and out of the area to load and unload freight (Tr. pg. 18). This was corroborated by Mr. Santowski, that employees could not park their cars in the loading dock area (Tr. pgs. 82-83). Furthermore, Petitioner was directed to park in the southern side of the employee parking lot because it was the safest place to park away from where the trailers back up (Tr. pg. 15).

Here, the uncontroverted evidence established that the Petitioner slipped on ice (the hazard) in the employee designated parking lot and employer controlled lot as he walked up to this car while carrying his overnight work bag in his right hand on February 26, 2019. In *Knox County YMCA*, claimant fell while descending stairs and ruptured her quadriceps, and the Commission held that carrying a drink and large purse with books that were required by her employer may have contributed to the fall. *See Industrial Commission*, 311 Ill.App.3d 880 (Ill. App. Ct. 2000). The video shows that the overnight work bag could have pulled Petitioner to the right side as he fell causing him to land on his right shoulder and arm as he slipped on the ice.

The above-mentioned cases and the uncontroverted facts establish Petitioner's right to benefits under the Act. Accordingly, The Arbitrator finds that pursuant to the Act and caselaw, Petitioner sustained a compensable work injury due to a hazard on the employer controlled and employee designated parking lot. Therefore, the Arbitrator finds that Petitioner proved that his work injury arose out of his employment and was in the course of his employment with Respondent under the Act.

ISSUE F: **IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY? THE ARBITRATOR FINDS AS FOLLOWS:**

The Arbitrator incorporates his findings of ISSUE C into ISSUE F herein.

The Arbitrator has already determined liability in that the accident arose out of and in the course of his employment with Respondent.

The parties' stipulation along with the medical records and the video marked as Respondent's Exhibit 1 support Petitioner's testimony that he suffered a work injury on February 26, 2019 as he walked up to his vehicle that was parked in the designated employee parking lot at Continental Express Line while carrying his overnight work bag. Furthermore, Petitioner's description of injury and pain is consistently reflected in the hospital and Dr. O'Laughin's medical records admitted into evidence and in his testimony.

The Arbitrator finds that, looking at the totality of the evidence, the opinions of Petitioner's treating physician, Dr. O'Laughin, and the caselaw are more credible than Respondent's argument of non-compensability.

The Arbitrator notes that Petitioner had no prior right upper extremity pain; and that he was working over 50 hours a week. The Arbitrator finds that Petitioner testified credibly coupled with the medical records. Accordingly, the Arbitrator finds that an accident occurred that arose out of and in the course of Petitioner's employment with Respondent. The Arbitrator finds that based on the totality of the above evidence, notice was provided to Respondent. Further, the Arbitrator finds the Petitioner's current condition of ill-being (continued right upper extremity limitations and pain with radicular symptoms into the right hand coupled with the medical records, and his work restrictions that he is not able to work) is causally related to his work injury of February 26, 2019.

ISSUE J: **WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES? THE ARBITRATOR FINDS AS FOLLOWS:**

The Arbitrator incorporates his findings of ISSUE C, and ISSUE F into ISSUE J herein.

Petitioner currently has numerous medical bills, listed below, that have not been paid by Respondent. The Arbitrator has already determined liability in that the accident arose out of and in the course of his employment with Respondent, and in the form of causal connection between Petitioner's February 26, 2019 work injury and his current condition of ill-being.

Exhibit	Medical Provider	Amt. of Bill
Px. 7	Alexian Bros. Medical Center	$ 134,133.30
Px. 8	Elk Grove Radiology	554.00
Px. 9	Alexian Bros. Medical Group	1,360.00
Px. 10	Anesthesia Business Consultants Compass Healthcare	*Unknown*
Px. 11	Dr. Charles O'Laughlin, Jr.	7,389.00
	TOTAL	$ 143,436.30

The Arbitrator has reviewed Petitioner's medical records and bills and finds that these bills were unpaid by the workers' compensation carrier, and Respondent is ordered to pay these bills pursuant to the Illinois Workers' Compensation Act.

ISSUE K: IS PETITIONER ENTITLED TO PROSPECTIVE MEDICAL CARE? THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator incorporates his findings of ISSUE C, ISSUE F and ISSUE J into ISSUE K herein.

Since the Arbitrator finds liability in favor of Petitioner, he also finds that the continued and prospective medical for the right upper extremity, as recommended by Dr. O'Laughin is proper. Therefore, Respondent is ordered to authorize and pay for the medical expenses related to the right upper extremity and future medical treatment.

ISSUE L: WHAT TEMPORARY BENEFITS ARE IN DISPUTE? THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator incorporates his findings of ISSUE C, ISSUE F, ISSUE J, and ISSUE K into ISSUE L herein.

The parties have stipulated Petitioner's AWW to be $1,292.31. Therefore, Petitioner's TTD rate is $861.97/wk. The Arbitrator further finds that Petitioner has not been released back to work; and no treating physician has placed Petitioner at MMI yet. The medical records demonstrate Petitioner is unable to return to work in any capacity as of the date of hearing.

The Arbitrator finds Petitioner's testimony of continued right shoulder, arm, elbow and hand pain and limitations and his work restrictions -- that he is not able to work as a long distance driver, to be credible.

Therefore, the Petitioner is entitled to temporary total disability benefits from: 02-26-19 through 05-14-19 (the last date of hearing) which represents 11 weeks. The Arbitrator orders Respondent to pay Petitioner a total of $9,481.67 (11 weeks x $861.97) in back temporary total disability benefits. The Arbitrator orders Respondent to issue Petitioner's temporary total disability benefits until Petitioner's condition stabilizes.

ISSUE M –SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT? THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator incorporates his findings of ISSUE C, ISSUE F, ISSUE J, ISSUE K, and ISSUE L into ISSUE M herein.

No penalties are warranted in this matter. In stating so, the Arbitrator notes that the legal theory behind Respondent's justification for not paying workers' compensation benefits has some merit. Restated, Respondent's theory is that Petitioner forced his car extremely close to a snow pile to fit it into his usual parking spot. In doing so, Petitioner exposed himself to an increased danger of slipping and falling on the ice that was separate from his employment responsibilities. Therefore, the injury did not arise out his employment. Who hasn't been in a similar situation

while parking a car during the winter in the upper Midwest? Some people will pass on such spot, others others will go ahead and park there. Those that pass do not want to contort their body to get in and out of their car. It's uncomfortable and there might be some risk of falling down. As such, Petitioner's parking choice served his own convenience and not his employer, who served no benefit from it. However compelling Respondent's theory and noting the Hatfill (jumping across water onto an incline), Dobson (walking down a wet, icy grassy slope) cases cited, as well as the recent Benson case (jumping off a dock) (2019 Ill. App. 4th Dist. 14 WC 36342), the Arbitrator notes that those cases differ from the present one in that the claimants' behavior in the above cited non-compensable claims were sometimes characterized by the court as unreasonable. In the present case, if one observes the video surveillance of the incident, (RX #1) it shows that Petitioner was engaged in reasonable behavior when he slipped and fell. Additionally, the Arbitrator specifically finds that his choice of parking spot was reasonable under the circumstances. (RX #1) The car was backed into a clear and level spot. It was not backed up upon the snowbank. Further, Petitioner fell in an icy spot that approached the "tight" or "contortion" area but not in it. He was not jumping (Dobson) or walking on a wet, icy incline like Hatfill & Benson. It should be noted that the condition of the parking lot may have changed throughout the day, making it icier. Wind may have covered the ice with blowing snow. Finally, it should be noted that Petitioner was the first one at work on most days and parked in his usual spot, as expected. If he had not done so, it would have caused a domino effect of forcing other employees to park in spots that they were unaccustomed. Some employees, who are otherwise productive, become agitated at such minor inconveniences resulting in disharmony in the workplace. Every place has an employee or two that is a little obsessive-compulsive. In that light, Petitioner's parking spot choice was benefit to his employer, as he did not wish to upset the "parking-space totem."

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

Joey Burgess,

Petitioner,

vs.

NO: 11 WC 1379
11 WC 1386

Illinois Youth Center – St. Charles,

Respondent.

20IWCC0700

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, medical expenses and prospective medical treatment, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with changes noted below, said Decision attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Commission corrects the Decision of the Arbitrator at p.12 to include the bill of Dr. Santwani in the amount of $1,998.89 for dates of service from 10/26/10 through 1/7/13.

The Commission also corrects several scrivener errors in the Arbitrator's decision, including at p.1, last paragraph, where he mistakenly references the accident date for claim 11 WC 1386 (6/5/10). The accident date for claim 11 WC 1379, which is the main focus of the Arbitrator's decision, is actually 10/25/10. In addition, the Commission corrects p.6 of the Arbitrator's decision to show that the MRI date in question was 1/6/12 (not 1/6/11).

All else is otherwise affirmed and adopted.

20IWCC0700

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 10/16/19 is affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses in the amount of $17,249.21 as well as reimbursement for the sum of $85.19 expended by Petitioner on medical services, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury, including $32.00 for medical benefits paid; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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.

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.

DEC 3 - 2020

DATED:
o: 11/10/20
TJT: pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

BURGESS, JOEY
Employee/Petitioner

Case# **11WC001379**
11WC001386

ILLINOIS YOUTH CENTER-ST CHARLES
Employer/Respondent

20IWCC0700

On 10/16/2019, 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 1.62% 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:

0657 TURNER & SACKETT LLC
RICHARD L TURNER
107 W EXCHANGE ST
SYCAMORE, IL 60178

6212 ASSISTANT ATTORNEY GENERAL
DREW DIERKES
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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 16 2019

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

20 IWCC0700

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Joey Burgess
Employee/Petitioner
v.

Case # **11** WC **1379**

Consolidated cases: **11** WC **1386**

Illinois Youth Center-St. Charles
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Wheaton, Illinois**, on **July 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. ☒ 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 _____

20IWCC0700

FINDINGS

On the dates of accident, **June 5, 2010 and October 25, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$61,454.64**; the average weekly wage was **$1,181.82**.

On the date of accident, Petitioner was **32** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of **$249,881.64** for TTD.

Respondent is entitled to a credit of **$32.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical charges of $17,249.21, pursuant to the Fee Schedule, as provided in Sections 8(a) and 8.2 of the Act; and shall reimburse Petitioner for the sum of $85.19, expended for medical services, as set forth in the Conclusions of Law attached hereto;

Respondent shall be given a credit of $32.00, for the medical benefits paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act;

Petitioner's claim for six weeks of TTD benefits is denied, as set forth in the Conclusions of Law attached hereto;

Petitioner's claim for prospective medical treatment is denied, as set forth in the Conclusions of Law attached hereto;

In no instance shall this award be a bar to subsequent hearing and determinations 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

10/14/19
Date

ICArbDec19(b)

OCT 16 2019

Procedural History

This matter was tried on July 17, 2019 pursuant to Sections 19(b) and 8(a) of the Act. The matter consists of two consolidated cases involving different body parts. Case number 11 WC 1386 involves injuries to Petitioner's hands and thumbs occurring on June 5, 2010. Case number 11 WC 1379 involves injuries to Petitioner's head and back occurring on October 25, 2010. Petitioner seeks TTD benefits, payment of medical bills and prospective medical care involving his lumbar spine. All of the pending issues involve Petitioner's lumbar spine condition and, as such, a decision will only be rendered for case number 11 WC 1379.

Regarding case number 11 WC 1379, the disputed issues are whether Petitioner's current lumbar spine condition of ill-being is causally related to his October 25, 2010 injury; whether Respondent is liable for unpaid medical bills; whether Petitioner is due TTD benefits from February 1, 2018 through March 11, 2018 and whether Petitioner is entitled to prospective medical care consisting of a spinal cord stimulator. Respondent stipulates to being responsible for medical bills involving Petitioner's hands, thumbs and head. (Arb. Ex. 1 and 2).

Findings of Fact

Testimony of Joey Burgess regarding the accidents of June 5, 2010 and October 25, 2010

Joey Burgess (hereafter referred to as "Petitioner") testified that he worked for Illinois Youth Center (hereafter referred to as "Respondent") as a youth officer. Petitioner testified that prior to June 5, 2010, he had no prior injuries to his low back, head or hands. (T. 10).

Petitioner testified that on June 5, 2010, several youths were fighting in a foyer of the school. Petitioner tried to place handcuffs on a youth. When he tried to place the handcuffs on one youth, other youths attacked the youth Petitioner was handcuffing. Petitioner testified that as he tried to place the handcuffs on the youth and fight off the other youths, his hands and thumbs got caught in the handcuffs. (T. 14). Petitioner testified that he injured his right and left thumbs and hands. After the incident, Petitioner testified that he sought medical treatment with his family physician, Dr. Allen, who referred him to Dr. Atkins, an orthopedist. Petitioner completed physical therapy and returned to work. (T. 15).

Petitioner testified that on June 5, 2010, he observed multiple youths fighting in the dietary. Petitioner saw that one youth was unconscious on the floor. Petitioner testified that he laid on top of the unconscious youth to protect his head. Petitioner testified that multiple youths fell on him and that he was kicked in the head four times. (T. 12).

Petitioner testified that the incident that he was experiencing "flashes" and when he tried to talk to his supervisor he had a flash and noticed that he was sitting on the floor. Petitioner testified to having another flash and waking up at the Delnor Hospital emergency room. (T. 13).

Petitioner testified to undergoing CT scans of the brain, lumbar and thoracic spine. While at the emergency room, Petitioner had a consultation with Dr. Rabin, a neurosurgeon. Petitioner was admitted to the hospital. While in the hospital he saw Dr. Savtwani, a neurologist. Petitioner testified that he was discharged from the hospital on October 31, 2010. (T. 17).

Petitioner testified that, after being discharged, he treated with Dr. Jamison, his primary care physician, Dr. Rabin, for his back, and Dr. Santwani, for post-concussion syndrome. (T. 17).

Petitioner's Medical Treatment after the June 5, 2010 accident (11 WC 1386)

Petitioner presented to the emergency room at Delnor Community Hospital on June 9, 2010 complaining of pain in both hands. (PX 1). X-rays of the left and right hand were normal. *Id.* Petitioner was diagnosed with a right thumb joint sprain and a left-hand sprain. *Id.* On June 14, 2010, Petitioner saw Dr. Jamison Allen of Gateway Clinic. (PX 6). Petitioner complained of pain in both thumbs and an inability to grip. *Id.* Dr. Allen diagnosed him with hand pain and referred him to a hand surgeon. *Id.*

On July 8, 2010, Petitioner presented to Dr. Thomas Atkins of Fox Valley Orthopaedics. (PX 2). Dr. Atkins diagnosed him with a bilateral thumb sprains and prescribed splints for both thumbs. *Id.* Petitioner returned to Dr. Atkins on August 6, 2010 and reported that his left thumb was doing better, but his right thumb was doing worse. *Id.* Dr. Atkins ordered an MRI of the right thumb that was taken on August 18, 2010. *Id.* The MRI showed radial collateral ligament exhibited enlargement, increased signal intensity and marked surrounding edema consistent with a grade 2 sprain near its metacarpal aspect. *Id.* On September 2, 2010, Dr. Atkins prescribed a course of physical therapy for Petitioner's right thumb. *Id.*

Petitioner underwent a physical therapy evaluation at Northern Rehabilitation & Sports Medicine on September 15, 2010. (PX 4). Petitioner reported limited strength and range of motion at this right thumb. *Id.* The plan of treatment called for physical therapy two times a week for six weeks. *Id.* Petitioner attended six sessions through October 18, 2010. *Id.* Petitioner followed up with Dr. Atkins on October 12, 2010 and reported that he was feeling better and that therapy was helpful. (PX 2). Dr. Atkins released him to full duty the following week. *Id.*

Petitioner's medical treatment after the October 25, 2010 accident (11 WC 1379)

Petitioner was admitted to Delnor Community Hospital on October 25, 2010. (PX 1). Petitioner noted being kicked in the stomach and the right side of his head a number of times. *Id.* Petitioner reported vomiting and passing out multiple times. *Id.* Petitioner complained of abdominal pain and right-side head pain. *Id.* A cervical spine CT showed normal alignment, no fractures or subluxations, a tiny protruding osteophyte along the anterior/superior border of C5 vertebra, a small detached osteophyte along the anterior/superior border of C7 vertebra, and the suggestion of a medium sized diffuse posterior and right lateral recess and right foraminal disc protrusion at C5-6 level. *Id.* A CT scan of the head showed an area of increased density in right medial anterior temporal lobe of brain. *Id.* A CT scan of the pelvis and x-ray of the right hand were normal. *Id.*

Petitioner was seen by Dr. Mercado on October 26, 2010 and diagnosed with a concussion, back pain, leukocytosis, and dizziness. *Id.* A repeat CT of the head showed no evidence for any acute intracranial process or intracranial hemorrhage or mass or acute infarction. *Id.* The previously noted artifcatual findings in the right medial temporal lobe of the brain were not redemonstrated. *Id.* A CT of the thoracic spine showed no evidence for any acute fractures or subluxations in the thoracic spine. *Id.* A CT of the lumbar spine showed no evidence for any significant bony abnormalities except subtle grade 1 retrolisthesis of the L5 vertebral body over S1. *Id.* An MRI of the head was normal appearing and x-rays of the thoracic and lumbar spine were negative. *Id.*

On October 27, 2010, Petitioner complained of headache, dizziness, nausea, and low back pain. *Id.* Petitioner was diagnosed with post concussive syndrome. *Id.* A CT of the brain taken on October 28, 2010 was normal. *Id.* The MRI of the lumbar spine taken October 29, 2010 showed that L1-2: was normal; L2-3: was normal with mild lateral bulge of the disc; L3-4 had a bilateral bulge; L4-5 had disc desiccation with slight posterior offset of L4 over L5 and a central disc broad based herniation with associated annular tear; L5-S1 had a minimal posterior offset of L5 over S1. *Id.* On October 31, 2010, a deep venous duplex ultrasound was done on the right upper extremity which found no evidence of deep venous thrombosis. *Id.* Petitioner was discharged and instructed to follow up with multiple physicians. *Id.*

On November 12, 2010, Petitioner presented to Dr. Allen at Gateway Clinic. (PX 6). Petitioner reported still having headaches and that he re-aggravated his right thumb sprain. *Id.* Dr.

Allen diagnosed Petitioner with photophobia, low back pain, and a concussion. *Id.* That same day Petitioner went to see Dr. Kenya Williams with the Hauser Ross Eye Institute complaining of headache and photophobia. (PX 3). A CT of the brain was taken at Delnor Community Hospital on November 18, 2010. (PX 1). It showed no acute disease. *Id.*

Petitioner presented to Suburban Neurology on November 23, 2010 and met with Scott Davis, NP-C. (PX 5). Petitioner complained of migraines that he rated 8/10. *Id.* Petitioner was diagnosed with post-concussive syndrome and migraine headaches. *Id.* Petitioner received prescriptions for Elavil, Zanaflex, and Fioricet. *Id.* Petitioner began a course of physical therapy at Gateway Clinic. (PX 6).

On December 22, 2010, Petitioner followed up with Dr. Williams. (PX 3). Dr. Williams noted improvement both objectively and subjectively in regard to photophobia. *Id.* Petitioner saw Dr. Kishore Santwani of Suburban Neurology on December 23, 2010 and reported less frequent headaches, although still high in intensity. (PX 5). Petitioner reported no change in his low back pain. *Id.* Dr. Santwani recommended continuing his medication. *Id.*

On January 26, 2011 Petitioner saw Dr. Michael Rabin of Neurosurgery & Spine Surgery. Petitioner reported continuing pain in his lower back radiating into his right leg. (PX 7). Petitioner reported some relief with physical therapy. *Id.* Dr. Rabin prescribed a course of epidural steroid injections. *Id.* The following day Petitioner went to Suburban Neurology and reported having migraines just once a week with less severity. (PX 5).

On March 1, 2011, Petitioner saw Dr. Sundraraj Cherala at Delnor Community Hospital's pain clinic. (PX 1). Petitioner reported back pain with occasional radiation down the right leg. *Id.* Dr. Cherala diagnosed Petitioner with multilevel degenerative disc disease and facet arthritis in the lower lumbar spine and recommended lumbar epidural steroid injections. *Id.* Dr. Cherala performed the first injection on March 8, 2011. *Id.* That same day Petitioner went to Suburban Neurology and reported having migraines approximately once a week, but they were becoming less severe. (PX 5).

Petitioner returned to the Delnor Hospital pain clinic on April 6, 2011 and reported his pain somewhat improved after the first injection. (PX 1). Dr. Edward Yang performed a repeat injection. *Id.* Petitioner followed up on April 20, 2011 and stated neither injection was helpful and that he had diarrhea after both occurrences. *Id.* Petitioner saw Dr. Rabin on May 2, 2011 who recommended continuing physical therapy. (PX 7). On May 9, 2011 Petitioner returned to

Suburban Neurology denying dizziness and noting that his headaches had pretty much resolved. (PX 5). Petitioner saw Dr. Allen on May 17, 2011 and May 23, 2011 and had B12 injections for help with Petitioner's memory loss. (PX 6).

On June 6, 2011, Petitioner followed up with Dr. Rabin who noted marked improvement with physical therapy and opined Petitioner needed another four to six weeks of therapy before returning to work. (PX 7). Petitioner went to Suburban Neurology on June 8, 2011 and was released to light duty work. (PX 5). Dr. Allen performed two more B12 injections on June 10, 2011 and June 17, 2011. (PX 6). Petitioner reported still having short term memory problems, but that he was improving. *Id.*

Petitioner saw Dr. Lisa Riemenschneider at Delnor Hospital for a neuropsychological evaluation on June 21, 2011. (PX 1). Dr. Riemenschneider diagnosed Petitioner with mild neurocognitive changes. *Id.* Petitioner saw Dr. Allen on July 15, 2011 and reported his short-term memory was about 80% better. (PX 6). Dr. Allen performed another B12 injection. *Id.*

On July 18, 2011, Petitioner returned to Dr. Rabin and reported he had worsened while in physical therapy. (PX 7). Dr. Rabin ordered a repeat MRI. *Id.* The MRI, taken on August 5, 2011, showed slightly more prominent central disc protrusions at L4-5 and L5-S1 with some interval desiccation of the L5-S1 disc since the last MRI. (PX 1). Petitioner followed up with Dr. Rabin, on August 22, 2011, and advised Dr. Rabin that he prefers proceeding with the microdiskectomy. (PX 7). At that time, Dr. Rabin prescribed a two level microdiskectomy at L4-L5 and L5-S1. *Id.*

On September 26, 2011, Petitioner saw Dr. Santwani, at Suburban Neurology, and reported that his symptoms were improving but that he was still having a headache a month. Petitioner also reported that his memory was slightly better but was still an issue. *Id.*

On October 17, 2011, Petitioner returned to Suburban Neurology reporting that he had been in a car collision on October 8, 2011. *Id.* Petitioner said that he went to the emergency room but was released the same day. *Id.* Petitioner complained of pain in his neck and shoulder down to his lower back. *Id.* Petitioner was diagnosed with back pain related to the auto collision on October 8, 2011. *Id.* The doctor opined that Petitioner had been almost ready to go back to work at light duty until the auto collision. *Id.*

On November 2, 2011, Petitioner returned to Dr. Rabin. (PX 7). Petitioner reported that his symptoms worsened after the collision but had since returned to baseline. *Id.* Dr. Rabin scheduled Petitioner for surgery on January 5, 2012. *Id.*

Dr. Rabin performed a right L4-L5, right L5-S1 microdiscectomy; right L4-5, L5-S1 microforaminotomy; and semihemilaminectomy and right L5 lamina at Delnor Hospital. (PX 1). An MRI taken on January 6, 2011 showed that at L2-3 Petitioner had a left paracentral disc bulging causing mild central canal stenosis; at L4-5 Petitioner had postsurgical changes right sided microdiscectomy with significant interval improvement of the mass effect onto the thecal sac when compared to prior study with a mild diffuse disc bulging causing mild to moderate central canal stenosis and L5-S1 post-surgical changes consistent with microdiscectomy with interval improvement of mass effect onto the thecal sac. The MRI also showed a small broad-based central disc bulge causing mild central canal stenosis. *Id.*

Petitioner underwent inpatient rehabilitation at Marianjoy Rehabilitation Hospital from January 11, 2012 to January 18, 2012. (PX 9). Petitioner began to do a course of physical therapy at Physician's Immediate Care on February 6, 2012. (PX 8).

On February 8, 2012, Petitioner saw Dr. Rabin and reported that his leg and back had improved 120% from before surgery and he had none of his preoperative pain. (PX 7). Petitioner did note numbness in his leg. *Id.* On February 22, 2012, Petitioner stated his only complaint was persistent leg numbness. *Id.* On March 7, 2012, Petitioner reported that he was doing very well and no longer needed a crutch or cane. *Id.* Petitioner complained of numbness and some mild back aching. *Id.* On April 18, 2012, Petitioner noted a lack of sensation to the lateral aspect from the knee to left ankle but was otherwise doing very well and had no pain. *Id.* Dr. Rabin believed Petitioner crossed into a reflex sympathetic dystrophy. *Id.* Dr. Rabin ordered continuing physical therapy and x-rays. *Id.*

An x-ray of the lumbar spine taken at Delnor Hospital on May 21, 2012 showed subtle retrolisthesis of L5 vertebral body over S1, interval decrease in disc height at L5-S1 level, postsurgical changes seen on the right side, and no fractures. (PX 1). Petitioner returned to Dr. Rabin on June 13, 2012 and reported no back pain and no leg pain but he was still experiencing numbness on the lateral aspect from his knee to the ankle. (PX 7). Dr. Rabin noted that physical therapy helped and that the only thing holding him back was the swelling in his foot. *Id.* Dr. Rabin referred Petitioner to Dr. James Wilson. *Id.* Petitioner ceased physical therapy on June 25, 2012. (PX 8).

On July 26, 2012, Petitioner met with Dr. Wilson of Interventional Pain Specialists. (PX 10). Petitioner complained of low back pain radiating down the right leg. *Id.* Petitioner did not

want an epidural injection and was prescribed Savella and was to consider a sympathetic branch block for diagnostic purposes. *Id.* Petitioner returned to Dr. Wilson on September 6, 2012 and noted he was receiving analgesia from prescribed medications and his activities of daily living were improved with the medications. *Id.*

Petitioner saw Dr. Kern Singh on September 27, 2012, pursuant to Section 12 of the act. (RX 3). Petitioner rated both his low back pain and leg pain as 5/10 and claimed his symptoms were worsening. *Id.* Dr. Singh diagnosed him with a lumbar muscular strain, status post L4-L5 and L5-S1 laminectomy and discectomy, and possible durotomy. *Id.* Dr. Singh said causality could not be determined until after an EMG of the lower extremities and a review of MRI films. *Id.*

On November 5, 2012, Petitioner returned to Dr. Rabin reporting that he was basically stable. (PX 7). Petitioner complained of numbness, burning, and swelling in his right leg. *Id.* Dr. Rabin believed it to be causalgia and ordered an EMG. *Id.* The EMG. performed on January 7, 2013, showed a mildly abnormal right lower extremity, consistent with a mild, subacute-to-chronic L5/S1 radiculopathy on the right with no definitive electrophysiological evidence of a peripheral neuropathy affecting the right lower extremity. (PX 5).

Petitioner returned to Dr. Rabin on January 25, 2013 and reported being essentially pain free with full strength. (PX 7). Petitioner complained of persistent numbness and aching and burning in his leg while active. *Id.* Dr. Rabin prescribed additional physical therapy and referred Petitioner back to Dr. Wilson. *Id.* Petitioner resumed physical therapy at Physician's Immediate Care on February 4, 2013. (PX 8).

On March 20, 2013, Petitioner reported at physical therapy that he twisted wrong getting out of the shower the day before and that he felt a pain in his lower back which went into his buttock/leg. *Id.* On March 25, 2013, Petitioner returned to Dr. Rabin who noted that Petitioner was improving until getting out of the shower, twisting, and feeling a pop in his back. (PX 7). Dr. Rabin ordered a new MRI. *Id.* The MRI, taken on March 27, 2013, showed evidence of a new left posterior lateral L2-L3 disc herniation; progressive degenerative changes at L4-5 and L5-S1 with previous postsurgical fluid collections at this level appearing to have reabsorbed with some postsurgical enhancement. (PX 1).

Petitioner follow up with Dr. Rabin on April 1, 2013 to review the MRI. Dr. Rabin opined that Petitioner had regional pain syndrome and he referred Petitioner to Dr. Wilson for branch blocks. *Id.* Petitioner finished physical therapy on May 10, 2013. (PX 8).

On April 25, 2013, Dr. Singh issued an addendum to his previous independent medical examination. (PX 4). Dr. Singh diagnosed Petitioner with degenerative disk disease at L4-L5, L5-S1 and status post L5-S1 laminectomy/discectomy. *Id.* Dr. Singh opined Petitioner was not at maximum medical improvement and he recommended a CT myelogram of the lumbar spine and flexion-extension radiographs. *Id.*

Petitioner saw Dr. Wilson on July 23, 2013 and reported that medication and physical therapy resulted in minimal relief. (PX 10). Petitioner indicated that he was unchanged since September 2012 and rated his pain 8/10. *Id.* Dr. Wilson diagnosed him with CRPS and lumbar radiculitis and prescribed a right lumbar sympathetic block. *Id.*

On September 24, 2013, Dr. Singh issued another addendum to his independent medical examination. (PX 5). Dr. Singh noted no overt instability based upon the flexion-extension radiographs and that the fluid collection had nearly completely resolved. *Id.* Dr. Singh recommended a functional capacity evaluation and 2-4 weeks of work conditioning, after which Petitioner would be at maximum medical improvement. *Id.*

On October 1, 2013, Petitioner followed up with Dr. Wilson. Petitioner rated his pain as 6 out of 10. (PX 10). Dr. Wilson recommended a diagnostic right lumbar sympathetic block. *Id.* On March 26, 2014, Petitioner underwent the right lumbar block at Kendall Point Surgery Center. (PX 11).

Petitioner followed up with Dr. Wilson on April 8, 2014 and reported receiving 10-20% relief. (PX 10). Petitioner rated his pain 4/10. *Id.* Dr. Wilson prescribed a series of three lumbar sympathetic blocks. *Id.* Dr. Wilson performed the blocks at Kendall Point Surgery Center on July 23, 2014, August 13, 2014, and August 27, 2014. (PX 11).

Petitioner returned to Dr. Rabin on October 21, 2014 and reported that he was doing well but had been in in a motor vehicle collision three days ago and, since then, his right leg had become very painful and he had trouble lifting it. (PX 7). Dr. Rabin recommended a repeat MRI. *Id.* Petitioner returned on January 9, 2015 with unchanged symptoms. *Id.* Dr. Rabin opined he may need to do a discogram. Dr. Rabin recommended SI joint injections. *Id.* Petitioner underwent the SI joint injection on April 16, 2015. (PX 10).

On July 22, 2015, Petitioner underwent a right L5 medial branch and right S1 dorsal branch radiofrequency rhizotomy with fluoroscopy. (PX 11). On September 24, 2015, Petitioner returned

to Dr. Wilson reporting two weeks of pain relief. (PX 10). Dr. Wilson recommended a spinal cord stimulator because Petitioner was not interested in a lumbar fusion. *Id.*

Dr. Wilson began the spinal cord stimulator trial on June 6, 2016, which showed significant pain relief. The following day, Petitioner reported 100% relief of pain. Dr. Wilson recommended a permanent implant. (PX 10).

On July 13, 2016, Dr. Rabin wrote a letter to Dr. Wilson noting that MRI scan showed spinal stenosis at L4-5 and mildly at L3 but there appears to be a collapsing of the L4-5-disc space which may require the need of instrumented fusion at L4-5 and even at L5-S1 with decompression at L3 through S1. Petitioner was given options of surgery or a spinal stimulator, but Petitioner a likely wants to proceed with the stimulator. (PX 7).

On December 6, 2017, Petitioner had an independent medical examination with Dr. Singh. (PX 6). Petitioner complained of consistent low back pain that he rated 8/10. *Id.* Dr. Singh's objective findings included extreme symptom magnification during the examination. *Id.* Dr. Singh diagnosed Petitioner with a resolved lumbar muscular strain and resolved degenerative disk disease at L4-5, L5-S1. *Id.* Dr. Singh opined there was no causal connection between Petitioner's current objective findings and the reported accident. *Id.* Dr. Singh also opined that Petitioner's medical treatment had been excessive in nature, *Id.* Dr. Singh further opined no additional medical treatment was necessary, that Petitioner could return to work full duty with no restriction, and that Petitioner had reached maximum medical improvement. *Id.*

Testimony of Dr. James Wilson: Treating Physician

Dr. James Wilson testified that he worked in interventional pain medicine since 2003. (PX 14, p7). Petitioner was referred to Dr. Wilson by Dr. Rabin. *Id.* at 8. Dr. Wilson first treated Petitioner on July 26, 2012. *Id.* On that date, Petitioner did not want an injection, so Dr. Wilson recommended a topical cream, muscle relaxant, local anesthetic, a trial of pain reliever and a sympathetic block. *Id.* at 11-12. Dr. Wilson next saw Petitioner on September 6, 2012, his pain remained unchanged. *Id.* at 13.

Dr. Wilson did not see Petitioner again until July 23, 2013, Petitioner's symptoms remained unchanged. *Id.* at 14-15. On that date, Dr. Wilson diagnosed Petitioner with complex regional pain syndrome. *Id.* at 16. Dr. Wilson opined that Petitioner sustained a work injury which resulted in the conditions Dr. Wilson was attempting to treat. *Id.* Dr. Wilson recommended a right lumbar sympathetic block. *Id.* at 19. Dr. Wilson saw Petitioner again on October 1, 2013. *Id.* at 21.

Petitioner complained of the same symptoms and left foot complaints. *Id.* A lumbar sympathetic block had not yet been approved. *Id.*

On March 18, 2014 the block was approved and performed on March 26, 2014. *Id.* at 22-23. Dr. Wilson opined that the block confirmed Petitioner had complex regional pain syndrome. *Id.* at 26. Dr. Wilson recommended a series of blocks, which were performed on July 23, 2014, August 13, 2014, and August 27, 2014. *Id.* at 27. The blocks resulted in almost 100 percent relief in the right lower extremity. *Id.* at 28. Petitioner continued to have back pain. *Id.* Dr. Wilson referred him to Dr. Rabin for his back complaints. *Id.* at 29. Dr. Wilson opined that the back pain was distinct and separate from the pain Dr. Wilson was treating. *Id.*

Petitioner was returned to Dr. Wilson for a right SI joint injection on April 16, 2015. *Id.* at 30. After the injection, Dr. Wilson recommended a radiofrequency denervation procedure. *Id.* at 32. Dr. Wilson performed the radiofrequency procedure on July 22, 2015. *Id.* at 33. Petitioner reported two weeks of relief. *Id.* On September 24, 2015, Dr. Wilson recommended a spinal cord stimulator for Petitioner's axial back pain and sympathetic back pain. *Id.* at 34.

On June 6, 2016, Petitioner underwent the spinal cord stimulator trial reporting significant relief. *Id.* at 38. At that time, Dr. Wilson opined that Petitioner would benefit from a permanent spinal cord stimulator. *Id.* at 39.

Dr. Wilson testified that he was not aware of the specific mechanism of Petitioner's injury. *Id.* at 44. Dr. Wilson also testified that he was not aware Petitioner's motor vehicle accident in the fall of 2011. *Id.* at 44-45. Dr. Wilson further testified that he was not aware that Petitioner reported to Dr. Rabin that he was essentially pain free in January 2013 and that he continued to improve until the twisting incident getting out of the shower. *Id.* at 47. Dr. Wilson testified that he was not aware of a second car accident being reported to Dr. Rabin. Dr. Wilson opined that it was possible that Petitioner's symptoms could be related to the motor vehicle collision in fall 2011, the shower accident in March 2013, or the motor vehicle collision in October 2014. *Id.* at 49-50.

Petitioner's testimony regarding his current condition and working

Petitioner testified that he continues to experience pain down his right leg and the pain is present every day. Petitioner also testified to experiencing swelling and stiffness in his low back. Petitioner further testified that he would like the spinal cord stimulator because it minimized his pain. (T. 33, 34).

Petitioner testified that after his examination with Dr. Singh, on December 6, 2017, he did not return to Drs. Rabin or Wilson. Petitioner has not received any medical treatment for his back since seeing Dr. Rabin in July of 2017.

Petitioner testified that he was not paid TTD benefits for 6 weeks, from January 29, 2018 through March 11, 2018. (T. 34). Petitioner testified that he returned to restricted work in March of 2018. Petitioner testified that when he returned to work, he was working security manning a computer and watching the main gate. Petitioner was able to perform this work in a seated position. (T. 36). Petitioner testified that he returned to full duty in July of 2018 and he has been working full duty since that time. (T. 36). Petitioner testified that the currently takes Aleve and/or Ibuprofen daily which helps. (T. 40).

The Arbitrator finds Petitioner's testimony to be credible regarding his injuries, but the Arbitrator finds that Petitioner's memory was not accurate regarding some of his treatment.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

With respect to issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *Sisbro v. Indust. Com'n*, 207 Ill.2d 193, 205 (2003). Workers need only prove that some act or phase of employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Indust. Com'n*, 359 Ill.App.3d 582, 592 (2005). The work-related task need not even be the sole or principal causative factor of the injury, as long the work is a causative factor. See *Sisbro*, 207 Ill.2d at 205. Even if the claimant has a preexisting degenerative condition which makes him more vulnerable to injury, recovery for an accidental injury will not be denied as long as she can show that her employment was also a causative factor. *Id.* At 205. Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has failed to prove by the preponderance of

the credible evidence that his current lumbar condition of ill-being is causally related to his work accident of October 25, 2010.

The Arbitrator does not find Dr. Wilson's opinions persuasive regarding the nature of Petitioner's current medical condition. Prior to his deposition of October 3, 2018, Dr. Wilson had not examined Petitioner since June of 2016. Dr. Wilson did not have the benefit of knowing Petitioner's current complaints or the benefit of current objective testing. Dr. Wilson was not aware that Petitioner returned to work full duty and had not sought any additional medical treatment since returning to work. The Arbitrator also notes that Dr. Wilson was not aware that Petitioner was involved in an automobile accident the fall of 2011 or that Petitioner was essentially pain free, prior to twisting his back in a shower, in March of 2013. (PX 14). The Arbitrator notes that the MRI taken on March 27, 2013 at Delnor Hospital, after the shower incident, showed evidence of a new left posterior lateral L2-L3 disc herniation when compared to previous MRIs. As such, the Arbitrator finds the opinions Dr. Wilson regarding whether Petitioner's current condition of ill-being being causally related to his accident of October 25, 2010 to be speculative. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL. App. (3d) 130028 WC, 14 N.E.3d 16, 383 Ill.Dec. 184.

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 concludes that Petitioner has proven by a preponderance of the evidence that the medical treatment for the injury he sustained was necessary through September 24, 2013. The Arbitrator finds that based on the medical records contained in Petitioner's Exhibit 8 that the $24,029.53 in charges in Petitioner's Exhibit 12 for Petitioner's visits to Physician's Immediate Care from February 6, 2012 through May 10, 2013 were reasonable and necessary. The Arbitrator awards $5,141.82 that shall be paid by Respondent to the medical providers pursuant to the fee schedule. The Arbitrator finds that based on the medical records contained in Petitioner's Exhibit 9 that the $8,150.69 in charges in Petitioner's Exhibit 12 for Petitioner's visits to Marianjoy Rehabilitation Hospital from January 11, 2012, through January 18, 2012 were reasonable and necessary. The Arbitrator awards $8,150.69 that shall be paid by Respondent to the medical providers pursuant to the fee schedule. The Arbitrator finds that based on the medical records contained in Petitioner's Exhibit 1 that the $1,751.00 in charges in

Petitioner's Exhibit 12 for services provided by West Central Anesthesiology Group on April 6, 2011 and April 20, 2011 were reasonable and necessary. The Arbitrator awards $1,751.00 that shall be paid by Respondent to the medical providers pursuant to the fee schedule. The Arbitrator finds that based on the medical records contained in Petitioner's Exhibit 1 that the $206.81 in charges in Petitioner's Exhibit 12 for services provided by Pathology Consultants on January 6, 2012 were reasonable and necessary. The Arbitrator awards $206.81 that shall be paid by Respondent to the medical providers pursuant to the fee schedule.

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

Petitioner request prospective medical care consisting of a permanent lumbar spinal cord stimulator. Just as the Arbitrator found that Petitioner failed to prove by the preponderance of the evidence that his current condition of ill-being, is it relates to his lumbar condition, is causally related to his accident of October 25, 2010, the Arbitrator also finds that Petitioner failed to prove by the preponderance of the evidence that he is entitled to prospective medical treatment.

Petitioner has not received medical treatment since July of 2016. The Arbitrator notes that Dr. Wilson had not examined Petitioner for over two years prior to his deposition on October 3, 2018. As such, the Arbitrator finds that Dr. Wilson was not aware of Petitioner's current physical condition when he was deposed October 3, 2018. The Arbitrator notes that since last treating with Dr. Wilson, Petitioner returned to work full duty and has been able to perform his job duties without seeking additional medical treatment. Petitioner has been able to manage his condition with over-the counter pain medication. The Arbitrator also notes that Dr. Wilson testified that he was not aware that Petitioner was involved in an automobile accident the fall of 2011 and a twisting incident in the shower in March of 2013. Dr. Wilson testified that was possible that Petitioner's symptoms could be related to either the car accident or to the shower incident. (PX 14). As such, the Arbitrator finds the opinions of Dr. Wilson to be speculative. *See Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL. App. (3d) 130028 WC, 14 N.E.3d 16, 383 Ill.Dec. 184.

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

Petitioner claims that he was not paid TTD benefits from February 1, 2018 through March 11, 2018. Respondent paid TTD benefits from October 26, 2010 through January 31, 2018. Based upon Dr. Singh's report of December 6, 2017, Respondent terminated TTD benefits

as of January 29, 2018. Petitioner returned to work after being offered restricted work on March 11, 2018. The Petitioner had not returned to his doctors as of July of 2016. The Arbitrator finds that Petitioner has failed to prove by the preponderance of the evidence that he was entitled to receive TTD benefits after January 31, 2018. Petitioner was not examined and found unable to work after Dr. Singh's examination of December 6, 2017. As such, Petitioner's claim for TTD benefits is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kimberly Scott,

Petitioner,

vs. NO: 13 WC 6546

Ford Motor Company,

20 IWCC0701

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, and nature and extent, and being advised of the facts and law, partially modifies the award of medical expenses in the Decision of the Arbitrator. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Initially, the Commission notes that prior to the arbitration hearing, the parties consolidated this case with a subsequent case. Case number 13 WC 32104 involves a subsequent injury that occurred on September 21, 2013. While the parties addressed both cases during the arbitration hearing, the Arbitrator issued separate Decisions for each case. The Commission addresses the issues Petitioner raised on review relating to the companion case in a separate Decision.

In the interest of efficiency, the Commission relies on the Arbitrator's detailed recitation of facts. After considering the evidence, the Commission modifies the Arbitrator's award of medical expenses and finds Respondent is liable for expenses for reasonable, necessary, and causally related medical treatment incurred through June 4, 2013. The Commission affirms the Arbitrator's conclusion that Petitioner reached maximum medical improvement ("MMI") for the injuries sustained due to the February 11, 2013, work incident by May 11, 2013. However, the Commission finds Petitioner's June 4, 2013, visit to the emergency room is causally related to the work incident. The medical records confirm that Petitioner arrived at the emergency room that day with complaints of neck pain and radiculopathy that worsened at work that day. While she also received treatment for low blood pressure, the Commission finds the primary reason for this visit was for Petitioner to receive treatment relating to her ongoing complaints of cervical pain. A

20IWCC0701

cervical CT scan was performed that day in the hospital due to Petitioner's complaints and medical personnel diagnosed Petitioner with cervical radicular pain as well as low blood pressure. For these reasons, the Commission finds Respondent is liable for the June 4, 2013, emergency room expenses.

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 February 16, 2018, is modified as stated herein.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for medical services incurred by Petitioner through June 4, 2013, as provided in Sections 8(a) and 8.2 of the Act. The Commission finds Respondent is liable for the June 4, 2013, emergency room visit.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: DEC 3 - 2020

o: 10/6/20
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCOTT, KIMBERLY
Employee/Petitioner

Case# **13WC006546**

13WC032104

FORD MOTOR COMPANY
Employer/Respondent

20IWCC0701

On 2/16/2018, 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 1.78% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2356 FOHRMAN, DONALD W & ASSOC
MONTE L BEATY
101 W GRAND AVE SUITE 500
CHICAGO, IL 60654

0560 WIEDNER & McAULIFFE LTD
DANIEL A BRAINARD
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

20 IWCC0701

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

Kimberly Scott
Employee/Petitioner

v.

Ford Motor Company
Employer/Respondent

Case # **13** WC **006546**

Consolidated cases: **13WC032104**

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 14, 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. ☒ 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 **2-11-13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**31,622.76**; the average weekly wage was $**608.13**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**2132.14** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**2132.14**.

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 fee schedule for all medical services incurred by Petitioner prior to May 11, 2013, if any remain unpaid.

Respondent shall pay Petitioner temporary total disability benefits of $405.42/week for 8 weeks commencing February 12, 2013 through April 8, 2013, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $2132.14 for temporary total disability benefits that have been paid.

Based on the following factors and the record taken, this Arbitrator finds Petitioner sustained no permanent partial disability and is not entitled to permanent partial disability payment.

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. This Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of petitioner, the record shows Petitioner worked the assembly line at Ford, doing very light duty on the line. She returned to work in her prior capacity as a result of the injury. Because of this I give less weight to this factor.

With regard to subsection (iii) of Section 8.1b(b), this Arbitrator notes that Petitioner was 50 years old at the time of the accident. Because of that age, this Arbitrator gives lesser weight to this factor.

With regard to subsection (iv) of section 8.1b(b), Petitioner's future earnings capacity, this Arbitrator notes there was no evidence of any impact on earning capacity and gives no weight to this factor.

With regard to subsection (v) of section 8.1b(b), evidence of disability corroborated by treating medical records, this Arbitrator notes Petitioner returned to full duty and was discharged by her doctors. Her complaints were not corroborated by any significant objective physical findings. I give no weight to this factor.

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

2/16/18
Date

FEB 16 2018

Kimberly Scott v. Ford Motor Company, No. 13 WC 06546, consolidated with 13 WC 32104

Introduction

These cases proceeded to hearing before me on December 14, 2017. The Request for Hearing forms for both cases indicated a petition for attorney's fees by a former attorney is pending. The parties indicated Petitioner's attorney has notified the former attorney of the date of the hearing. The files of both cases contain Petitions for Fees and Costs filed by Howard Ankin, Ankin Law Office, 162 West Grand Avenue, Chicago, Illinois. Ankin did not appear at the hearing.

The disputed issues at the hearing for these cases were:

13 WC 06546 (date of injury 2-11-13): is Petitioner's current condition of ill-being causally related to the injury; were the medical services that were provided to Petitioner reasonable and necessary; has Respondent paid all appropriate charges for all reasonable and necessary medical services; what temporary benefits are in dispute (TTD); and what is the nature and extent of the injury.

13 WC 032104 (date of injury 9-21-13): is Petitioner's current condition of ill-being causally related to the injury; were the medical services that were provided to Petitioner reasonable and necessary; has Respondent paid all appropriate charges for all reasonable and necessary medical services; what temporary benefits are in dispute (TTD); and what is the nature and extent of the injury.

Findings of Fact

Kimberly Scott (Petitioner), a 50 year old female, was working a split evening shift on the assembly line at Ford's Chicago Assembly Plant (Respondent) on February 11, 2013. She testified that during a time the assembly line was temporarily down, she went to the bathroom on the second floor of the plant and walked back down to return to the line. She testified she tripped over a weight (a barbell and weights). She did not see it on the way to the bathroom, it was in the middle of the floor. Kimberly Scott v. Ford Motor Company, No. 13 WC 06546 (consolidated), Transcript of Proceedings on Arbitration at 12. In other circumstances, she said she tripped on a 45 pound weight from the weight bench; tripped while walking through the company workout room; tripped on a ten pound weight; and on the floor in a walkway. Petitioner's Exhibit 4 at 37; Petitioner's Exhibit 10 at 1,3; Respondent's Exhibit 2 at 1.

Petitioner testified the next thing she knew, she was lying on the floor. She said she landed face first on concrete, literally falling face first. All of her, she said, came in contact with the ground. She said she was in pain and could not move. The Chicago Fire Department, who

transported Petitioner to Advocate Trinity Hospital, found her lying on her back. Scott at 12, 13-14; Petitioner's Exhibit 3 at 12.

Petitioner was seen at the emergency room at Advocate Trinity Hospital, by then, February 12, 2013. Advocate Trinity staff diagnosed her with a fall, prescribed Acetaminophen-Hydrocodone, and 600 mg Ibuprofen. CT scans were done of her head (no acute hemorrhage); her spine (no fracture); left hand (normal); and left shoulder (old trauma, no fracture/dislocation). She was discharged that day. Petitioner's Exhibit 3 at 12, 17, 28-29, 72-73. At trial, Petitioner testified she "...actually knocked a tooth out." Scott at 20. There is no corroborating evidence, or record of this claim, or any subsequent dental treatment.

Upon discharge, Petitioner returned to Respondent, then saw her primary care physician, Dr. Sharonda Shaw-Berrocal at Family Christian Health Center. Shaw-Berrocal found her in no acute distress. Petitioner complained of body ache, and pain on the left side of her body. She was diagnosed with contusions of multiple sites of upper limb and multiple sites of lower limb. Scott at 20; Petitioner's Exhibit 10 at 3, Petitioner's Exhibit 9 at 7-8.

When Petitioner returned to Respondent, she was examined by Dr. Patricia Lewis who noted no swelling to knees or elbows, a small abrasion to the right leg, no swelling to either leg or knee. Petitioner was advised not to return to work until February 15, 2013. On the 14th, Petitioner produced a note from Shaw-Berrocal that she should not return to work until the 18th, and Petitioner said she could not return as indicated by Lewis because she hurt too much. Petitioner's Exhibit 10 at 3-5; Petitioner's Exhibit 4 at 60.

Except for a visit to Family Christian Health Center on February 27, 2013, Petitioner abruptly sought treatment at AMCI-Associated Medical Centers of Illinois, from February 18, 2013, through May 6, 2013. Petitioner's off work status was routinely extended, often without a diagnosis. On March 1, 2013, Petitioner was asked by Dr. Lewis, at Ford, why she needed to be off work. She told Lewis she didn't know, and didn't ask. At AMCI, Petitioner's complaints widened to her neck, both shoulders, both elbows, left hand and both knees. AMCI expanded her diagnoses to cervical, bilateral shoulder, bilateral elbow and forearm, bilateral knee sprain; face, neck, and scalp abrasion and cervical radiculopathy. An x-ray of the right shoulder was normal. An MRI of the right shoulder showed no rotator cuff tear. An MRI of the left elbow was unremarkable. Petitioner was treated with therapeutic exercises. Petitioner returned to work April 9, 2013, on light duty, and was discharged from care May 6, 2013. Petitioner's Exhibit 4 at 37, 41, 44, 2, 4-6, 37, 40-41, 44; Petitioner's Exhibit 10 at 11, 23.

On the February 27, 2013, visit to Family Christian Health Center, Dr. Shaw-Berrocal noted petitioner was "...here for workmans comp." She also noted Petitioner was in no acute distress. Petitioner complained of pain in her shoulders, elbows, and knees and a tingling in her left hand. The diagnosis remained the same. A prescription for Norco, Flexeril, Prilosec Pack, and Meloxicam Tabs was added to Petitioner's medications. Petitioner was to return to work June 7, 2013. Petitioner's Exhibit 9 at 10-14.

Petitioner testified, when discharged by Dr. Foreman at AMCI, her symptoms were manageable. Petitioner testified she received no treatment for the February 11, 2013, fall, from June 4, 2013, to her subsequent accident September 21, 2013. Scott at 30-31; 35.

On June 4, 2013, Petitioner was taken by Chicago Fire Department Ambulance to the emergency room at St. Margaret Health. Petitioner told the emergency room staff she had fallen a few weeks ago, hitting her face. She recalled no acute neck injury but said her neck began to ache at work, with pain radiating down her right arm. Staff noticed she was in no distress. A CT scan of the cervical spine found no fracture or disc herniation or significant spinal canal stenosis. When the emergency room doctor discussed the results of the CT scan with petitioner and mentioned cervical radiculopathy as a possibility, Petitioner recalled having the same symptoms and being told that in the past after a car accident. Petitioner was told to follow up with Dr. Shaw-Berrocal. Petitioner did follow up with Family Christian Health Center on June 5, 2013, but said she had a low blood pressure reading and went to the emergency room. She was diagnosed with Hypotension and her medication was modified. Petitioner's Exhibit 9 at 16-18; Petitioner's Exhibit 11 at 4-13; 55.

As to that prior accident, Petitioner testified she was in a car accident in 2011. She told a Dr. H.A. Metcalf, on June 8, 2011, she was the driver in a car that was rear ended June 2, 2011. She complained of neck pain, left shoulder and sternum pain, lower back pain, and left lateral arm pain. Metcalf's impression was cervical sprain, left shoulder sprain, thoracic/lumbar sprain, and left breast contusion. Petitioner was treated with therapy, manipulation, and exercise through October 2011. On her final visit, she was still complaining of muscle spasms and worsening progress. Scott at 74-75; Respondent's Exhibit 7.

During the time Petitioner was being seen at AMCI, she submitted to an independent medical examination by Dr. Neal Labana on March 19, 2013, 35 days after the fall. During her physical examination, Labana found her behavior and reactions typical of a patient who has some degree of symptom magnification. Labana believed most of Petitioner's multiple complaints were not backed up by significant objective physical findings. He thought Petitioner could return to work immediately with limited walking or standing and no lifting over five pounds with both of her extremities and no use above shoulder level. Labana reviewed Petitioner's MRI results and thought her prognosis was good, no surgery was needed, and Petitioner could return to work immediately on light duty. He believed she would be at MMI approximately three months after the date of the injury. Respondent's Exhibit 2.

Petitioner testified she continued to work at Respondent in the same position on the assembly line. On September 21, 2013, she was working the day shift. At trial, Petitioner testified the line went down, she went to cross over the line, her foot caught under a mat and she fell. At various times and to various people, since that fall, she said she simply slipped and fell at the plant; tripped over uneven floor mats; tripped and fell; tripped on either a mat or conveyor; or could not remember how she fell. Scott at 36; Petitioner's Exhibit 6 at 22; Petitioner's Exhibit 7 at 3; Petitioner's Exhibit 10 at 39; Petitioner's Exhibit 13 at 6; Respondent's Exhibit 3 at 2.

Petitioner testified she fell into a pole and hit her right side, knee and back. At various times and to various people, since that fall, she said she hit both her knee and right elbow; her right shoulder and knee; and her full right side; struck her knees on a steel surface and right shoulder and elbow on a pole. Petitioner's Exhibit 6 at 22; Petitioner's Exhibit 7 at 3,6; Petitioner's Exhibit 10 at 35.

Petitioner was taken to see a nurse at the plant who noted an abrasion to her right knee, cleaned and dressed it. Petitioner testified she refused to go back to work and had her son take her to Ingalls Hospital. Petitioner's Exhibit 10 at 39-40; Scott at 38-39.

At Ingalls Memorial Hospital, Petitioner was admitted into the emergency room. She told staff she fell at the Ford plant and complained of a dull aching pain and swelling to the right knee with an abrasion. She had no chest or neck pain, her symptoms were moderate. A physical examination was normal, but included a finding of abrasion, ecchymosis, swelling, tenderness of the right knee. The knee's range of motion was normal. An x-ray was taken of Petitioner's right knee; it found no acute abnormalities. She was given prescriptions for Ibuprofen, and Keflex. Her abrasion was cleaned, Neosporin and a dressing applied. This was what was done at the plant. A the plant, Petitioner insisted she was going to see her family doctor, but went to Ingalls instead. Petitioner was given a cane at Ingalls. There is no indication as to why, as she was walking with a steady gait upon arrival at Ingalls. Petitioner was discharged home, unaccompanied. Petitioner's Exhibit 10 at 39-40; Petitioner's Exhibit13 at 4-5; 6-7; 10.

Petitioner testified she returned to Ingalls the following day, September 22, 2013, because her knee had "swell up" and she had problems with her neck and lumbar spine. She said she was in severe pain. However, once back at Ingalls, Petitioner first complained of bilateral knee pain, ecchymosis to her right knee lateral side, and abrasion to her right knee, and pain down the side of her neck down the right side. Two hours later her complaints expanded to right side chest pain, a bruise to her right elbow, and pain to her right side lower back. The pain was a dull ache, mild in severity and intermittent. A physical exam was normal, except for noting a right knee abrasion. Petitioner received six x-rays: right rib (no fracture or acute abnormalities); chest (unremarkable unchanged chest); right elbow (unremarkable); left knee (unremarkable); lumbar sacral spine (grade 1 to 2 spondylolisthesis with spinal lysis at L5-S1 appears chronic); and cervical spine (unremarkable). Petitioner was diagnosed with multiple contusions, knee abrasion, cervical strain, and lumbar strain. She was discharged home, ambulated without assistance and drove herself unaccompanied. There was no note of her using a cane. At the plant, the same day she told the nurse she went back to the emergency room when she realized so much pain, swelling and bruising just below her right arm pit. At the plant, she was using her cane. Petitioner's Exhibit 13 at 13, 14, 19, 20, 22-27; Petitioner's Exhibit 10 at 41.

Petitioner testified she returned to AMCI. She visited AMCI, September 26, 2013, complaining of neck, low back, right shoulder, right elbow, right hand, and bilateral knee stiffness. AMCI records indicate Petitioner "...felt unable to return to work due to her injuries..." Dr. Hooton at AMCI enlarged Petitioner's diagnosis to: cervical, thoracic, lumbar, shoulder/upper arm, elbow/forearm, hand, knee/leg sprain; and abrasion hip/thigh/knee/leg/ankle, and for the first time anywhere offered an assessment of post traumatic

headache. His plan was nothing specific, simply to consider physical therapy and avoid strenuous activity and rest. Scott at 42; Petitioner's Exhibit 6 at 22-24.

From September 30, 2013, through December 13, 2013, Petitioner continued to see doctors and therapists at AMCI, 32 times. Treatment for Petitioner consisted entirely of therapy: hot wet packs; mechanical traction; ultrasound and exercises. Petitioner still complained of pain, the diagnosis did not change. An MRI was done of Petitioner's right shoulder on October 24, 2013, which was unremarkable except for some mild inflammatory fluid surrounding the distal supraspinatus tendon, thought to represent tendonitis and/or bursitis. There is an unsupported reference in the notes of November 11, 2013, of a knee MRI revealing tendonitis bursitis, and was noted as unremarkable. Petitioner's Exhibit 2; Petitioner's Exhibit 6 at 27-98.

Petitioner was seen for an Independent Medical Evaluation by Dr. Neal Labana on November 5, 2013. There Petitioner complained of knee pain. Labana found Petitioner likely had pre-existing arthritis in her knee which was noted on a previous MRI. He did not believe she needed any further treatment for her knee under work injuries, and could be returned to regular duties with no restrictions. He found no objective findings other than some consistent with arthritis. He found her having MMI. Respondent's Exhibit 2.

On December 9, 2013, Dr. Michael Foreman at AMCI noted Petitioner had plateaued with conservative care and ruled out "...disc involvement cs and ls." He stopped therapy and discharged Petitioner from his care. Petitioner's Exhibit 6 at 93.

Petitioner returned to work December 12, 2013. Petitioner's Exhibit 10 at 57.

Petitioner testified Dr. Foreman at AMCI recommended she see Dr. Axel Vargas at Chicago Pain and Orthopedic Institute. He is an Anesthesiologist. Seven months after the accident of September 2013, she went to see Vargas. During the six months Petitioner saw Vargas, her complaints, diagnosis, and recommendations inflated and expanded dramatically. Vargas noted Petitioner presented, at her initial visit, with chronic distal lower back pain axial pain with intermittent lower extremity sciatica symptoms, right shoulder and right knee pain, and dysfunction. Vargas' records are replete with comments made for use in litigation. (see e.g. Petitioner's Exhibit 7 at 6,8; Exhibit 14 at 8,17). At her initial visit with Vargas on May 29, 2014, Vargas's impressions were: lumbo-sacral discogenic radiculopathy; lumbo-sacral discogenic pain syndrome; lumbar facet pain syndrome; right shoulder internal derangement; and right knee internal derangement. His impressions are unique from any other diagnosis made of Petitioner since the fall in September 2013. His plan was for Petitioner to resume focused physical therapy and a course of NSAIDS, muscle relaxants, non-opiate analgesic, and increasing doses of neuromodulation. Scott at 58; Petitioner's Exhibit 7 at 3-10; Petitioner's Exhibit 6 at 23; Petitioner's Exhibit 13 at 3; Respondent's Exhibit 6 at 3.

About a month and a half later, on July 11, 2014, Petitioner went back to Vargas with an MRI of the lumbosacral spine from Advantage MRI-South Holland, done June 6, 2014. The images demonstrated: at L2-L3 patent canal and neural foramina; at L3-L4 diffuse disc bulge with some 1 mm posterior central disc protrusion (no significant canal compromise); at L4-L5 there is a 1.8 mm posterior central disc protrusion/early herniation with associated posterior central canal

narrowing (mild bilateral facet arthropathy); at L5-S1 there is a 3 mm broad uncovering of the disc margin with associated posterior central canal narrowing (mild left foraminal compromise is demonstrated). Vargas believed the MRI showed a disc herniation at L4-L5, and in a rather vague recommendation, stated "...most clinicians would agree, Mrs. Scott would indeed benefit from a trial series of bilateral L4-L5 and L5-S1 transforaminal epidural steroid injection." Petitioner testified she received three injections. Scott at 61, 63-64; Petitioner's Exhibit 1 at 2, 7; Petitioner's Exhibit 7 at 7.

Petitioner continued to see Vargas until November 25, 2014. Vargas, on October 7, 2014, indicated Petitioner should return to work with restrictions, yet indicated on a Patient Status Form, dated October 7, 2014, "Patient Can Not Work." By November 25, 2014, Vargas felt Petitioner would be a candidate for surgical decompression and possible fusion. Petitioner testified she did not return to Vargas after November 25, 2014, and has seen no other doctor relating to her September 2013 fall. She has had no treatment since November 2014. Scott at 69-70; Petitioner's Exhibit 14 at 7, 8, 17, 22.

Petitioner was seen for an Independent Medical Examination on August 28, 2017, by Dr. Steven Mather at DuPage Medical Group Orthopaedics, Bone, Joint, and Spine Center. Petitioner denied having any radiating symptoms down the legs and has isolated knee pain since 2008. She said she does not take any pain medication. Mather noted Petitioner was a 5 foot 5 inch, 228-pound diabetic (takes insulin) who smokes ½ pack a day. Her physical examination was normal except for complaints of lower back pain, with ROM at 90-95% of normal. Imaging showed an old isthmic spondylolisthesis at L5-S1 with spondylolysis of L5 grade 1, unchanged from x-rays taken September 22, 2013. Mather reviewed Petitioner's medical records, noting that two months after the September fall, Petitioner denied having back pain and had no back complaints whatsoever. Mather noted that when Petitioner saw Vargas, her complaints were not present in previous notes and her history was different. Mather's impression was: lumbar strain; morbid obesity; pre-existing spondylolisthesis L5-S1. He felt the strain resolved, and she could return to work without restrictions and required no further medical diagnostic testing or treatment. Respondent's Exhibit 3 at 2, 3, 5, 6.

Conclusions of Law

13 WC 006546

As to disputed issue F, is Petitioner's current condition of ill-being causally related to the injury, this Arbitrator makes the following conclusion of law: this Arbitrator concludes that Petitioner's current condition of ill-being is not causally related to the injury sustained on February 11, 2013.

In support of this conclusion, this Arbitrator notes that in March 2013, Dr. Neal Labana, who examined Petitioner, found a degree of symptom magnification on the part of Petitioner and believed most of her multiple complaints were not corroborated by significant objective physical

findings. I also note the scattered and changing nature of Petitioner's complaints, and the shifting location of complained of pain. I rely on Dr. Labana's finding Petitioner needed no surgery, could return to work immediately on light duty, and would be at MMI by May 11, 2013. I find, based on my observations of Petitioner's demeanor and testimony, as well as a review of the exhibits in evidence, Petitioner is not entirely credible.

With regard to disputed issue **J**, whether medical services that were provided to Petitioner were reasonable and necessary; and whether Respondent paid all appropriate charges for all reasonable and necessary medical services, this Arbitrator finds, with MMI on May 11, 2013, all medical services subsequent to that date neither reasonable nor necessary, and are denied. If unpaid, all charges incurred prior to May 11, 2013, are awarded. The only unpaid charge appears to be $4200.00 to Preferred Open MRI for services performed March 18, 2013. Petitioner's Exhibit 17.

As to disputed issue **K**, TTD in dispute, this Arbitrator makes the following conclusion of law: this Arbitrator concludes that Petitioner is entitled to temporary total disability benefits from February 12, 2013, through April 8, 2013, at $405.42 per week.

In support of this conclusion, this Arbitrator relies on the corroborated testimony of Petitioner, that she was off work February 12, 2013, through April 8, 2013. Scott at 33. I also rely on the records of Ford Motor Company, indicating Petitioner presented return to work documents on April 8, 2013. Petitioner's Exhibit 10 at 29. I also rely on records from AMCI. Petitioner's Exhibit 4 at 46.

With regard to disputed issue **L**, the nature and extent of the injury, this Arbitrator makes the following conclusion of law: this Arbitrator concludes that Petitioner sustained a fall resulting in contusions to upper and lower limbs.

In support of this conclusion, I rely on the records of Advocate Trinity Hospital and Family Christian Health Center. Petitioner's Exhibit 3 at 12, 28-29, 72-73; Petitioner's Exhibit 9 at 8.

As to permanent partial disability, this Arbitrator makes the following conclusions of law: this Arbitrator concludes Petitioner is not entitled to permanent partial disability. In support of this finding, I consider the factor found in Section 8.1b(b) of the Act. No permanent partial disability impairment report is in evidence and I give no weight to this factor. Petitioner worked the assembly line at Ford doing very light duty on the assembly line. Respondent's Exhibit 3 at 1. She returned to work doing the same job. I give less weight to this factor. Petitioner was 50 years old at the time of the injury. I give lesser weight to this factor. There is no evidence of any impact on earning capacity and I give no weight to this factor. There is no credible evidence of disability corroborated by the treating medical records. Petitioner testified she returned to full duty and was discharged by doctors at AMCI. Her complaints were not corroborated by any significant objective physical findings. Scott at 30-31; Respondent's Exhibit 2 at 2. I give no weight to this factor. Based on considerations of the factors in Section 8.1b(b), I find no permanent partial disability.

As to disputed issue **F**, is Petitioner's current condition of ill-being causally related to the injury, this Arbitrator makes the following conclusions of law: this Arbitrator concludes that Petitioner's current condition of ill-being is not causally related to the injury sustained on September 21, 2013.

In support of this conclusion, this Arbitrator notes the initial reported injury to Petitioner was noted, by both the medical clinic at Ford and the emergency room at Ingalls Memorial Hospital, as an abrasion to the right knee. Ingalls treated Petitioner the same as the nurse at Ford. Petitioner was discharged home. Only later, at another visit to Ingalls, did Petitioner's complaints widen and Ingalls diagnosed her with multiple contusions, knee abrasion, cervical strain and lumbar strain. From that visit on, Petitioner's complaints expanded and the diagnosis of subsequent medical providers wildly enlarged Petitioner's diagnosis over the next fourteen months.

I rely on the examination by Dr. Labana on November 5, 2013. There he noted an exaggerated response to minimal testing of Petitioner's knee. He found no objective findings other than some consistent with arthritis. He found no need for further treatment based on a work injury, had Petitioner at MMI, and said she could return to regular duty without restrictions.

I further rely on Dr. Steven Mather, who examined Petitioner on August 28, 2017, a scant four months before this hearing. He noted a pre-existing back injury from 2011 and isolated knee pain since 2008. Mather found her pain complaints to be nonphysiologic (of the mind). He noted, as did I, Petitioner's inconsistent versions of events, as well as inconsistent complaints of pain, and the nonspecific findings of previous treating medical providers. He concluded she had a lumbar strain in September 2013, that resolved. Petitioner, he said, could work without restrictions. He believed Petitioner was exhibiting symptom magnification.

I completely disregard the notes of Dr. Axel Vargas as remote in time from the accident; containing inaccurate data; and containing many comments for use in litigation and non-medical in nature.

I find Petitioner was at MMI by November 5, 2013.

As to disputed issue **J**, whether medical services that were provided to Petitioner were reasonable and necessary; and whether Respondent paid all appropriate charges for all reasonable and necessary medical services, this Arbitrator finds that medical services rendered Petitioner up to November 5, 2013 were reasonable and necessary and, if unpaid, Respondent liable for charges, pursuant to the medical fee schedule, incurred to Ingalls Memorial Hospital, and AMCI to November 5, 2013. All other medical services and their respective charges are denied as not causally related.

In support of this conclusion I rely on the records of Respondent, the records of Ingalls Memorial Hospital, and the credible opinions of Dr. Labana and Dr. Mather, and the records as a whole.

As to disputed issue **K**, TTD in dispute, this Arbitrator makes the following conclusion of law: this Arbitrator concludes that Petitioner is entitled to temporary total disability benefits from September 21, 2013 through November 5, 2013, at $438.97 per week.

In support of this conclusion, this Arbitrator relies on the examination of Petitioner by Dr. Labana on November 5, 2013. Labana found Petitioner needed no further treatment for work injuries and could return to regular duties without restrictions. He found Petitioner at MMI.

Respondent shall be given credit for benefits paid by Unicare at $400.00 per week. Respondent's Exhibit 4.

With regard to disputed issue **L**, the nature and extent of the injury, this Arbitrator makes the following conclusions of law: this Arbitrator concludes that Petitioner sustained a fall resulting in a right knee abrasion and lumbar strain.

In support of this, I rely on the testimony of Petitioner; the records of Ford Motor Company, and Ingalls Memorial Hospital; and the opinions of Dr. Mather. Scott at 38; Petitioner's Exhibit 10 at 40; Petitioner's Exhibit 13 at 7, 10; Respondent's Exhibit 3 at 5.

As to permanent partial disability, this Arbitrator concludes that Petitioner suffered 2.5% loss of a person as a whole; and 1% loss of right leg due to injuries sustained in the accident of September 21, 2013.

In support of this finding, I consider the factors found in Section 8.1b(b) of the Act. No permanent partial disability impairment report is in evidence, and I give no weight to this factor. Petitioner worked the assembly line doing very light duty on the assembly line. Scott at 34; Respondent's Exhibit 3 at 1. She returned to work. Scott at 49, 52; Petitioner's Exhibit 10 at 57. I give less weight to this factor. Petitioner was 51 years old at the time of the injury. I give less weight to this factor. There is no evidence of any impact on earning capacity, and I give no weight to this factor. I do note Petitioner was terminated for attendance issues, filed a grievance and was offered her job back. She said she "chose not to" return to work. Scott at 54, 57. There is some evidence of non-specific lower back pain corroborated by Dr. Mather, seemingly subjective. Scott at 70; Respondent's Exhibit 3 at 3, 6-7. I give some weight to this factor.

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

Kimberly Scott,

Petitioner,

vs. NO: 13 WC 32104

Ford Motor Company,

20IWCC0702

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, and nature and extent, and being advised of the facts and law, modifies the award of nature and extent. The Commission otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that the parties consolidated this case with an earlier case (case number 13 WC 6546) involving identical parties and a prior injury to Petitioner suffered on February 11, 2013. The Commission has rendered a separate Decision in the companion case. The Arbitrator issued separate Decisions; however, the Arbitrator did not attach a separate Findings of Fact and Conclusions of Law to the Decision in this case. Instead, the Arbitrator attached a Findings of Fact and Conclusions of Law that addresses both cases to the Arbitrator Decision in case number 13 WC 6546. Thus, when the Commission refers to specific pages in the Arbitrator Decision, the Commission is referring to the Findings of Fact and Conclusions of Law attached to the Decision in 13 WC 6546.

In the interest of efficiency, the Commission relies on the Arbitrator's detailed recitation of facts. After carefully considering the evidence, the Commission finds Petitioner sustained a 4% loss of use of the whole person and a 2% loss of use of the right leg due to the September 21, 2013, work incident. The Commission views the credible evidence slightly differently than the Arbitrator and thus modifies the Arbitrator's analysis pursuant to the fifth factor of Section 8.1b(b) of the Act. A review of the medical records reveals that Petitioner immediately complained of an abrasion as well as pain and swelling in her right knee. Within a few days of the work incident, Petitioner complained of cervical pain, lumbar pain, as well as right shoulder, right elbow, and bilateral knee pain. The medical records reveal Petitioner's numerous complaints were all treated very

20IWCC0702

conservatively. The Commission agrees with the Arbitrator's finding that Petitioner's subjective complaints throughout her treatment were inconsistent and were not always supported by objective findings. However, Petitioner did undergo a right knee injection as well as a right shoulder injection due to her ongoing complaints. Petitioner also participated in an extensive amount of physical therapy. A careful review of the medical records reveals Petitioner sustained strains to her cervical spine, lumbar spine, right knee, and right shoulder due to the work incident. Given the totality of Petitioner's complaints and very conservative treatment, the Commission finds an award of 2% loss of use of the right leg and 4% loss of use of the whole person is appropriate.

The Commission also makes the following additional changes to the Arbitrator Decision. On page five (5) of the Decision, the Commission strikes the following sentence: "Vargas' records are replete with comments made for use in litigation. (see e.g. Petitioner's Exhibit 7 at 6,8; Exhibit 14 at 8,17)." On page eight (8) of the Decision, the Commission strikes the following sentence: "I completely disregard the notes of Dr. Axel Vargas as remote in time from the accident; containing inaccurate data; and containing many comments for use in litigation and non-medical in nature."

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 February 16, 2018, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of $397.07/week for 4.3 weeks, because the injuries sustained caused the 2% loss of the right leg, as provided in Section 8(e) of the Act. Respondent shall also pay Petitioner permanent partial disability benefits of $397.07/week for 20 weeks, because the injuries sustained caused the 4% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,500.00. 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.

DEC 3 - 2020

DATED:
o: 10/6/20
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCOTT, KIMBERLY
Employee/Petitioner

Case# **13WC032104**

13WC006546

FORD MOTOR COMPANY
Employer/Respondent

20IWCC0702

On 2/16/2018, 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 1.78% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2356 FOHRMAN, DONALD W & ASSOC
MONTE L BEATY
101 W GRAND AVE SUITE 500
CHICAGO, IL 60654

0560 WIEDNER & McAULIFFE LTD
DANIEL A BRAINARD
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

20IWCC0702

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

Kimberly Scott
Employee/Petitioner

v.

Ford Motor Company
Employer/Respondent

Case # **13** WC **032104**

Consolidated cases: **13WC006546**

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 14, 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. ☒ 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 **9-21-13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**34,239.40**; the average weekly wage was $**658.45**.

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

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

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

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

Respondent is entitled to a credit of $**4664.97** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services incurred by Petitioner to Ingalls Memorial Hospital from September 21, 2013 to November 5, 2013; and to AMCI from September 26, 2013 to November 5, 2013, if any remain unpaid.

Respondent shall pay Petitioner temporary total disability benefits of $438.75 per week commencing September 21, 2013 through November 5, 2013 as provided for in Section 8(b) of the Act. Respondent shall be given a credit of $400.00 a week for amounts paid under Section 8(j).

Respondent shall pay, based on the following factors, and the record taken as a whole, permanent partial disability benefits of $397.07 per week because the injuries sustained caused 2.5% loss of a person as a whole; and 1% loss of a right leg as provided in Section 8(e)12 and 8(d)2 of the Act.

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, and so gives no weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, this Arbitrator notes the record reveals Petitioner was employed on an assembly line doing light duty at the time of the accident and was able to return to work in her prior capacity as a result of said injury. Because of this, this Arbitrator gives lesser weight to that factor.

With regard to subsection (iii) of Section 8.1b(b) this Arbitrator notes that Petitioner was 51 years old at the time of the accident. Because of that this Arbitrator gives lesser weight to that factor.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, this Arbitrator notes there was no evidence of any impact on such capacity and this Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by treating medical records, this arbitrator notes there is some evidence of this, and therefore gives some weight to this factor.

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

2/14/18
Date

FEB 16 2018

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brian Davis,

Petitioner,

vs. NO: 18 WC 743

SOI/IYC Harrisburg,

Respondent.

20IWCC0703

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with changes as stated herein, said decision being attached hereto and made a part hereof.

The Commission corrects the Arbitrator's decision at p.10, fourth paragraph, to show that Petitioner's injuries resulted in the loss of use of 10% of the ***right*** (not left) hand and ***17.5%*** (not 25%) of the right arm in order to correspond to the Arbitrator's Order found on p.2 of the form decision.

In addition, the Commission corrects the Arbitrator's decision to show that the applicable PPD rate in this case would be the maximum rate of $790.64 given an average weekly wage of $1,463.00 and a date of accident 11/28/17.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 7/17/19 is affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

20 IWCC0703

reasonable and necessary medical expenses as outlined in Petitioner's group exhibits, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $790.64 per week for a period of 64.775 weeks, as provided in §8(e)9 and §8(e)10 of the Act, for the reason that the injuries sustained caused the permanent partial loss of use of 10% of the right hand and 17.5% of the right arm, respectively.

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; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,000.00. 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: DEC 3 - 2020
o: 11/10/20
TJT: pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DAVIS, BRIAN
Employee/Petitioner

Case# **18WC000743**

STATE OF ILLINOIS/IYC HARRISBURG
Employer/Respondent

20IWCC0703

On 7/17/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.01% 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

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERL
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

JUL 17 2019

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

20 IWCC0703

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRIAN DAVIS,
Employee/Petitioner

v.

STATE OF ILLINOIS/IYC HARRISBURG,
Employer/Respondent

Case # **18** WC **00743**

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 **Herrin**, on **June 12, 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 _____

20IWCC0703

FINDINGS

On **November 28, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$76,104.00**; the average weekly wage was **$1,463.00**.

On the date of accident, Petitioner was **52** 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 **$all paid** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$all paid**.

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

ORDER

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's group exhibit, as provided in § 8(a) and § 8.2 of the Act.

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

Respondent shall pay Petitioner permanent partial disability benefits of **$813.87**/week for **64.775** weeks, because the injuries sustained caused the permanent partial loss of use of the right hand to the extent of **10% (20.5 weeks)** as provided in Section 8(e)9 of the Act and the permanent partial loss of use of the right arm to the extent of **17.5% (44.275 weeks)** as provided in § 8(e)10 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 Robert M. Harris

July 17, 2019
Date

JUL 17 2019

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner is a Juvenile Justice Specialist at Respondent's IYC Harrisburg facility. (T.11) He has held that job for a little over fifteen years. (T.11) The parties stipulated that Petitioner sustained accidental injuries on November 28, 2017. (T.7) At Arbitration, Petitioner testified as to how the accident occurred:

> I was taking the youth to dining, and a Code 2 started, which is a multiple youth fight, and I proceeded to break up one of the youth because they were hurting the other youth pretty bad, and that's when I fell on my elbow, and the youth fell on top of me. (T.12)

Petitioner filled out an accident report the same day and the history therein is consistent with his testimony at trial. (RX2) Respondent's Supervisor's Report of Injury or Illness indicates that Petitioner injured himself while breaking up a fight between two youths, and under the description of injury section is the statement "right arm hurting." *Id.* A workers compensation preliminary medical report provided by Respondent was also entered into evidence. *Id.* The object of information contained therein is as follows:

> Right forearm dislocation at present time. Great amount of swelling to right arm above anticubital area. No deformity noted present time right hand and arm, warm to touch, pulse present to right hand/arm. (RX2)

Prior to the date of accident Petitioner filed a Repetitive Trauma claim with the Illinois Workers' Compensation Commission alleging a date of accident of August 29, 2011, with regard to both his right and left hands and right and left arms. (RX3) This however was dismissed in June of 2012 by Arbitrator Gerald Grenada. *Id.* A copy of the dismissal form was entered into evidence. (RX3)

Petitioner sought treatment for his November 28th injury with Dr. Nathan Mall on December 13, 2017, and he noted a consistent account of Petitioner's injury. (PX5, 12/13/17) Dr. Mall's examination showed pain to palpation over the ulnar nerve, a positive flexion compression test to the elbow producing numbness and tingling into the ulnar distribution, and a positive Tinel's sign test. *Id.* Petitioner's elbow was stable to varus and valgus stress testing; however, he had pain to palpation over both the lateral epicondyle and medial epicondyle along with pain to resisted wrist extension inflexion. *Id.* X-rays were taken showing a mild spur at the triceps insertion on to the olecranon. *Id.* Dr. Mall's assessment was right elbow strain, possible tearing, and ulnar nerve

inflammation. He recommended an ulnar nerve night brace, anti-inflammatory medication, and an MRI. *Id.*

The MRI was completed and reviewed by Dr. Mall, who believed it showed some partial tearing of Petitioner's lateral epicondyle tendons along with fluid around the ulnar nerve and increased signal in the ulnar nerve. (PX5, 12/22/17) Dr. Mall's assessment was ulnar nerve injury and right elbow extensor partial tearing. *Id.* He recommended a cortisone injection into the right elbow lateral epicondyle, anti-inflammatory medication, and physical therapy along with continued use of the ulnar nerve night brace. *Id.* When Petitioner returned to Dr. Mall on February 8, 2018, he presented with continued symptoms in his right elbow, numbness and tingling in his ulnar digits, and pain on the lateral aspect of his elbow. (PX5, 2/8/18) Petitioner's examination was unchanged and Dr. Mall's assessment was right elbow lateral epicondylitis and cubital tunnel syndrome. *Id.* At this point Dr. Mall recommended an EMG/ nerve conduction study of his right arm. *Id.* This was done on March 9, 2018, by Dr. Alam, a board certified neurologist in Herrin, IL. Dr. Alam's impression was moderately severe right ulnar neuropathy at the elbow, moderately severe right carpal tunnel syndrome with no evidence of cervical radiculopathy. (PX6, 3/9/18) Based on the results of the MRI, the EMG, and the fact that Petitioner had failed conservative treatment, Dr. Mall recommended surgery. (PX5, 3/21/18)

Petitioner was medically cleared by Prairie Cardiovascular Consultants in Springfield, and surgery was done on April 12, 2018, by way of a right elbow lateral epicondyle debridement, right lateral epicondylectomy, right elbow microfracture of the lateral epicondyle, ulnar nerve decompression with transposition, repair of the extensor carpi radialis longus tendon, and a carpal tunnel release. (PX5, 4/12/18; PX7, 4/10/18) In espousing his rationale for performing carpal tunnel surgery, Dr. Mall stated:

> He was asked to pay careful attention regarding the carpal tunnel like symptoms over the last few weeks and he has noted that this has been more of an issue for him than he was initially aware of. He felt that all of the numbness was coming from his ulnar nerve initially; however, as he learn more about this and noted that his thumb index, and long finger were not part of the ulnar nerve distribution. He noted these were numb as well. (PX5, 4/12/18)

Of special note, Dr. Mall noted in his operative report that the ulnar nerve was extremely swollen at the elbow level within the cubital tunnel. (PX5, 4/12/18) Following surgery Dr. Mall recommended physical therapy per protocol. (PX5, 4/25/18)

Petitioner's last visit with Dr. Mall was on July 11, 2018, at which time he reported minimal complaints after work hardening and was comfortable with returning back to full duty. (PX5, 7/11/18) Dr. Mall stated that Petitioner had made an excellent recovery. *Id.* At Arbitration, Petitioner denied any symptoms "before the date he was injured" in either his elbow or his hands of the nature that he had following the accident. (T.17-18) This is consistent with a traumatic versus a repetitive event and the type of symptoms Petitioner experienced after the traumatic date of accident. In addition, Petitioner testified that his left arm "was fine." (T.21) Following surgery, Petitioner testified to significant improvement and had not missed any work because of right arm symptoms since Dr. Mall released him in July of 2018. *Id.*

On cross examination, Petitioner testified that he did turn in a claim for his arm previously but did not go to the doctor, because he "thought it was fine." (T.26) In short Petitioner filed a claim for repetitive trauma but when his condition improved and was fine the claim was dismissed without any compensation being awarded.

Petitioner also testified that after surgery he participated in a golf tournament with his son in late June. (T.33) At that time, Petitioner had visited Dr. Mall on June 20, 2018, and during that visit Dr. Mall recommended work conditioning and a return to work with no lifting over 5 pounds, no inmate contact, and clerical duty only. (PX5, 6/20/18) Dr. Mall released Petitioner three weeks later. Petitioner testified that his son did all of the lifting for him, that he was driving in a golf cart and teeing off with an iron, not a driver. (T.34-35) For this he received a one day suspension even though he was not violating any of his doctors restrictions or physical therapy restrictions. (T.38) He testified he did not lift anything greater than 5 pounds and there were no inmates on the golf course. (T.41)

Last, Petitioner testified that despite the favorable result from surgery he experiences symptoms in his elbow with a lot of use. (T.21-24) He lacks the same strength he has when picking up objects and although he has a full range of motion it is not without pain. *Id.* He takes over the counter medication for his elbow once a day and has cut down on his golfing. *Id.* The surgery to his right dominant arm has relieved all his numbness and tingling. *Id.* He testified his grip strength is fine although he has some stiffness in his hand. *Id.*

Respondent had Petitioner examined by Dr. Anthony Sudekum on September 27, 2018 after surgery and after Petitioner had been released to full duty. Dr. Sudekum took the history of

the injury. (RX1) Dr. Sudekum was provided no records prior to the date of accident and none were admitted into evidence by either party. Dr. Sudekum noted that Dr. Mall had originally decided to hold off on any carpal tunnel surgery and stated that same was not indicated; however he omitted Dr. Mall's statement in his operative note which again states:

> He was asked to pay careful attention regarding the carpal tunnel like symptoms over the last few weeks and he has noted that this has been more of an issue for him than he was initially aware of. He felt that all of the numbness was coming from his ulnar nerve initially; however, as he learn more about this and noted that his thumb index, and long finger were not part of the ulnar nerve distribution. He noted these were numb as well. (PX5, 4/12/18)

Dr. Sudekum's examination showed well healed surgical scars, negative wrist Tinel's and Phalen's signs, equivocal elbow Tinel's sign on the right and positive on the left. (RX1) Grip strength, sensation, and range of motion were normal, but Petitioner had a ten degree extension lag of the right elbow. (RX1) Right lateral elbow pain was present with resisted wrist flexion and extension, and scaffold shift was positive on the right for a painful clunk. *Id.*

Petitioner told Dr. Sudekum he had relative weakness in his right hand and arm with intermittent pain in his lateral elbow especially with lifting. *Id.* There was also some numbness on the back of the right elbow and pain when extending his right elbow. *Id.* Dr. Sudekum noted that Petitioner was friendly and cooperative during the examination and that the medical records suggested that Petitioner may have sustained a relatively minor injury to the right lateral elbow and possible mild biceps muscle strain as a result of the accident. *Id.* He stated that there was no indication that Petitioner sustained an acute injury to the medial elbow posterior or the right hand or wrist despite the report of the facility doctor who noted all of the above. *Id.*

With the regard to the issue of causal connection Dr. Sudekum believed that the incident of November 28th may have served as a causal or aggravating factor in the development of mild right lateral epicondylitis and possible mild right biceps tendonitis. *Id.* He did not believe that the work related incident served as a causal or aggravating factor in the development of right cubital or carpal tunnel syndrome. *Id.* Instead he attributed this to Petitioner's age, insulin dependent diabetes, arthritis, and smoking. *Id.* He opined that Petitioner's surgery was not needed and that continued conservative management would have improved his condition. *Id.*

Dr. Mall testified by way of deposition. (PX9) He stated that his treatment of Petitioner at the outset consisted of conservative care in the form of anti-inflammatory medicine, physical

therapy, bracing, and a cortisone injection. (PX9, p.10) D. Mall then recommended diagnostic studies which revealed objective abnormalities that accounted for Petitioner's symptoms. *Id.* When he was specifically asked why carpal tunnel surgery was performed he testified:

> So initially he was not having a lot of symptoms at the carpal tunnel, and so he and I had talked about it. He does have a very significant cardiac history, and so surgery in general was slightly more risky for him than a normal person. And so we talked about it with the carpal tunnel.
>
> He wasn't having a ton of symptoms in the carpal tunnel. I asked him to sort of pay careful attention to that, because if he did have symptoms with the carpal tunnel we'd want to go ahead and do that all at the same time rather than wait and then have to go through a second anesthesia for the carpal tunnel, if that became a problem for him later.
>
> When I saw him before surgery on 3/21/18, we essentially had elected to wait on the carpal tunnel as he wasn't having a lot of symptoms from that. But then when he came in for the actual surgery after I had discussed with him to sort of pay attention to the carpal tunnel symptoms, he actually was having some carpal tunnel-like symptoms, and therefore I felt to go ahead and do the carpal tunnel at the same time as the surgery for the elbow. (PX9, p.11-12)

Dr. Mall specifically noted that Petitioner never had any symptoms with regard to his left arm. (PX9, p.13) As of his last visit Dr. Mall stated that Petitioner had minimal complaints, did his work hardening, and was comfortable returning back to work after a successful surgery. *Id.*

With regard to causation, Dr. Mall testified that the lack of any prior history of right arm complaints or nerve related symptoms, the fact that MRI scan correlated with his clinical signs and symptoms, the immediate reporting of his injury, and the objective diagnostic studies coupled with Petitioner's excellent recovery, all pointed to the fact that his symptoms and the need for the treatment were causally related to the injury of November 28, 2017. (PX9, p.15)

CONCLUSIONS OF LAW

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

In addition to or aside from expert medical testimony, circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam*

Masonry v. Indus. Comm'n, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

The law also holds that accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003). [Emphasis added]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3d Dist. 2000). Employers are to take their employees as they find them. *A.C. & S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist., 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

Although Petitioner had previously filed a claim for right carpal tunnel syndrome in August of 2011 and dismissed said claim in June of 2012; from the time the claim was dismissed in 2012 until the time Petitioner suffered the injury in question in November of 2017, Petitioner's history with respect to his right upper extremity was entirely uneventful, with the exception of a minor arm injury for which he required no care or treatment that occurred approximately a year before the November 2017 accident. (T.26) Immediately following the traumatic incident on November 29, 2017, however, Petitioner has had persistent, unabating complaints in only his right arm and right upper extremity. Moreover, Petitioner testified that the symptoms that he previously had were not of the same nature as those he suffered following this accident. (T.17) Petitioner's diagnostic testing revealed objective evidence of moderately severe right ulnar neuropathy at the elbow, moderately severe right carpal tunnel syndrome with no evidence of cervical radiculopathy. (PX6, 3/9/18) Petitioner remained symptomatic despite conservative care and ultimately required surgical intervention, which in turn drastically improved his symptoms.

Based upon the chain of events outlined above, the Arbitrator finds that Petitioner met his burden of proof on the issue of causal connection. Although Respondent's Exhibit 3 suggests that Petitioner had some preexisting pathology, this is not fully borne out by the medical records in such a way that the Arbitrator can causally relate Petitioner's current symptoms, which without a

doubt only came about in the severity reflected in Petitioner's exhibits following the November 2017 accident, to Petitioner's prior claim which was dismissed. To the contrary, Petitioner's condition only required ongoing care and surgical treatment following the November 2017 accidental injury. As the Court in *Sisbro* highlighted, a claim is not barred merely because a claimant has had some preexisting complaints, and Respondent has offered no credible evidence to rebut the clear chain of events and objective medical evidence in support of Petitioner's claim attributable to the injury of November 28, 2017.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts. Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion." Gross v. Illinois Workers' Compensation Comm'n, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. "If the basis of an expert's opinion is

grounded in guess or surmise, it is too speculative [**18] to be reliable." Id. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." In re Joseph S., 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). **Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician.** *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 31 Ill. Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992). **That is what the Arbitrator has decided to do in this matter. Accordingly, the Arbitrator places greater credibility, weight, and reliance on the opinions of treating physician and surgeon Dr. Mall over the opinions of Respondent's Section 12 examining expert Dr. Sudekum.**

With regard to causation, Dr. Mall stated that the lack of any prior history of right arm complaints or nerve related symptoms, the fact that MRI scan correlated with his clinical signs and symptoms, the immediate reporting of his injury, and the objective diagnostic studies coupled with Petitioner's excellent recovery, all pointed to the fact that his symptoms and the need for the treatment were causally related to the injury of November 28, 2017. (PX9, p.15) Dr. Mall specifically noted that Petitioner never had any symptoms with regard to his left arm. (PX9, p.13) As of his last visit Dr. Mall stated that Petitioner had minimal complaints, did his work hardening, and was comfortable returning back to work after a successful surgery. *Id.*

The Arbitrator is not persuaded by the opinion of Dr. Sudekum, who opined Petitioner's condition was attributable to anatomical and comorbid risk factors. Petitioner's current symptoms manifested only in his right injured upper extremity following the November 2017 traumatic incident; no such complaints were noted in his left upper extremity as one would expect in the case of systemic neuropathy. The Arbitrator therefore finds more credible and persuasive the opinions of Dr. Mall, who took into consideration both the objective medical evidence and the clear chain of events presented by the circumstantial evidence.

Consequently, the Arbitrator finds that Petitioner's current condition of ill-being in his right arm and hand is causally related to the traumatic work injury of November 28, 2017.

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

Petitioner's complaints were well-outlined in the treatment records, and despite conservative care, continued unabated. Petitioner then received surgical care, which provided marked relief of his symptoms. The Arbitrator therefore finds all of Petitioner's care and treatment reasonable and necessary based on the above findings as to causal connection and the medical evidence in the record. Respondent is hereby ordered to pay all the medical expenses in Petitioner's group exhibit. Respondent shall receive credit for any amounts paid, provided that it indemnifies and holds Petitioner harmless from any claims arising from the expenses for which it claims credit.

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

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

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner continues to work as a Juvenile Justice Specialist in the same job position that subjects him to altercations and caused his injury. The Arbitrator places greater weight on this factor.

(iii) **Age**: Petitioner was 52 years old at the time of his injury. He has diminished healing capacity is a result thereof, but must still live and work with his disability for a number of years. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity**: There is no evidence of reduced earning capacity contained in the record. Consequently, the Arbitrator places no weight on this factor.

(v) **Disability**: As a result of his injury, Petitioner sustained traumatic lateral epicondylitis, cubital tunnel syndrome, and carpal tunnel syndrome, which proved refractory to conservative care and required operative intervention. Despite the improvement from surgery, Petitioner testified that he experiences symptoms in his elbow with a lot of use. (T.21-24) Petitioner lacks the same strength he has when picking up objects and although he has a full range of motion it is not without pain. *Id.* Petitioner takes over the counter medication for his elbow once a day and has cut down on his golfing. *Id.* The surgery to his right dominant arm has relieved all his numbness and tingling. *Id.* Petitioner testified his grip strength is fine although he has some stiffness in his hand. *Id.*

The Arbitrator finds Petitioner's testimony unrebutted by the record, as Petitioner was not released to return to work full duty until his final visit with Dr. Mall on July 11, 2018, at which time he was placed at maximum medical improvement. (PX5, 7/11/18) The Arbitrator does not find Petitioner's complaints out of proportion with the findings in his medical records. As such, the Arbitrator places greater weight on this factor, and finds that Petitioner sustained serious and permanent injuries that resulted in the 10% loss of his left hand and the 25% loss of his right arm.

The Arbitrator bases the award for the loss of the hand on a schedule of 205 weeks rather than 190 weeks, as the Act states that the 190-week cap only "if the accidental injury involves carpal tunnel syndrome due to repetitive or cumulative trauma." 820 ILCS 305/8(e)9. Since Petitioner's carpal tunnel syndrome arose from a traumatic injury, the Arbitrator finds that Petitioner is entitled to 20.5 weeks of compensation for the loss to his hand. Respondent shall therefore pay a total of **64.775 weeks** of permanent partial disability benefits, for the **10%** loss of Petitioner's right hand (20.5 weeks) and the **17.5%** loss of Petitioner's right arm (**44.275 weeks**).

Robert M. Harris

20 IWCC0703

Robert M. Harris, Arbitrator

Dated: July 17, 2019

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

Syeda Jafri,

Petitioner,

vs.

NO: 18 WC 1646

20IWCC0704

Glen Ellyn Donuts,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the decision of the Arbitrator to show that Petitioner is entitled to the reasonable and necessary medical expenses associated with pre-operative testing and evaluation in addition to the surgery recommended by Dr. Ankur Chhadia in the form of arthroscopic surgery with debridement and synovectomy and possible residual tear meniscectomy and chondroplasty to the right knee, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

Finally, the Commission corrects the Arbitrator's decision to show that Petitioner was temporarily totally disabled from 11/20/17 through 4/23/19, for a period of 74-2/7 weeks (not 74-1/7 weeks).

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 6/14/19 is modified as stated herein.

20IWCC0704

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $162.32 per week for a period of 74-2/7 weeks, from 11/20/17 through 4/23/19, 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 reasonable and necessary medical expenses in the amount of $33,335.52, as outlined in PX6-10, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to prospective medical treatment as prescribed by Dr. Chhadia in the form of arthroscopic surgery with debridement and synovectomy and possible residual tear meniscectomy and chondroplasty to the right knee as well as pre-operative testing and evaluation, and the reasonable and necessary medical expenses associated therewith, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 3 - 2020
o: 10/20/20
TJT: pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

JAFRI, SYEDA
Employee/Petitioner

Case# **18WC001646**

GLEN ELLYN DONUTS
Employer/Respondent

20IWCC0704

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

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

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

0147 CULLEN HASKINS NICHOLSON ET AL
MICHAEL A ROM
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

2837 JOSEPH A MARCINIAK LAW OFFICES
BRENT W HALBLEIB
200 W MADISON ST SUITE 501
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS
COUNTY OF DuPage)

20 IWCC0704

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Syeda Jafri
Employee/Petitioner

Case # 18WC001646

Consolidated Cases _____

v.

Glen Ellyn Donuts
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Frank Soto, Arbitrator of the Illinois Workers' Compensation Commission, in the city of Wheaton, on 4/23/2019. 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

20 I.C.C.0704

FINDINGS

On the date of accident, 11/19/2017, 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 $8,440.64; the average weekly wage was $ 162.32.

On the date of accident, Petitioner was **40** 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 **$1,878.24** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of **$1,878.24 (TTD from 1/13/2018 - 4/4/2018)**.

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

ORDER

Respondent shall pay reasonable and necessary medical services in the amount of $33,335.52, as outlined in Petitioner's Exhibits 6-10, pursuant to the Medical Fee Schedule and Sections 8(a) and 8.2 of the Act. The medical bills awarded are as follows: PX. 6 Suburban Orthopedics bill of $1,827.00; PX. 7 Glen Oaks Hospital bill of $3,400.00; PX. 8 Aziz Family Medical Center bills of $895.00 and $288.00; PX. 9 Center for Sports Medicine bill in the amount of $8,400.52: and, PX. 10 Physical Medicine Group bill of $18,525.00, as provided in the Conclusions of Law attached hereto; ;

Respondent shall pay Petitioner temporary total disability benefits of $162.32 per week for 74-1/7 weeks, as provided in Section 8(a) of the Act, less a credit for temporary total disability benefits previously paid, as provided in the Conclusions of Law attached hereto;

Prospective medical treatment under Section 8(a) is hereby awarded under the terms and findings on the attached Conclusions of Law, attached hereto and made a part of this Order. Specifically, Respondent shall authorize arthroscopic surgery with debridement and synovectomy and possible residual tear meniscectomy and chondroplasty to the right knee as recommended by Petitioner's treating physician, Dr. Ankur Chhadia.

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

6/13/2019
Date

ICArbDec19(b)

JUN 14 2019

20 IWCC0704

Procedural History

This matter was tried on April 23, 2019 pursuant to Sections 19(b) and 8(a) of the Act. The disputed issues are whether Petitioner's current condition of ill-being is causally connected to her injury, whether Respondent is liable for unpaid medical bills, whether Petitioner is entitled to TTD benefits and prospective medical treatment. (Arb. Ex. #1).

Findings of Fact

Syeda Jafri (hereinafter referred to as "Petitioner") is a 42-year-old, single mother of two children who speaks Udru as her first language. Petitioner worked for Glen Ellyn Donuts (hereinafter referred to as "Respondent") performing various tasks such as cleaning, working the register, stocking items and waiting on customers. Prior to November 19, 2017, Petitioner was employed by Respondent for six or seven months.

The parties stipulate that on November 19, 2017, Petitioner suffered an undisputed accident when she slipped and fell on ice. Petitioner testified that she injured her right knee. (Arb. Ex. #1). Petitioner testified that she had never injured or received medical treatment to her right knee prior to November 19, 2017.

Petitioner was transported by ambulance to Glen Oaks Hospital where x-rays were taken, and she was told to follow up with her family doctor. On November 20, 2017, Petitioner was seen by her primary care physician, Dr. Mohammed Samiruddin who referred her to Dr. Theodore Suchy. On November 29, 2017, Petitioner was examined by Dr. Suchy who performed an injection to the right knee and prescribed an MRI. As of November 29, 2017, Dr. Suchy placed Petitioner on work restrictions consisting of sit-down work only.

On November 30, 2017, Petitioner underwent an MRI, at Glen Oaks Hospital, which revealed a tear of the right medial meniscus. Based on his exam and the MRI findings Dr. Suchy performed an arthroscopic repair of the right knee with partial menisectomy. Dr. Suchy described the tear as a complex tear of the medial meniscus. After surgery, Petitioner started a course of physical therapy at Physicians Medicine Group of Illinois. Dr. Suchy took Petitioner off all work from December 6, 2017 through January 22, 2018. (PX. 3).

On February 21, 2018, Petitioner followed up with Dr. Suchy April 5, 2018, who noted that Petitioner was doing better but still complaining of generalized pain. Dr. Suchy issued work restrictions consisting of sit-down work only from January 22, 2018 through April 5, 2018. Petitioner returned to Dr. Suchy on February 23, 2018. At that visit, Dr. Suchy also noted that Petitioner's right knee was swollen. Dr. Suchy proscribed 800mg Ibuprofen three times a day. Dr. Suchy indicated that Petitioner should be completed with physical therapy over the next two weeks and, at that time, she should be able to return to her regular work. Dr. Suchy also indicated that Petitioner could get a second opinion if she was unhappy with her result.

Petitioner continued to treat with Dr. Suchy until April 25, 2018. On that date, Dr. Suchy noted that Petitioner was still complaining of pain and discomfort. Dr. Suchy's examination showed full range of motion, no synovitis or joint effusion and no evidence of quadriceps atrophy. Dr. Suchy released Petitioner back to work, without restrictions, and scheduled a follow up appointment in four weeks. (PX 1).

On April 16, 2018, Petitioner sought a second opinion from Dr. Ankur Chhadia. Petitioner complained of sharp pain and burning on the medial aspect of the right knee. Petitioner reported difficulty walking, sitting and driving. The examination showed moderate effusion or swelling of the right knee and tenderness at the medical joint line. Dr. Chhadia reviewed the November 30, 2017 MRI and opined the MRI showed a complex peripheral tear of the right medial meniscus at the junction of its posterior horn and body. Dr. Chhadia diagnosed right knee effusion, and moderate right knne arthroscopic partial medial meniscectomy of January of 2018. Dr. Chhadia found that Petitioner's current medical condition was related to work and that she was medically unable to work. Petitioner returned to Dr. Chhadia on April 25, 2018. At that time, Dr. Chhadia recommended an MRI and an OTC NSAID, which was performed at that time. Petitioner underwent the MRI on May 3, 2018 which showed a mild intrasubstance signal alteration of the medial meniscus without evidence of surface tear and moderate joint effusion. (PX 2).

On May 7, 2018, Petitioner followed up with Dr. Chhadia and he indicated that the MRI showed mild intrasubstance signal alteration of the medial meniscus without evidence of surface tear, marrow edema/contusion of the posterolateral tibial plateau, moderate joint effusion and a small anserine cyst. Dr. Chhadia recommended physical therapy, OTC NSAIDs and injections. Dr. Chhadia kept Petitioner off work. (PX 2).

On May 31, 2018, Petitioner was examined by Dr. Brian Cole, pursuant to Section 12 of the Act. Dr. Cole opined that continued care was warranted for the right knee. Dr. Cole recommended an epidural steroid injection and further opined that Petitioner's right knee effusion and pain was related to her November 19, 2017 injury. In his report dated May 31, 2018, Dr. Cole wrote, "*I would recommend an additional aspiration and cortisone injection into the right knee plus 3 weeks of physical therapy for a generalized hip, core, glutes, pelvic stability strengthen. If Dr. Chhadia already did use a short-acting corticosteroid at the time of the last injection, then I would recommended consideration for use of Zilretta, which is a long-acting triamcinolone corticosteroid. Her MMI remains to be determined pending release/lack thereof from the treatment rendered.*". In that same report, Dr. Cole also wrote, "*She can likely work full duty with regard to her right knee as well as her job description and diagnosis was certainty sedentary. She should not be doing any repetitive squatting, kneeling, climbing, but I think this allows her to work full duty with no restrictions in her Dunkin Donuts work Capacity*". *(RX 1).*

Petitioner received the injections and physical therapy. Thereafter, Dr. Chhadia recommended revision right knee diagnostic arthroscopy with debridement and synovectomy. In his letter, dated September 17, 2018, Dr. Chhadia wrote, "*It is my opinion to a reasonable degree of medical and surgical certainty that the traumatic work injury was the cause of her current right knee condition and symptoms based on the history, physical examination and objective MRI findings as well as her prior knee arthroscopy. Her current symptoms and dysfunction are a sequela of her right knee injury and surgery. She has failed all nonoperative treatments.*". *(PX 2).*

Respondent performed a utilization review concerning the second surgery. On September 21, 2018, after a peer-to-peer review with Dr. Chhadia, the surgery was certified based on "conservative treatment failure, persistent symptoms of locking and catching and pain in the right leg". (Utilization Review date September 21, 2018. PX. 2).

On April 16, 2018 through May 14, 2018, Dr. Chhadia indicated that Petitioner was medically unable to work. From May 14, 2018 through January 11, 2019, Dr. Chhadia issued light duty restrictions which included no repetitive squatting, kneeling prolonged standing, no bending and climbing.

Petitioner testified that she continues to suffer swelling, pain in her right knee and that she can't sit or lie down for extended periods of time. Petitioner testified that it is her desire to undergo the surgery recommended by Dr. Chhadia.

Petitioner testified that she has not received any TTD benefits after being released from Dr. Suchy. Petitioner also testified that she has not returned to work because of pain.

The Arbitrator finds 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 issue "F", is the Petitioner's current condition of ill-being causally related to the injury, the Arbitrator concludes the following:

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665, 672 (2003). Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982). Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (First Dist. 1988). A claimant's prior condition need not be a of good health prior to the accident, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting deterioration from whatever the previous condition had been. *Schroeder v. Illinois Worker's Compensation Comm'n*, 4-16-0192WC (Fourth Dist. 2017).

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 her current right knee condition is causally related to her work accident of November 19, 2017, as more fully explained below.

The Arbitrator finds Petitioner to be credible. There is no evidence that Petitioner had any problems with her right knee prior to her fall on ice on November 19, 2017. There is no dispute that Petitioner suffered a work-related accident to her right knee on November 19, 2017. There is no dispute that the first surgery performed by Dr. Theodore Suchy was casually related to that undisputed accident. The sole issue in this case is the causal connection and need for a second surgery to the right knee.

On April 25, 2018, Petitioner complained of continued pain following the first surgery. Dr. Suchy felt Petitioner could return to work and indicated that Petitioner could seek a second opinion if she was not happy with the results. Dr. Suchy told her to follow up with his office in four weeks and to continue strengthening exercises.

Petitioner choose to seek a second opinion and on April 16, 2018, she started treatment with Dr. Ankur Chhadia. After the failure of conservative treatment Dr. Chhadia recommended a right knee arthroscopy with debridement and synovectomy and possible residual tear meniscectomy and chondroplasty. (PX 2, record of September 17, 2018 and January 11, 2019). Dr. Chhadia states that it is his opinion to a reasonable degree of medical and surgical certainty that the traumatic work injury was the cause of her recurrent right knee condition based on history, physical examination and objective MRI findings as well as her prior knee arthroscopy. Dr. Chhadia indicated that all treatment to the right knee to date has been reasonable and necessary and related to the work accident.

Respondent's independent medical examiner, Dr. Brian Cole performed an examination on May 31, 2018. Dr. Cole found a causal connection between Petitioner's current condition and her work accident. He states, "*I would not consider any of the injured workers' present disability to be the natural progression of an underlying disease process...she has no present disability that can identify to the left elbow. The right knee maintains symptoms of effusion and pain in relation to the November 19, 2017 injury, but not in regard to any underlying disease process.*" (RX 1)

Both the treating physician, Dr. Chhadia and Respondent's independent medical examiner, Dr. Brian Cole, agree that Petitioner's current complaints of knee paid are related to her work accident of November 17, 2017.

In support of the Arbitrator's decision related to issue (J) whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent paid all appropriate charges, the Arbitrator finds as follows:

The Arbitrator concludes that as a result of injuries sustained on November 19, 2017, Petitioner incurred $33,335.52 in medical expenses, which were reasonable and necessary and incurred to cure or alleviate Petitioner's condition of ill-being as related to the right knee. These bills remain unpaid. Petitioner submitted into evidence bills from Suburban Orthopedics totaling $1,827.00 (PX 6); Glen Oaks Hospital of $3,400.00 (PX 7), Aziz Family Medical Center $895.00 and $288.00 (PX 8), Center for Sports Medicine $8,400.00 (PX 9), Physician Medicine Group $18,525.00. Regarding the final bill from Physician Medical Group, the Arbitrator notes that Dr. Cole, Respondent's Section 12 examiner, on May 31, 2018, also recommended additional physical therapy. As such, the Arbitrator finds that Respondent shall pay the reasonable and necessary medical services of $33,335.52 as provided in Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision related to issue (K), whether Petitioner is entitled to prospective medical care, the Arbitrator finds as follows:

Petitioner sought a second opinion with Dr. Chhadia on April 16, 2018 due to continued pain in her right knee. Dr. Chhadia treated Petitioner conservatively with a repeat MRI, bracing, physical therapy, and corticosteroid and viscosupplementation injections. Petitioner continued to have symptoms of locking, catching and pain in her right knee. Based on the failure of conservative treatment, Dr. Chhadia recommended a revision right knee diagnostic arthroscopy with debridement and synovectomy. Dr. Chhadia indicated that the arthroscopy was reasonable, medically and surgically indicated due to the failure to progress with all other treatment options. Dr. Chhadia felt continued nonoperative treatment is likely to result in permanent impairment for the patient and permanent disability.

On May 31, 2018, Dr. Cole, who performed the Section 12 examination, noted that Petitioner continued to experience right knee symptoms and effusion despite appropriate treatment with Drs. Suchy and Chhadia. Dr. Cole also recommended additional aspiration and cortisone injections (possibly the use of Zilretta, a long-acting triamcinolone corticosteroid) into the right knee as well as additional physical therapy. (RX 1)

After Dr. Chhadia recommended surgery, Respondent performed a utilization review which resulted in a non-certification of the second right knee surgery on August 26, 2018. After a peer to peer review between Nancy Noonan, RN, CCM initial Clinical reviewer at The Hartford and Dr. Chhadia, the utilization review found that the request for right knee arthroscopic debridement and synovectomy was appropriate and approved the procedure following review of additional medical information provided by Dr. Chhadia. Specifically, Dr. Chhadia explained that the initial denial made based on the lack of significant pathology was incorrect since Petitioner had failed conservative care and continued to have pain, effusion, and locking, catching and persistent symptoms in the right knee. As a result, the utilization review certified the second surgery.

The Arbitrator finds the opinions of Dr. Chhadia reliable. Having found a causal connection between Petitioner's accident and her current condition of ill-being, the Arbitrator further finds that Petitioner is entitled to prospective medical care, specifically the right knee surgery recommended by Dr. Chhadia and certified by Respondent's utilization review on September 21, 2018.

In support of the Arbitrator's decision related to issue (L) what temporary benefits are due, if any, the Arbitrator finds as following:

Petitioner claims to be entitled to TTD benefits from November 20, 2017 through April 23, 2018 representing 74 1/7 weeks. Respondent paid TTD benefits from January 13, 2018 through April 4, 2018. (Arb. Ex.#1).

It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.*, whether the claimant has reached maximum medical improvement." *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, 561 N.E.2d at 627.* This court has held, "[t]he 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 1087,1090, 666 N.E.2d 827, 828, 217 Ill.Dec. 158 (1996).* A claimant reaches maximum medical improvement when he is as far recovered or rested as the permanent character of his injury will permit. *Nascote Industries v.*

Industrial Comm'n 353 Ill. App. 3d 1067 (Citing *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). In determining whether the claimant has reached maximum medical improvement, a court may consider such factors as a release to return to work, and medical testimony or evidence concerning the claimant's injury, the extent thereof, and most importantly, whether the injury has stabilized. *Id.* Once a claimant has reached maximum medical improvement, an injury has become permanent and he is no longer eligible for TTD benefits. *Nascote Industries*, 353 Ill. App. 3d at 1072 (Citing *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990).

Respondent does not dispute that Petitioner was off work from January 13, 2018 (the date of the first surgery to her right knee) and April 4, 2018, the date Dr. Suchy released her to return to work and gave her the option to seek a second opinion if she was not happy with the results of the surgery. Petitioner had sought that second opinion on April 16, 2018 with Dr. Ankur Chhadia who removed her from the work force. As such, the Arbitrator finds that Petitioner has not reached maximum medical improvement and that she was not at maximum medical improvement at the time she was released to return to work by Dr. Suchy. The Arbitrator does not find the opinion of Dr. Suchy persuasive regarding the determination that Petitioner reached maximum medical improvement. Dr. Suchy's opinion conflicts with the opinions and examination finding of Drs. Cole and Chhadia and the MRI.

On July 2, 2018, Dr. Chhadia indicated Petitioner could perform light duty consisting of no squatting, no kneeling, no prolonged standing, no bending, and no climbing. Petitioner testified that her job duties include standing, squatting and kneeling. When Dr. Suchy issued light duty restrictions, consisting of sit-down work only, from January 22, 2018 through April 5, 2018, Respondent did not offer Petitioner work within her restrictions and paid her TTD benefits during that period. No evidence was presented that Respondent offered Petitioner light duty work after Dr. Chhadia issued the restrictions on July 2, 2018. The Arbitrator finds it reasonable to infer that no light duty work was available since Respondent did not submit evidence of that light duty work was available, within Petitioner's restrictions, and that light duty work was not offered to Petitioner when Dr. Suchy previously issued light duty restrictions.

As such, the Arbitrator finds that Respondent shall pay Petitioner temporary total disability of $162.32 per week for 74 1/7 weeks for the period November 20, 2017 thru April 23, 2019, as provided in Section 8(b) of the Act, less a credit for TTD previously paid.

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

VICTOR OCHOA,

Petitioner,

vs. NO: 11 WC 25718

RAILWAY & INDUSTRIAL SERVICES, INC. and
SELF-INSURERS ADVISORY BOARD,

Respondent.

20IWCC0705

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to a timely Petition for Review filed by the Respondent herein. While the matter was pending on Review, Respondent Railway & Industrial Services, Inc. ceased business operations and the Self-Insurers Advisory Board, represented by the Illinois Attorney General, filed an appearance and assumed administration of the claim. Notice given to all parties, the Commission, after considering the issues of accident, causation, temporary disability, and permanent disability, and being advised of the facts and law, clarifies the Decision of the Arbitrator as set forth below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

1 – The Commission observes the awarded period of temporary total disability encompasses 28 3/7 weeks, and the decision is corrected to so reflect.

2 – The Arbitrator utilized the §8.1b framework in determining Petitioner's permanent partial disability. The Commission notes Petitioner's accidental injury occurred prior to September 1, 2011 and while the analysis of the §8.1b factors was not required, we nonetheless find the relevant evidence of Petitioner's disability was properly considered and affirm the finding Petitioner sustained the 17.5% loss of use of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 17, 2018, as corrected above, is hereby affirmed and adopted.

20IWCC0705

IT IS FURTHER ORDERED BY THE COMMISSION that a copy of this decision be provided to the Attorney General at AGWorkersCompChicago@atg.state.il.us.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $529.33 per week for a period of 28 3/7 weeks, representing May 9, 2011 through September 29, 2011 and September 12, 2012 through November 5, 2012, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $136,926.84 for reasonable and necessary medical expenses as provided in §8(a), subject to §8.2. Respondent shall be given a credit for medical expenses that have been paid, and Respondent shall hold Petitioner harmless from any claims by 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 $476.40 per week for a period of 87.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 17.5% loss of use of the person as a whole.

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

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

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

Stephen Mathis

D. Douglas McCarthy

DISSENT

I respectfully dissent. I find Petitioner sustained an accident on May 6, 2011, and his condition of ill-being is related, in part, as to a low back strain. I find Petitioner entitled to temporary total disability benefits from May 9, 2011 through September 29, 2011 as Petitioner reached maximum medical improvement (MMI) as of September 29, 2011. I find no medical expenses due and owing after the MMI date. I find Petitioner proved permanent partial disability to the extent of 5% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

Petitioner injured his lower back on May 6, 2011 while lifting metal parts. T. 17. On May 9, 2011, Petitioner sought treatment from Provena St. Joseph ER providing a consistent history of injury and complaining of low back pain and numbness into his left leg. PX2. On May 20, 2011, Petitioner underwent an MRI at the direction of Dr. Ajmere. *Id.* On May 21, 2011, Dr. Ajmere reviewed the MRI finding diffuse disc dehydration and recommended physical therapy and rest. PX4. On May 24, 2011, Petitioner attended his initial physical therapy evaluation with therapy continuing through September 1, 2011. PX5.

On the referral of Dr. Ajmere, Petitioner sought treatment with Dr. Patel. PX6. On June 13, 2011, Dr. Patel evaluated Petitioner and recommended epidural steroid injections (ESI) which were subsequently performed on June 15, 2011; July 8, 2011; and August 5, 2011. *Id.* The ESIs provided relief to Petitioner's back pain, but his radiating pain and numbness in the left leg persisted.

As such, Dr. Ajmere recommended an EMG which was performed on July 18, 2011 by Dr. Gulati. Dr. Gulati found the EMG provided "no convincing electrical evidence for acute or chronic lumbosacral radiculopathy" but "evidence for a distal deep peroneal neuropathy." PX7. Given this finding, Dr. Ajmere referred Petitioner to Dr. Gulati for further treatment.

On August 17, 2011, Dr. Gulati evaluated Petitioner who provided a history of low back pain recently relieved following three ESIs. Petitioner complained of persistent numbness in the left lower extremity which was intermittent and occurred with certain positioning. PX7. Dr. Gulati found Petitioner's EMG abnormalities and resulting complaints could not be explained by lumbar spine disease but instead due to peroneal neuropathy possibly due to a Baker's cyst. Dr. Gulati recommended continued physical therapy and an ultrasound. *Id.* On August 9, 2011, an ultrasound of the left lower extremity was performed with normal results. PX7.

On September 6, 2011, at the recommendation of Dr. Patel, Petitioner commenced work hardening which continued through September 28, 2011. PX5. At the completion of work hardening, Petitioner underwent an FCE which placed Petitioner at Very Heavy Physical Demand Level which exceeded his requirements as a welder. *Id.* Petitioner returned to work in his full-duty capacity for Respondent.

Petitioner testified he continued to experience pain following his return to work. T. 33. On October 24, 2011, Dr. Gulati evaluated Petitioner who complained of continued left foot pain. PX7. Dr. Gulati recommended a consultation with a podiatrist. On November 13, 2011, Dr. George, a podiatrist, evaluated Petitioner; diagnosed peroneal neuropathy; and recommended bracing and physical therapy. PX8. Thereafter, Petitioner sought no treatment for several months (while continuing to work full duty) until he again consulted with Dr. Gulati. On February 2, 2012, Dr. Gulati re-evaluated Petitioner who complained of intermittent back pain with consistent pain radiating into his left foot. Dr. Gulati reviewed Petitioner's diagnostic tests-MRI, CT scan, and EMG which revealed no evidence of radiculopathy as a cause of his continuing symptoms. PX7. Dr. Gulati recommended a CT scan of Petitioner's abdomen/pelvis to rule out abdominal pathology. *Id.*

On February 21, 2012, Petitioner sought treatment from Dr. Templin. Dr. Templin reviewed the MRI and diagnosed L5 radiculitis and recommended a repeat MRI and selective nerve root block (SNRB). PX9. On March 12, 2012, an MRI was performed evidencing a disc

bulge at L4-L5. PX10. On May 10, 2012, Dr. Patel performed a SNRB, and based on the positive results, Dr. Templin performed surgery on September 12, 2012 consisting of a laminectomy at L4-L5. PX9. Following a short course of physical therapy, Petitioner returned to work without restrictions on November 5, 2012. *Id.*

On August 22, 2014, Dr. Templin testified via evidence deposition. PX12. Dr. Templin testified Petitioner's lifting at work caused a disc protrusion aggravating Petitioner's nerve. PX12, p. 16.

In the interim, Dr. Ghanayem evaluated Petitioner on October 20, 2011 pursuant to Section of the Act at Respondent's request. On November 11, 2014, Dr. Ghanayem testified via evidence deposition. RX1. Dr. Ghanayem testified he performed a physical examination which was normal. RX1, p.11. Dr. Ghanayem opined he "saw no evidence of a surgical issue based on the diagnostic study results and [Petitioner's] clinical exam." *Id.* Dr. Ghanayem went on to explain whatever the inciting cause- lifting at work; planting tomatoes; or placing his socks on, Petitioner's medical condition did not require surgical intervention. RX1, p. 19.

I afford greater weight to the opinions of Dr. Ghanayem over those of Dr. Templin. I find Dr. Ghanayem's opinions to be completely consistent with Petitioner's medical treatment and diagnostic studies. Petitioner underwent a course of conservative treatment which included many months of physical therapy and three ESIs. Following the completion of his treatment, Petitioner underwent work hardening culminating in an FCE which placed Petitioner at a Very Heavy Physical Demand Level. None of the diagnostic studies revealed stenosis nor nerve compression. In fact, the EMG ruled out radiculopathy instead finding peroneal neuropathy. More importantly, Dr. Templin testified he was unable to confirm a herniated disc and, therefore, performed no surgical intervention as to the disc. PX12, p. 22.

Consistent with Dr. Ghanayem's opinion, I find Petitioner reached MMI as September 29, 2011. I find no benefits, temporary or medical, owing thereafter. I find Petitioner entitled to permanent disability to the extent of 5% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

For the above-stated reasons, I respectfully dissent.

DATED: DEC 4 - 2020

L. Elizabeth Coppoletti

LEC/mck

D: 10/7/2020

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OCHOA, VICTOR
Employee/Petitioner

Case# **11WC025718**

13WC004760
15WC021100

RAILWAY & INDUSTRIAL SERVICES INC
Employer/Respondent

20IWCC0705

On 10/17/2018, 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 2.41% 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:

4595 WHITESIDE & GOLDBERG LTD
DAVID H LATARSKI
155 N MICHIGAN AVE SUITE 540
CHICAGO, IL 60601

0560 WIEDNER & McAULIFFE LTD
BROOKE E TORRENGA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Victor Ochoa
Employee/Petitioner
v.

Case # 11 WC 25718

Consolidated cases: 13 WC 4760
15 WC 21100

Railway & Industrial Services, Inc.
Employer/Respondent

20IWCC0705

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Barbara N. Flores, Arbitrator of the Commission, in the city of Ottawa, on August 24, 2018 and proofs were closed on September 17, 2018. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On May 6, 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 as explained *infra*.

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

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

In the year preceding the injury, Petitioner earned $41,288.00; the average weekly wage was $794.00.

On the date of accident, Petitioner was 47 years of age, *married* with 1 dependent child.

Petitioner *has* received all reasonable and necessary medical services as explained *infra*.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services as explained *infra*.

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 $0 under Section 8(j) of the Act.

ORDER

Accident & Causal Connection

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established that he sustained a compensable injury at work involving the lumbar spine as well as a causal connection between his condition of ill-being and accident.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $529.33/week for 29 & 2/7th weeks, commencing May 9, 2011 through September 29, 2011 and September 12, 2012 through November 5, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from May 6, 2011 through September 17, 2018, and shall pay the remainder of the award, if any, in weekly payments.

Medical Benefits

As explained in the Arbitration Decision Addendum, Respondent shall pay reasonable and necessary medical services as reflected in Petitioner's Exhibits for medical bills totaling $136,926.84 that remain unpaid pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also 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.

Permanent Partial Disability

As explained in the Arbitration Decision Addendum, Respondent shall pay Petitioner permanent partial disability benefits of $476.40/week for 87.5 weeks, because the injuries sustained caused the 17.5% loss of use of person as a whole (lumbar spine), as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

October 10, 2018
Date

OCT 17 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Victor Ochoa
Employee/Petitioner

v.

Case # **11** WC **25718**

Consolidated cases: **13** WC **4760**
15 WC **21100**

Railway & Industrial Services, Inc.
Employer/Respondent

FINDINGS OF FACT

A consolidated hearing was held in the above-captioned cases. The issues in dispute in this case include accident, causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to a period of temporary total disability benefits commencing on commencing May 9, 2011 through September 29, 2011 and September 12, 2012 through November 5, 2012, and the nature and extent of the injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1. The issues in dispute related to Petitioner's November 29, 2012 and March 1, 2014 claimed injuries are addressed in the concurrent decisions issued in Case Nos. 13 WC 4760 and 15 WC 21100. *See also* AX2-AX3.

Background

Victor Ochoa (Petitioner) testified[2] that he worked for Railway & Industrial Services, Inc. (Respondent) as a Welder on all three alleged dates of accident. He explained that he has been employed by Respondent, a company that fixes train cars, for approximately 30 years.

Accident

On May 6, 2011, Petitioner testified that he worked from 7:00 a.m. to 3:30 p.m. Petitioner explained that he was working on a lock adjuster, which makes the brakes on a train car work on the rails. While trying to lift a heavy piece of metal up to put in the pin Petitioner testified that he felt pain in his back. He described a sharp pain like a needle pinched him in his back. Petitioner testified that the lower part weighs about 50 pounds, but it has to be lifted with other metal pieces to put in the pin.

Petitioner testified that his partner, Federico Navarrette, was working elsewhere about 300 feet away from him at the time of the injury. Later that day Petitioner testified that he told co-workers Opominar Guzman and Marciano Patino about the incident. Petitioner testified that Opominar saw him limping and asked him what happened. Petitioner finished up the rest of his day, but did not mention the injury to his supervisor. Petitioner testified that he did not immediately report his pain because he thought it would pass.

The next day, Saturday, Petitioner explained that he did not do anything major; a little gardening planting tomato plants with his girls. Sunday was Mother's Day, so he went to dinner, but still felt the pain in his low back. The following Monday Petitioner testified that he intended to go to work, but instead went to the hospital.

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

[2] Petitioner testified through an interpreter at the hearing.

Petitioner made calls to his supervisor, Fernando Cisneros, from 11:00 a.m. until 5:00 p.m. when he picked up his phone. Petitioner explained what happened on Friday and asked for a week vacation, but was told by Mr. Cisneros not to take it, that this was a "worker's comp."

Medical Treatment

On Monday, May 9, 2011, Petitioner presented to Provena St. Joseph Medical Center emergency department. He gave a history that provides the following in pertinent part:

> The patient presents with pain in the area of the lower back that began approximately 3 days prior to arrival lasting up until now. He states the pain has become much worse since this morning as he was preparing himself to get ready for work. It is unknown how the injury occurred. The patient recalls no specific reason for the pain. There is no history of heavy lifting. ... The patient has no prior history of back pain. The patient has no prior history of surgery for this condition.

Petitioner reported severe leg pain on the left side radiating from the left lumbar spine. The emergency room physician, Dr. Paula Green, made a differential diagnosis of degenerative disc disease, herniated disc, back strain, scoliosis, and/or vertebral fracture. Petitioner was admitted to the hospital due to his complaints and a lumbar CT was obtained showing mild lumbar spondylosis throughout the lumbar spine.

On May 10, 2011, Petitioner was evaluated by Dr. Kishor Ajmere who noted the following in pertinent part:

> This 48-year-old-gentleman presented who presented to the emergency room with severe pain in the left lumbar region radiating to the left leg. It started about 2 days ago while he was working. The pain was mild to start with and subsequently became severe this morning. He started getting ready to go to work. He could not move and he had severe chest muscle spasm in the left side of the back, also the pain was radiating to left buttock. ... does not remember acute injury at work but he works as a welder and he has to lift some heavy objects at work. In the emergency room it was noted that patient has acute pain. ... Apparently patient has some lumbar radiculitis causing him severe pain.

Dr. Ajmere diagnosed Petitioner with acute lumbar radiculitis secondary to lumbar disc disease.

Recorded Statement – Mr. Cisneros

On May 10, 2011, Fernando Cisneros provided a recorded statement relating to the May 6, 2011 accident. RX4. He stated that Petitioner did not present to work the previous day. *Id.* He was not aware of the reason until Petitioner called him at 5:00 p.m. on May 9, 2011. *Id.* Mr. Cisneros stated that Petitioner requested a whole week of vacation and that he called into the office[3] on May 9, 2011 asking for a vacation day. *Id.* Mr. Cisneros further stated that Petitioner described that "[h]e say he got a little bit of pain on his back like when you pinch yourself with a needle. It wasn't that bad, so that way he told nothing. He don't want to make a big issue over that because he say he feels fine, just minor pain on his back." *Id.*

Continued Medical Treatment

Petitioner followed up with Dr. Ajmere on May 14, 2011 and a lumbar MRI was ordered. The MRI was completed on May 20, 2011, and revealed degenerative changes throughout the lumbar spine with disc

[3] The individual or individuals that received Petitioner's call on Monday morning in Respondent's office did not testify at the hearing.

dehydration and degenerative changes primarily from L3-4 through L5-S1, mild bilateral foraminal narrowing at L4-5 without significant spinal stenosis. Dr. Ajmere placed Petitioner off work until the 21st for lumbar radiculitis and referred him to ATI for physical therapy. Dr. Ajmere kept Petitioner off work at least through August 8, 2011 while engaged in physical therapy.

Recorded Statement – Petitioner

On May 19, 2011, Petitioner provided a recorded statement on May 19, 2011 relating to the May 6, 2011 accident. RX3. When asked to describe the accident, Petitioner stated "[w]ell, it wasn't really like an accident. I was loading [some parts for] a truck and I was bending over and I felt like something sharp in the back, I mentioned it to the manager. But it wasn't anything out of the ordinary. It happens often." *Id.* He estimated that the parts were not heavy, weighing around 50 pounds, more or less. *Id.* When asked whether he was lifting the part or putting it together, Petitioner stated "[n]o, I was putting it together. I was putting them together before lifting them. It was then, when I was putting them together that I felt that. I was able to stand up. I didn't feel anything out of the ordinary." *Id.* When asked how he felt during the rest of the day, Petitioner stated "[n]o, the rest of the day I felt fine, except that I was going to put another iron piece, one that was heavier, and I asked a coworker there, a fellow by the name of Federico Navarrete, to help me with the last piece that was going to be the last one on the truck. I asked him because the next iron was heavier. I was being very careful with my back because I had an accident in 82." *Id.* On further inquiry regarding any prior injuries, Petitioner stated that he has had a problem in the same place in the back. *Id.* However, "[i]n the past if I felt these yanks, the pain might last for a week or two and then it goes away, but not this time. On Saturday I kept doing my own thing but the cramp continued to be there. This time I did not feel that strong a cramp, but continued to be there. On the next day, getting ready for work – I already had my lunch prepared and everything, I bent over to put my sock on, and when I lifted my leg to put my sock on that when the sharp pain down my leg came." *Id.* Petitioner described the pain as "very sharp" and it went all the way down past his knee down to his toes such that he could no longer move his foot or leg. *Id.* Petitioner then stated that he "call them and told them I could not move my leg and would not be able to do the work. There is no way I can go with that pain. They ask me to come so they could take me to the emergency room at the hospital in a wheelchair." *Id.*

Continued Medical Treatment

On June 13, 2011, Petitioner saw Dr. Udit Patel for pain management complaining of back and left leg pain radiating into the foot. He noted the following in pertinent part:

> ... This is an acute episode with no prior history of back pain. He states that the current episode of pain started after the injury, dated 5/6/11. The event which precipitated this pain was he was putting together some metal pieces. He was bent forward then tried to get up and notes increased low back pain.. Patient noted he felt increase pain on 5/9/11 and ended up in ER of St. Joseph hospital. ....

Petitioner reported that this is the first time that he felt left lower extremity symptoms. Dr. Patel diagnosed Petitioner with lumbar radiculopathy and low back pain. He also recommended and administered a series of L5-S1 epidural injections over the next three months. A lower extremity EMG was completed on July 18, 2011 and was negative for acute or chronic lumbosacral radiculopathy in the left lower extremity, although there was evidence of a distal deep peroneal neuropathy in the left lower extremity.

On referral from Dr. Ajmere, Petitioner then saw neurologist Dr. Surendra Gulati on August 17, 2011 noting the following in pertinent part:

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> [Petitioner] was at work on 5-6-2011, attempting to lift a piece of steel to in-sert a pin when he noticed immediate pinching sensation in the left lower back. He was able to continue working though he had discomfort "like a strain". By that night low back pain was much worse. He used ice and he could not move by 5-9-2011 because of severe low back pain and left leg pain. Over the past three months, he has improved low back pain. He received three lumbar epidur-al injections of steroids. Low back is now much improved since the last in-jection with very little pain. Left leg symptoms are intermittent and occur in certain positions, from lower back, down the left leg to the calf and a feel ing of numbness on top of the left foot distally, lateral three toes and adjoin ing portion of the sole of the foot and some discomfort in the anterior part of the ankle. Left leg symptoms are not constant, often positional, made worse by activity.

Dr. Gulati conducted an EMG noting no convincing electrical evidence for acute or chronic lumbosacral radiculopathy in the left lower extremity, no definite evidence for generalized neuropathy, and no evidence for myopathy. However, Dr. Gulati found evidence for a distal deep peroneal neuropathy in the left lower extremity with evidence of denervation activity seen in the extensor digitorum brevis muscle. Dr. Gulati felt there was no clinical evidence for myelopathy or lumbosacral radiculopathy, and he recommended an ultrasound of the left popliteal fossa to rule out underlying causes for Petitioner's symptoms.

Petitioner continued with physical therapy and progressed to work conditioning. On September 16, 2011, Dr. Patel recommended Petitioner complete work conditioning and a functional capacity evaluation. He released Petitioner to return as needed. On September 29, 2011, Petitioner underwent the recommended functional capacity evaluation at ATI, which was valid and released him back to work at the very heavy physical demand level.

Petitioner next presented to Dr. Joe George at MK Orthopaedics on November 3, 2011, complaining of right foot pain. He was diagnosed with peroneal neuropathy of the right ankle.

Petitioner sought no further treatment for his back until February 7, 2012, when he returned to Dr. Gulati. Petitioner noted continued lower back pain radiating into the left foot. Dr. Gulati reiterated that MRI findings were minimal and an EMG showed no evidence of neuropathy or lumbosacral radiculopathy. He felt there were no significant findings on MRI or examination to suggest a cause for continuing symptoms. Dr. Gulati recommended a consult with podiatry for possible plantar fasciitis and a CT scan of the abdomen and pelvis to rule out abdominal pathology that could explain the left leg symptoms.

On February 21, 2012, Petitioner presented to Dr. Cary Templin at Hinsdale Orthopedics who noted the following in pertinent part:

> [Petitioner] is a very pleasant, 49-year-old gentleman, who works as a welder for the railroad, I believe. He is here today for evaluation of a injury which occurred at work on May 6, 2011. He notes that on the day of the injury he was bending and twisting and lifting a lock adjustor which weighed about 50 pounds. At that time, when he was bent over to the left and looking around his leg to see what he was doing. He noted severe onset of pain in the back, extending into the left buttock and leg. He has has extensive treatment including multiple weeks of physical therapy and work conditioning. He has had epidural inhections by Dr. Patel at the Pain and Spine Institute, noted initially relief with that, went on have an IME and was returned to work at full duty, and he has been working full duty since that time, and been able to do so, but having continued pain -> across his back and into the left leg. Pain diagram shows pain extending into the left buttock with burning pain down the leg into the dorsum of the foot, as well as to

the plantar surface of the foot. He rates his pain as 5/10. He has had an MRI scan back on May 20, 2011, and presents with that for my evaluation.

Dr. Templin reviewed Petitioner's MRI finding some abnormality to the left L5 nerve root on the sagittal T1 cut just through a lateral recess and inferior to the disk space, but it was difficult to determine whether there was an inflamed and dilated nerve root. He also noted that there was some abnormality compared to the contralateral side on the axial cuts. Dr. Templin took steps to call the radiologist. According to Dr. Templin, the radiologist did not note any conjoined or inflamed nerve root in his report, but verbally agreed with him that either of the foregoing could be causing Petitioner's symptoms. Dr. Templin diagnosed Petitioner with symptoms consistent with L5 radiculitis.

On March 12, 2012, Petitioner underwent the updated lumbar MRI, which was not compared with the prior MRI study. Dr. Templin reviewed the updated MRI on April 9, 2012, noting left lateral recess narrowing at L4-5 with no evidence of foraminal stenosis at L5-S1 and, overall, mild degenerative changes most prominently at L4-L5 with a diffuse disc bulge with facet arthropathy.

Dr. Templin ordered selective nerve root blocks on the left L5 nerve root. Petitioner underwent the L5 injection with Dr. Patel on April 30, 2012. Based on what he interpreted as a positive response to the nerve block, Dr. Templin recommended surgery.

On September 12, 2012, Dr. Templin diagnosed Petitioner with left L4-L5 spinal stenosis pre- and post-operatively. He performed a left L4-L5 laminectomy at Silver Cross Hospital. Post-operatively, Petitioner returned to Dr. Templin for follow up care. Dr. Templin released Petitioner to work without restrictions as of November 5, 2012, and discharged him from care on November 26, 2012.

Deposition Testimony – Dr. Templin

Petitioner called Dr. Templin as a witness and he gave testimony at an evidence deposition taken on August 22, 2014. PX12. As to causal connection, he testified that Petitioner had "a mechanism of bending, lifting and twisting about 50 pounds" which he felt would be consistent with an injury of the nature he observed. PX12 at 16. He was not aware of any other episodes Petitioner had involving his back, was not aware Petitioner characterized the incident at work as resulting in a slight cramp in his back, and was not aware of Petitioner experiencing increased pain down his leg the following Monday while getting ready for work. PX12 at 16, 18. Dr. Templin did not confirm the disc, but did confirm the inflamed nerve. PX12 at 22. He was aware that Petitioner was gardening over the weekend and disagreed that the instigating factor was when Petitioner was putting on his socks before work. PX12 at 19-23. Dr. Templin concluded that the incident on May 6, 2011 caused the disc protrusion for which Petitioner ultimately underwent surgery, noting that this was based on the history provided to him of back pain extending into the right buttock while lifting, bending, and twisting. PX12 at 25. Dr. Templin did not suspect that Petitioner was not untruthful in his report of mechanism on May 6, 2011. *Id.*

Section 12 Examination & Report – Dr. Ghanayem

Dr. Alexander Ghanayem evaluated Petitioner on October 20, 2011 at the request of Respondent, and his deposition was completed on November 26, 2014. RX1 at 5. Dr. Ghanayem noted no nerve compression or spinal stenosis on Petitioner's lumbar CT and MRI, and that the findings on the EMG suggested a peripheral nerve issue and not a spine problem. RX1 at 7, 9-10. On examination he noted normal range of motion, normal

neurologic examination, normal motor, sensory and reflex functions, and negative straight leg raise. RX1 at 11. He evaluated Petitioner approximately one year before he had surgery and saw no evidence of a surgical issue based on his examination and review of the medical. *Id.* With the understanding that Petitioner had undergone a valid FCE and returned to full duty heavy work between the time of his evaluation and his surgery, Dr. Ghanayem opined that the alleged work accident was not in any way related to his surgery. RX1 at 18-19. On cross-examination, Dr. Ghanayem acknowledged that he did not review the actual films, but rather relied on the reports instead. RX1 at 22.

Glenn Dian

Respondent called Glenn Dian (Mr. Dian) as a witness. He testified that he is employed by Respondent as the Director of Finance and Human Resources and has been so employed for a little over five years. In this position, Mr. Dian is responsible, in part, for administering policies regarding reporting and documenting work injuries. He explained that when Respondent hires an employee, that person is informed that any injury, no matter how big or small, is to be reported immediately to their supervisor. Mr. Dian testified that in addition to new employee training, there are also safety meetings every Monday morning and employees are reminded of this policy several times during the year. He explained that the new employee packet also states that employees need to report any injuries, even if they do not think they need to go to a clinic, to their supervisor or the safety manager. Employees are informed that reporting injuries to another employee will not be sufficient per Respondent's policy.

Mr. Dian also testified that when employees are given work restrictions, they should convey those restrictions to the front office. He will get a copy of the restrictions and also make a copy for the supervisor, the safety manager and the plant superintendent to let them know the employee's restrictions so that they can be followed. Mr. Dian testified that if an injured worker feels that their restrictions are not being accommodated, they can go to him, the safety manager, the direct supervisor, or the union steward as a last resort. He explained that this is something that Respondent takes very seriously and, in Petitioner's case, he feels that he's made all efforts to accommodate Petitioner's restrictions. When Petitioner has come to him with issues regarding his restrictions, he has rectified them with Petitioner's supervisor.

Mr. Dian testified that he recently offered Petitioner a new accommodated position as a janitor after a janitor recently retired. He outlined the duties and Petitioner's supervisor and the safety manager asked Petitioner to review and sign it. *See* RX26. Petitioner indicated that he wanted to run that past his lawyer before he signed it and, to date, he has yet to return the form so at this point he's not working as a janitor. Petitioner is currently working in the paint shop picking up some things on the premises performing duties that will keep him within his restrictions. Mr. Dian testified that when Petitioner first came in his restrictions were basically one line and then he could come back and say I cannot do this job to which he responded that he is not a doctor and he directed Petitioner back to your doctor and modify those restrictions, and he did that a few times.

On cross-examination, Mr. Dian testified that the janitor position does not involve lifting objects that are heavier than 50 pounds in most cases, but when it is required Respondent would have someone without restrictions perform that activity. He also testified that every time they have a supervisors meeting, the supervisors are told to make sure that they're aware of everything that is going on out there and make sure they are reporting injuries in a timely fashion.

Fernando Cisneros

Respondent called Fernando Cisneros (Mr. Cisneros) as a witness. He testified that he is employed by Respondent as a Supervisor, and he has been so employed since approximately 2010. Mr. Cisneros has been employed by Respondent for 19 years and he was Petitioner's supervisor on May 6, 2011.

Mr. Cisneros explained that he saw Petitioner pretty much all day on May 6, 2011, and last saw him around 3:15 p.m. rolling his stuff and all of the tools that he does to do the car repairs. He classified this type of work to be at the medium physical demand level, although there is other work that is heavier. Mr. Cisneros testified that he observed Petitioner throughout the day and Petitioner did not appear to be in distress or have any difficulty performing his activities. He gave Petitioner his paycheck on that day at about 3:15 p.m. and he did not mention anything about an injury, he was not limping, and he did not appear to be in any pain.

On Monday, Mr. Cisneros testified that Petitioner did not show up for work. To his knowledge, Petitioner did not attempt to call him or leave him any messages, but he did eventually speak with Petitioner at around 5:00 p.m. on Monday, May 9, 2011. Mr. Cisneros testified that Petitioner was asking for some vacation time, he believed, because Petitioner tried to call the office and he was not sure if they got the message or something. Mr. Cisneros did not recall all the details on what they discussed. However, Mr. Cisneros testified that Petitioner told him that on Friday he got a little like a kink on his back. He testified that Petitioner described it in Spanish, which is a little bit hard to translate sometimes; but the way he explained to Mr. Cisneros was like he got like a needle pinching on his back.

Mr. Cisneros prepared an Accident Investigation Report that included all information he had from Petitioner at that point. Mr. Cisneros also provided a recorded statement, which was based on all the information he had from Petitioner. Mr. Cisneros testified that Javier Navarrette also provided a statement and he was a translator for him.

Mr. Cisneros denied telling Petitioner on Monday, May 9, 2011 that he had to take workers' compensation leave. He explained that he told Petitioner that he needed to talk to his supervisor. Mr. Cisneros did not recall whether Petitioner told him that he was in the hospital, or he was seeking medical attention. He also testified that Respondent's report of injury policy required him to document the injury pretty much right away, but first offer medical attention or take them to the hospital if needed. Mr. Cisneros testified that Don Patton is one of his direct superiors.

On cross-examination, Mr. Cisneros testified that he did not conduct follow-up for three days about how Petitioner was injured because Petitioner was not at work so he could not ask questions about what exactly happened. *See* RX8.

Donald Patton

Respondent called Donald Patton (Mr. Patton) as a witness. He testified that he is employed by Respondent as the Director of Operations. On May 9, 2011, Mr. Patton received a call sometime in the morning from Petitioner's wife. She called to ask if her husband could get a vacation day that day and said that he could not come to work for personal reasons. Mr. Patton testified that Petitioner's wife did not tell him that Petitioner sustained an injury at work. He documented his conversation in an email. RX5. Petitioner's wife was subpoenaed to testify at the hearing, but did not appear. RX10.

Additional Information

Petitioner was released back to work with permanent restrictions. He explained that he was not to use his right hand above shoulder level when working and not to do heavy lifting. Petitioner testified that he continues to see Dr. Patel once per month. He continues to take medication including muscle relaxers and patches.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

In support of the Arbitrator's decision relating to Issues (C) and (D), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent as claimed and the date of such accident, the Arbitrator finds the following:

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (LEXIS 2010). The "in the course of employment" element refers to "[i]njuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work...." *Metropolitan Water Reclamation District of Greater Chicago v. IWCC*, 407 Ill. App. 3d 1010, 1013-14 (1st Dist. 2011). Additionally, Petitioner must establish the "'arising out of' component [which] refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Metropolitan Water Reclamation District*, 407 Ill. App. 3d at 1013-14 (*citing Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989)). A claimant must prove both elements were present (i.e., that an injury arose out of and occurred in the course of his employment) to establish that his injury is compensable. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006).

At the hearing, Petitioner described the mechanism of injury on May 6, 2011 to involve lifting or putting together a metal lock adjuster for a train car at which time he felt a sharp pain "like a needle" in his low back. He testified that he did not immediately report this to his supervisor because he thought his symptoms would pass. The foregoing is consistent with Petitioner's minor low back injuries in the past, none of which required surgery and were minor enough to resolve with conservative care.

The medical records also corroborate Petitioner's testimony about the mechanism of injury, specifically his characterization that it was a minimal event until the following Monday morning. The emergency room physician noted that Petitioner presented with low back pain that began approximately three days prior, which became much worse that morning as he was getting ready for work. The physician noted that "[i]t is unknown how the injury occurred. The patient recalls no specific reason for the pain. There is no history of heavy lifting...." The foregoing is consistent with Petitioner's testimony at the hearing as well as his recorded statement that he did not consider moving parts weighing about 50 pounds to be heavy and his minimization of the pain, which he had experienced occasionally in the course of his work for Respondent over many years. Petitioner then presented to Dr. Ajmere the following day. He noted that Petitioner experienced severe pain in the left lumbar region radiating to the left leg on Monday. Dr. Ajmere specifically noted Petitioner's report that his "pain was mild to start with and subsequently became severe" when he started getting ready to go to work.

Respondent obtained a recorded statement[4] from Petitioner on May 19, 2011 in which he gave a similar description of the mechanism and onset of symptoms. Namely, that he was bent over loading or working with metal parts when he felt something sharp in his back. Petitioner estimated that the parts weighed around 50 pounds, which he did not believe were heavy, and he described that this incident was nothing out of the ordinary. When preparing to return to work the following work day, he felt a sharp pain going down his leg to his toes while putting on his sock.

Petitioner's characterization of a minimal and not unusual incident at work causing a pinch, twinge, or needle-like pain in his back is consistent with the recorded statement as well as the recorded statement of his supervisor, Mr. Cisneros. Petitioner was employed by Respondent for 30 years performing heavy work. During his employment, he acknowledged that he had sustained minor injuries at work involving his low back, but none required significant medical treatment or any surgical recommendation. No evidence was provided to the contrary.

Overall, the medical records and other evidence submitted at the hearing corroborate Petitioner's description of the mechanism of injury, the initial onset of symptoms, and the increase in pain and onset of radiculopathy within 72 hours. The discrepancies in Petitioner's description noted in medical records and his recorded statement are *de minimus*, particularly given that Petitioner's recitation of events to each medical provider and in his recorded statement were made in limited English or translated from Spanish by interpreters whose qualifications are unknown. Moreover, the understanding of Petitioner's supervisor, Mr. Cisneros, of the onset of symptoms and mechanism of injury generally corroborate Petitioner's testimony. Thus, the Arbitrator finds Petitioner's testimony to be credible.

Based on the foregoing, the Arbitrator finds that an accident occurred that arose out of and in the course of Petitioner's employment with Respondent on May 6, 2011 as claimed.

In support of the Arbitrator's decision relating to Issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

In consideration of the record as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident at work on May 6, 2011. Petitioner credibly testified about his injury and presented a consistent sequence of events corroborated by contemporaneous medical records reflecting that he sustained an injury the symptoms of which escalated and necessitated extensive medical treatment after his accident.

Additionally, two physicians also provided opinions regarding the relatedness of Petitioner's lumbar spine condition, if any, to the accident at work. Dr. Ghanayem opined that Petitioner's lumbar spine condition was unrelated to any accident at work. After an examination on October 20, 2011, Dr. Ghanayem noted no nerve compression or spinal stenosis on Petitioner's lumbar CT or MRI and found that his EMG suggested a peripheral nerve issue and not a spine problem. Dr. Ghanayem did not have the opportunity to review the actual films from these diagnostic tests and relied on the radiologist's reports. In contrast, Dr. Templin[5] understood a

[4] It is unclear from the recorded statement whether Petitioner made his statements in English or if they were translated from Spanish and, if so, by whom.

[5] Dr. Templin noted a conversation in which he asserts that a radiologist agreed with his own interpretation of Petitioner's films, which the original radiologist interpreting the films did not note in his report. Given that the original interpreting radiologist did not note any such findings in his report or any addendum, the Arbitrator accords no additional weight to Dr. Templin's opinions based on this conversation.

similar mechanism of injury to that described by Petitioner at the hearing which is generally corroborated by other, more contemporaneous, medical records from the emergency room and Dr. Ajmere. Specifically, he understood Petitioner to have sustained an injury to the low back involving "bending, lifting and twisting about 50 pounds." Dr. Templin opined that this mechanism of injury would be consistent with Petitioner's lumbar spine condition. Thus, the Arbitrator does not rely on the opinions of Dr. Ghanayem in this case.

Based on the foregoing, the Arbitrator finds Petitioner's current condition of ill being is causally related to the accident at work on May 6, 2011 as claimed.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (*citing University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (1st Dist. 2001).

As explained more fully above, the Arbitrator finds that Petitioner sustained a compensable accident and a causal connection between his condition of ill-being and injury at work. The medical bills submitted into evidence related to Petitioner's spine are for reasonable and necessary medical care to alleviate him of the effects of his injury at work. Thus, Respondent shall pay reasonable and necessary medical services of $136,926.84, reduced pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also 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.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits and temporary partial disability benefits, the Arbitrator finds the following:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003).

Petitioner testified that he was restricted from working full duty by his physician during the claimed temporary total disability period. The medical records corroborate Petitioner's testimony. Thus, the Arbitrator finds that Petitioner has established that he is entitled to temporary total disability benefits as claimed.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of the injury, the Arbitrator finds the following:

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011. Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at the hearing, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to Subsection i of Section 8.1b (b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gave this factor no weight.

With regard to Subsection (ii) of Section 8.1b (b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a Welder for 30 years with some years of anticipated employment ahead of him. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (iii) of Section 8.1b (b), the Arbitrator notes the parties' stipulation that Petitioner was 47 years old at the time of accident. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (iv) of Section 8.1b (b), the Petitioner's future earning capacity, the Arbitrator notes that no evidence was proffered regarding any loss Petitioner's future earning capacity as a result of this injury. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (v) of Section 8.1b (b), evidence of disability corroborated by treating medical records, the Arbitrator notes that Petitioner has established that he sustained a lumbar injury resulting in low back pain and radicular symptoms requiring conservative treatment modalities and a left L4-L5 laminectomy surgery followed by post-operative care and with some continuing symptomatology. The Arbitrator therefore gives this factor greater weight.

Based on the above factors, and the totality of the record, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 17.5% loss of use of person as a whole (lumbar spine) pursuant to §8(d)2 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

VICTOR OCHOA,

Petitioner,

vs. NO: 13 WC 4760

RAILWAY & INDUSTRIAL SERVICES, INC. and SELF-INSURERS ADVISORY BOARD,

20IWCC0706

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to a timely Petition for Review filed by the Respondent herein. While the matter was pending on Review, Respondent Railway & Industrial Services, Inc. ceased business operations and the Self-Insurers Advisory Board, represented by the Illinois Attorney General, filed an appearance and assumed administration of the claim. Notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary disability, and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 17, 2018 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that a copy of this decision be provided to the Attorney General at AGWorkersCompChicago@atg.state.il.us.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $529.33 per week for a period of 6 weeks, representing April 13, 2013 through May 24, 2013, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $60,693.07 for reasonable and necessary medical expenses as provided in §8(a), subject to §8.2.

Petitioner who complained of knee discomfort with an increase upon pivoting the day prior. Dr. Papeliou continued the light-duty restrictions and recommended a consult. *Id.*

On January 17, 2013, Dr. Dorning evaluated Petitioner who again provided a history of injury to the knee when a rock was lodged in his knee pad. Dr. Dorning diagnosed bursitis and provided an injection. Dr. Dorning felt the possible meniscus tear was unrelated to Petitioner's work accident of kneeling. PX14.

Thereafter, Petitioner sought no treatment for several months until his consultation with Dr. Rhode on March 11, 2013. Petitioner provided a history of kneeling on a stone which caused a "sudden onset of pain and attempted to stand up and turned." PX15. This is the first mention of a twisting component to Petitioner's injury. Dr. Rhode eventually performed surgery on April 13, 2013 which revealed Petitioner's meniscus to be intact without any tearing. *Id.* Following a course of post-operative care, on February 3, 2014, Petitioner is placed at MMI with a release to heavy duty work and no kneeling greater than one hour at a time. PX15.

I find Petitioner failed to prove he injured his medial meniscus due to the accident of November 29, 2012. Petitioner testified at hearing, "I kneeled down and there was a rock. And this rock got into my knee protector, and I kneeled on it like that." T. 37. There is absolutely no testimony as to a twisting component to the injury. Petitioner seeks medical care throughout December of 2012 and January of 2013 and makes no mention of a twisting injury. It is not until March 11, 2013 almost three and half months post-accident that Petitioner provides a history of a twisting injury leading to the diagnosis of a meniscal tear. Even such, when surgery is ultimately performed by Dr. Rhode, Petitioner's meniscus is not torn but intact.

I find Petitioner's accident caused his bursitis in the left knee. I find Petitioner at MMI as of January 17, 2013. I find no benefits, temporary or medical, owing thereafter. I find Petitioner proved permanent disability to the extent of 5% loss use of the left leg pursuant to Section 8(e)12 of the Act.

For the above-stated reasons, I respectfully dissent.

L Elizabeth Coppoletti

DATED: DEC 4 - 2020

L. Elizabeth Coppoletti

LEC/mck

D: 10/7/2020

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Respondent shall be given a credit for medical expenses that have been paid, and Respondent shall hold Petitioner harmless from any claims by 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 $476.40 per week for a period of 43 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused the 20% loss of use of the left leg.

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.

Stephen Mathis

D. Douglas McCarthy

DISSENT

I respectfully dissent. I find Petitioner sustained an accident on November 29, 2012, and his condition of ill-being is related, in part, as to left knee bursitis. I find Petitioner not entitled to temporary total disability benefits and would vacate the award of the same. I find Petitioner reached maximum medical improvement (MMI) as of January 15, 2013. I find no medical expenses due and owing after the MMI date. I find Petitioner proved permanent partial disability to the extent of 5% loss of use of the left leg pursuant to Section 8(e)12 of the Act.

Petitioner injured his left knee on November 29, 2012 when he knelt, and a rock became lodged in his knee pad. T. 37. On November 30, 2012, Petitioner sought treatment with Dr. Sarcu and provided a consistent history of injury- "states he was unaware that a rock slipped into the knee pad and when he knelt down he felt a sharp pain." PX14. Dr. Sarcu referred Petitioner to Dr. Papeliou who initially evaluated Petitioner December 3, 2012. Petitioner again provided a history of kneeling on a rock and feeling a sharp pain. Dr. Papeliou diagnosed a contusion and recommended light duty. PX14.

Petitioner's complaints improved, but an MRI was performed on January 10, 2013 which evidenced a possible medial meniscus tear. PX14. On January 15, 2013, Dr. Papeliou evaluated

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OCHOA, VICTOR
Employee/Petitioner

Case# **13WC004760**

11WC025718
15WC021100

RAILWAY & INDUSTRIAL SERVICES INC
Employer/Respondent

20IWCC0706

On 10/17/2018, 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 2.41% 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:

4595 WHITESIDE & GOLDBERG LTD
DAVID H LATARSKI
155 N MICHIGAN AVE SUITE 540
CHICAGO, IL 60601

0560 WIEDNER & McAULIFFE LTD
BROOKE E TORRENGA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Victor Ochoa
Employee/Petitioner

v.

Case # **13** WC **4760**

Consolidated cases: **11** WC **25718**
15 WC **21100**

Railway & Industrial Services, Inc.
Employer/Respondent

20IWCC0706

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Barbara N. Flores, Arbitrator of the Commission, in the city of Ottawa, on August 24, 2018 and proofs were closed on September 17, 2018. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On November 29, 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 as explained *infra*.

In the year preceding the injury, Petitioner earned $41,288.00; the average weekly wage was $794.00.

On the date of accident, Petitioner was 49 years of age, *married* with 1 dependent child.

Petitioner *has* received all reasonable and necessary medical services as explained *infra*.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services as explained *infra*.

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 $0 under Section 8(j) of the Act.

ORDER

Causal Connection

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established a causal connection between his condition of ill-being and accident at work.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $529.33/week for 6 weeks, commencing April 13, 2013 through May 24, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 29, 2012 through September 17, 2018, and shall pay the remainder of the award, if any, in weekly payments.

Medical Benefits

As explained in the Arbitration Decision Addendum, Respondent shall pay reasonable and necessary medical services as reflected in Petitioner's Exhibits for medical bills totaling $60,693.07 that remain unpaid pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also 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.

Permanent Partial Disability

As explained in the Arbitration Decision Addendum, Respondent shall pay Petitioner permanent partial disability benefits of $476.40/week for 43 weeks, because the injuries sustained caused the 20% loss of use of left leg (knee), as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

October 10, 2018
Date

OCT 17 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Victor Ochoa
Employee/Petitioner

v.

Case # **13** WC **4760**

Consolidated cases: **11** WC **25718**
15 WC **21100**

Railway & Industrial Services, Inc.
Employer/Respondent

FINDINGS OF FACT

A consolidated hearing was held in the above-captioned cases. The issues in dispute in this case include causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to a period of temporary total disability benefits commencing on commencing April 13, 2013 through May 24, 2013, and the nature and extent of the injury. Arbitrator's Exhibit[1] ("AX") 2. The parties have stipulated to all other issues. AX2. The issues in dispute related to Petitioner's May 6, 2011 and March 1, 2014 claimed injuries are addressed in the concurrent decisions issued in Case Nos. 11 WC 25718 and 15 WC 21100. *See also* AX1, AX3.

Background

Victor Ochoa (Petitioner) testified[2] that he worked for Railway & Industrial Services, Inc. (Respondent) as a Welder on all three alleged dates of accident. He explained that he has been employed by Respondent, a company that fixes train cars, for approximately 30 years.

Accident

On November 29, 2012, Petitioner explained that he was working under a rail car that required him to crawl on his knees. *See* PX25 (rail car photograph). Petitioner testified that a rock got into his knee protector[3] and he kneeled on it. He reported the occurrence to his supervisor Jose Ochoa and finished work that day.

Medical Treatment

The following day, Respondent sent Petitioner to Meridian Medical Associates. PX14; RX2. The medical records reflect that Petitioner presented complaining of left leg/knee discomfort and swelling. *Id.* He reported that a rock slipped into his knee pad and when he knelt down he felt a very sharp pain. *Id.* The examining physician noted some swelling and tenderness and indicated that Petitioner would not be able to kneel for several days. *Id.* X-rays were obtained of this left knee and he was diagnosed with a knee contusion with swelling. *Id.* Petitioner was provided work restrictions not to kneel or bend his knee. *Id.*

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[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

[2] Petitioner testified through an interpreter at the hearing.

[3] Petitioner produced the knee guard provided by his employer which he was wearing and identified where a rock made its way under the protective guard.

Petitioner returned in December reporting some improvement, but continued pain. PX14; RX2. An MRI was ordered, which Petitioner underwent on January 20, 2013. *Id.* The interpreting radiologist noted a small joint effusion and Type II intrameniscal signal of the posterior horn of the medial meniscus suggesting combination of mucoid degeneration and possibly a small intrameniscal tear. *Id.*

In follow-up with Dr. Papaeliou on January 15, 2013, Petitioner was referred to Dr. Dorning for orthopedic consultation. PX14; RX2. Petitioner reported he had pivoted the day before and had increased discomfort in the knee. *Id.* On physical examination, Petitioner had pain over the medial joint line. *Id.* Dr. Dorning felt only the bursitis was related to the kneeling injury, stating that the meniscal tear seen on the MRI was not related. *Id.* He administered a left knee injection at that time. *Id.*

Petitioner testified that he was not able to follow up with Dr. Dorning and saw Dr. Alvi who referred him to Dr. Blair Rhode with Orland Park Orthopedic. PX15.

On March 11, 2013, Petitioner presented to Dr. Rhode reporting a consistent mechanism of injury when a stone became caught beneath his knee pad while he was crawling under a train. PX15. Dr. Rhode noted the following in pertinent part:

> ... He experienced sudden onset of pain and attempted to stand up and turned. He sustained a twisting injury to his left knee with sudden onset medial knee pain. He was initially evaluated and treated for a prepatellar bursitis for which he underwent an injection with minimal relief. He continues to experience anterior pain distal to his tibial tubercle as well as medical knee pain with locking and catching. He is underwent an MRI which demonstrates a tear of the posterior horn of the medial meniscus. ...

Id. Dr. Rhode diagnosed Petitioner with knee pain, a medial meniscal tear, pes anserinus bursitis, and prepatellar bursitis. *Id.* He believed that Petitioner experienced traumatic prepatellar bursitis with subsequent medial meniscus tear at work. *Id.* Dr. Rhode administered injections and released Petitioner to work at the medium physical demand level. *Id.*

On March 25, 2013, Petitioner reported improvement in his prepatellar symptoms, but continued medial symptoms. PX15. Dr. Rhode noted that conservative treatment had failed and recommended a partial medial meniscectomy. *Id.*

On April 13, 2013, Dr. Rhode performed surgery at South Chicago Surgical Solutions. PX17. Pre-operatively, he diagnosed Petitioner with a left knee medial meniscus tear. PX17. Dr. Rhode ultimately performed a left knee chondroplasty medial femoral condyle. *Id.* During the procedure the medial compartment revealed an intact medial meniscus, but inspection of the medial femoral condyle showed grade 3 condyle changes, which were debrided. *Id.* Post-operatively, Dr. Rhode diagnosed Petitioner with a grade 3 left knee chondral injury medial femoral condyle. *Id.*

Petitioner returned to Dr. Rhode for follow up care. PX15. As of April 22, 2013, Petitioner remained off work for 4-6 weeks of post-operative recovery. *Id.* He was then referred for physical therapy at ATI and continued off work until his follow up in four weeks. *Id.* On May 24, 2013, Dr. Rhode returned Petitioner to modified medium-heavy duty work with no ladders, squatting, kneeling or crawling. *Id.*

Petitioner continued to follow up with Dr. Rhode or his physician's assistant, Mark Bordick, P.A., through January 6, 2014. PX15. On that date, Mr. Bordick released Petitioner to heavy duty work with no kneeling over

one hour at a time. *Id.* The restriction was noted to be permanent. *Id.* On February 3, 2014, Dr. Rhode reiterated the permanent restriction, placed Petitioner at maximum medical improvement, and discharged him from care. *Id.* Dr. Rhode also noted that Petitioner may need future medication or injections to relieve pain. *Id.* Petitioner testified that Respondent is accommodating his restrictions.

Additional Information

Petitioner testified that he was released back to work with permanent restrictions. He explained that he was not to bend or kneel a lot on his left knee and that Respondent is accommodating the restrictions. Regarding his current condition of ill-being, Petitioner testified that sometimes his left knee still bothers him.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

In support of the Arbitrator's decision relating to Issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

In consideration of the record as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident at work on November 29, 2012. He testified about his injury and symptoms, which are corroborated by contemporaneous medical records. Petitioner sustained an injury to the left knee when he kneeled on a rock caught in his protective knee gear causing immediate pain and symptoms. He presented to Meridian as referred by Respondent and was referred to Dr. Dorning. He opined that only Petitioner's prepatellar bursitis was causally related to his injury at work. Petitioner then underwent care with Dr. Rhode. Petitioner's symptoms did not abate and he eventually underwent a left knee chondroplasty of the medial femoral condyle for a post-operative diagnosis of grade 3 left knee chondral injury of the medial femoral condyle. Notably, there is no evidence that Petitioner suffered from any prior left knee symptoms or underwent medical treatment to the left knee. Based on the foregoing, the Arbitrator finds that the medical evidence as a whole supports Dr. Rhode's determination that Petitioner's left knee symptoms were caused by the accident at work. Thus, the Arbitrator finds that Petitioner's current condition of ill being is causally related to the accident at work on November 29, 2012 as claimed.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (*citing University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (1st Dist. 2001).

As explained more fully above, the Arbitrator finds that Petitioner has established a causal connection between his condition of ill-being and injury at work. The medical bills submitted into evidence related to Petitioner's spine are for reasonable and necessary medical care to alleviate him of the effects of his injury at work. Thus, Respondent shall pay reasonable and necessary medical services of $60,693.07, reduced pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also 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.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits and temporary partial disability benefits, the Arbitrator finds the following:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003).

Petitioner testified that he was restricted from working full duty by his physician during the claimed temporary total disability period. The medical records corroborate Petitioner's testimony. Specifically, on April 13, 2013, Dr. Rhode took Petitioner off work prior to surgery through post-operative recovery until May 24, 2013 when he was returned to modified duty work. Thus, the Arbitrator finds that Petitioner has established that he is entitled to temporary total disability benefits as claimed.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of the injury, the Arbitrator finds the following:

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011. Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at the hearing, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to Subsection i of Section 8.1b (b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gave this factor no weight.

With regard to Subsection (ii) of Section 8.1b (b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a Welder for 30 years with some years of anticipated employment ahead of him. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (iii) of Section 8.1b (b), the Arbitrator notes the parties' stipulation that Petitioner was 49 years old at the time of accident. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (iv) of Section 8.1b (b), the Petitioner's future earning capacity, the Arbitrator notes that no evidence was proffered regarding any loss Petitioner's future earning capacity as a result of this injury. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (v) of Section8.1b (b), evidence of disability corroborated by treating medical records, the Arbitrator notes that Petitioner has established that he sustained a left knee injury resulting in extended conservative treatment followed by a left knee chondroplasty of the medial femoral condyle. He was diagnosed post-operatively with grade 3 left knee chondral injury of the medial femoral condyle. After additional physical therapy, Petitioner was ultimately released to work at the heavy physical demand level with permanent restrictions involving no kneeling over one hour, which Respondent is accommodating. Dr. Rhode also indicated that Petitioner might require future medication or injections to relieve pain, but no further treatment was rendered after his release to maximum medical improvement. Petitioner testified that he continues to experience occasional symptoms. The Arbitrator therefore gives this factor greater weight.

Based on the above factors, and the totality of the record, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 20% loss of use of left leg (knee) pursuant to §8(e) 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

VICTOR OCHOA,

Petitioner,

vs. NO: 15 WC 21100

RAILWAY & INDUSTRIAL SERVICES, INC. and
SELF-INSURERS ADVISORY BOARD,

Respondent.

20IWCC0707

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to a timely Petition for Review filed by the Respondent herein. While the matter was pending on Review, Respondent Railway & Industrial Services, Inc. ceased business operations and the Self-Insurers Advisory Board, represented by the Illinois Attorney General, filed an appearance and assumed administration of the claim. 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 October 17, 2018 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that a copy of this decision be provided to the Attorney General at AGWorkersCompChicago@atg.state.il.us.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $540.00 per week for a period of 49 6/7 weeks, representing June 11, 2014 through May 25, 2015, that being the stipulated period of temporary total incapacity for work under §8(b) of the Act. Respondent shall have a credit of $26,459.88 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses incurred for Petitioner's right shoulder treatment as

20IWCC0707

provided in §8(a), subject to §8.2. Respondent shall be given a credit for medical expenses that have been paid, and Respondent shall hold Petitioner harmless from any claims by providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act. Respondent is not liable for expenses incurred at Pain & Spine Institute, Medorizon, and Metro Health Solutions for treatment of Petitioner's neck/cervical spine or treatments non-certified per Utilization Review.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $486.00 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 25% loss of use of the person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: DEC 4 - 2020

L. Elizabeth Coppoletti

LEC/mck

D: 10/7/2020

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L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OCHOA, VICTOR
Employee/Petitioner

Case# **15WC021100**

11WC025718
13WC004760

RAILWAY & INDUSTRIAL SERVICES INC
Employer/Respondent

20IWCC0701

On 10/17/2018, 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 2.41% 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:

4595 WHITESIDE & GOLDBERG LTD
DAVID H LATARSKI
155 N MICHIGAN AVE SUITE 540
CHICAGO, IL 60601

0560 WIEDNER & McAULIFFE LTD
BROOKE E TORRENGA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

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

Victor Ochoa
Employee/Petitioner

v.

Case # **15** WC **21100**

Consolidated cases: **11** WC **25718**
13 WC **4760**

Railway & Industrial Services, Inc.
Employer/Respondent

20IWCC0707

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Barbara N. Flores, Arbitrator of the Commission, in the city of Ottawa, on August 24, 2018 and proofs were closed on September 17, 2018. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent
F. [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 March 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* causally related to the accident as explained *infra*.

In the year preceding the injury, Petitioner earned $42,120.00; the average weekly wage was $810.00.

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

Petitioner *has* received all reasonable and necessary medical services as explained *infra*.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services as explained *infra*.

Respondent shall be given a credit of $26,459.88 for TTD, $0 for TPD, $0 for maintenance, and $0, for other benefits, for a total credit of $26,459.88.

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

ORDER

Causal Connection

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established a causal connection between his condition of ill-being in the right shoulder and accident at work. Petitioner has failed to establish a causal connection between any cervical spine or neck condition and accident at work. By extension, any compensation and benefits claimed related to the cervical spine or neck are denied.

Temporary Total Disability

Per the parties' stipulation, Respondent shall pay Petitioner temporary total disability benefits of $540.00/week for 49 & 6/7th weeks, commencing June 11, 2014 through May 25, 2015, as provided in Section 8(b) of the Act. Respondent shall receive a credit for temporary total disability payments made in the amount of $26,459.88. *See* AX3.

Medical Benefits

As explained in the Arbitration Decision Addendum, Petitioner's claim for payment of medical expenses from Pain & Spine Institute, Medorizon, and Metro Health Solutions is denied as these relate to treatment for neck pain, cervical spine treatment, or treatments non-certified per Utilization Review.

Respondent shall pay the remaining reasonable and necessary medical services related to Petitioner's right shoulder treatment, reduced pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also 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.

Permanent Partial Disability

As explained in the Arbitration Decision Addendum, Respondent shall pay Petitioner permanent partial disability benefits of $486.00/week for 125 weeks, because the injuries sustained caused the 25% loss of use of person as a whole (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.

Signature of Arbitrator

October 10, 2018
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Victor Ochoa
Employee/Petitioner

v.

Case # **15** WC **21100**

Consolidated cases: **11** WC **25718**
13 WC **4760**

Railway & Industrial Services, Inc.
Employer/Respondent

FINDINGS OF FACT

A consolidated hearing was held in the above-captioned cases. The issues in dispute in this case include causal connection, Respondent's liability for certain unpaid medical bills, and the nature and extent of the injury. Arbitrator's Exhibit[1] ("AX") 3. The parties have stipulated to all other issues. AX3. The issues in dispute related to Petitioner's May 6, 2011 and November 29, 2012 claimed injuries are addressed in the concurrent decisions issued in Case Nos. 11 WC 25718 and 13 WC 4760. *See also* AX1-AX2.

Background

Victor Ochoa (Petitioner) testified[2] that he worked for Railway & Industrial Services, Inc. (Respondent) as a Welder on all three alleged dates of accident. He explained that he has been employed by Respondent, a company that fixes train cars, for approximately 30 years.

Accident & Medical Treatment

On March 1, 2014, Petitioner explained that he injured his right shoulder at work. The accident is not in dispute. AX3. The medical records reflect that

The medical records of Meridian Medical Associates reflect that Petitioner presented on March 3, 2013. PX14. He reported right knee and shoulder pain stating that he and a coworker were carrying a long piece of plywood and his coworker dropped his end which then hit him in the right shoulder and knee. *Id.* An x-ray revealed minimal arthrosis of the right AC joint. *Id.*

Petitioner returned to Meridian and saw Dr. Papaeliou on March 17, 2014. PX14. He noted a positive supraspinatus test and speed test and diagnosed Petitioner with a right shoulder strain, restricted him not to use his right hand and not to lift more than five pounds, and ordered him to begin physical therapy three times a week for two weeks. *Id.*

Petitioner continued physical therapy at Meridian through April 7, 2014 when therapist Jose Becerra reported slow gains. PX14. Due to ongoing complaints, a right shoulder MRI was ordered. *Id.* Petitioner underwent the MRI on April 11, 2014. *Id.* The interpreting radiologist noted a full thickness tear of the anterior footprint of the supraspinatus tendon, moderate tendonopathy, and an interstitial tear of infraspinatus tendon. *Id.*

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.
[2] Petitioner testified through an interpreter at the hearing.

Dr. Papaeliou referred Petitioner to an orthopedic specialist, Dr. Michael Dorning, also with Meridian. PX14. On April 16, 2014, after a physical examination, Dr. Dorning diagnosed Petitioner with impingement of the right shoulder, a complete tear of the right rotator cuff, and an acute tear of the right rotator cuff tendon. *Id.* He suggested right shoulder arthroscopy with subacromial decompression and mini open rotator cuff repair and ordered Petitioner not to return to work. *Id.*

On May 19, 2014, Petitioner presented to Dr. Nikhil Verma with Midwest Orthopedics at Rush. PX20. Petitioner reported a consistent mechanism of injury, provided a history of treatment, and underwent a physical examination. *Id.* Dr. Verma concurred that Petitioner sustained a full thickness tear. *Id.* He prescribed medication and kept Petitioner on work restrictions. *Id.* Dr. Verma ultimately recommended surgery, and Petitioner remained on work restrictions. *Id.*

On June 17, 2014, Dr. Verma performed a right shoulder arthroscopy with subacromial decompression and acromioplasty, distal clavicle excision, rotator cuff repair, and mini-open subpectoral biceps tenodesis. PX22. He diagnosed Petitioner with right shoulder pain, impingement, acromioclavicular joint pain, rotator cuff tear, and biceps tenosynovitis. *Id.*

After the surgery he was referred for physical therapy at ATI. PX20; PX21. Concurrently Petitioner continued to follow up with Dr. Verma. *Id.* On August 18, 2014, Dr. Verma opined that Petitioner showed evidence of frozen shoulder following rotator cuff repair. PX20. On September 15, 2014, the Medrol Dosepak provided no relief, so Dr. Verma provided cortisone injections. *Id.* Petitioner did not show improvement through November 17, 2014 when Dr. Verma requested another MRI. *Id.* The November 24, 2014 MRI revealed moderate supraspinatus tendinosis with partial tear near the insertion post rotator cuff repair, a chronic tear of intraarticular portion of the biceps tendon, and moderate osteoarthritis. *Id.* Dr. Verma recommended a second surgery in the form of an arthroscopy with release. *Id.*

On December 16, 2014, Petitioner the second surgery consisting of a right shoulder arthroscopic capsular release and bursectomy with subacromial lysis of adhesions. PX20; PX22. When he returned eight days later, Dr. Verma ordered aggressive physical therapy for his right shoulder and continued his prescription for Norco. PX20. He continued to follow up with Dr. Verma while attending physical therapy with ATI. PX20; PX21.

Work Restrictions & Continued Medical Treatment

On May 12, 2015, Petitioner underwent a functional capacity evaluation at ATI. PX21. The evaluating physical therapist found the results to be valid and released Petitioner to work at the medium-to-heavy physical demand level. *Id.* The evaluator also noted that Petitioner met the demands of his job according to the job description provided by Respondent, but noted that not as described by Petitioner requiring him to lift tools and equipment weighing over 100 pounds. *Id.*

On May 18, 2015, Petitioner returned to Dr. Verma. PX20. He placed Petitioner at maximum medical improvement and released him back to work with permanent restrictions related to the right shoulder including no frequent lifting over 50 pounds and no frequent carrying over 25 pounds. *Id.*

Petitioner reported to Dr. Verma on June 3, 2015 reporting that his restrictions were not being accommodated. PX20. Dr. Verma ordered a Medrol Dosepak and set a follow up visit at which time he expected to release Petitioner back to work full duty. *Id.*

On July 20, 2015, Petitioner returned to Dr. Verma reporting that he submitted to an independent medical evaluation. PX20; RX11. Petitioner reported that the examining physician felt that he may have some neck symptoms, but Dr. Verma disagreed and stated "[i]t is my opinion that this is unlikely a neck condition as he has no reproduction of symptoms with neck range of motion and peritrapezial pain with significant pain with shoulder motion, which is consistent with a shoulder diagnosis." *Id.* Dr. Verma also reiterated that Petitioner was at maximum medical improvement, but added restrictions including no overhead work or hammering. *Id.*

As of August 17, 2015, Dr. Verma again stated that Petitioner was at maximum medical improvement, and added restrictions to "both shoulders as it is unreasonable to do significant heavy lifting in the left hand without having the capability of use of the right hand for similar activities. In addition, he should be restricted to no overhead work." *Id.*

On September 23, 2015, Dr. Verma clarified Petitioner's permanent restrictions as follows:

> ... Lifting 50 lbs with both hands with maximum with frequent lifting and/or carrying of objects weighing up to 25 lbs. No overhead use of the hammer on the right side. No power tools with the right hand, no crawling. No lying on ground and limited ladder use. No work about the shoulders. ...

PX20.

On December 10, 2015, Dr. Verma referred Petitioner to Dr. Patel, a pain specialist with Pain & Spine Institute. PX23. Petitioner testified that he continues to treat with Dr. Patel, who address his condition with pain medicine, muscle relaxers and patches. *Id.*; *see also* PX23.

Petitioner resumed treatment with Dr. Patel on January 13, 2016 with complaints of neck pain, cervical radiculopathy, and shoulder pain. PX22. Petitioner continued to see Dr. Patel and voiced similar complaints through October 2016. *Id.* From November 2016 onward, Dr. Patel's treatment appears to have been focused primarily on the cervical spine as opposed to the shoulder. *Id.* Throughout treatment, Dr. Patel has administered a number of cervical injections and has prescribed medications including Tramadol, Flexeril, Lidocaine patches, and Cyclobenzaprine. Virtually all of the treatment and medications petitioner received under Dr. Patel have been denied by Utilization Review. RX13-25.

Glenn Dian

Respondent called Glenn Dian (Mr. Dian) as a witness. He testified that he is employed by Respondent as the Director of Finance and Human Resources and has been so employed for a little over five years. In this position, Mr. Dian is responsible, in part, for administering policies regarding reporting and documenting work injuries. He explained that when Respondent hires an employee, that person is informed that any injury, no matter how big or small, is to be reported immediately to their supervisor. Mr. Dian testified that in addition to new employee training, there are also safety meetings every Monday morning and employees are reminded of this policy several times during the year. He explained that the new employee packet also states that employees need to report any injuries, even if they do not think they need to go to a clinic, to their supervisor or the safety manager. Employees are informed that reporting injuries to another employee will not be sufficient per Respondent's policy.

Mr. Dian also testified that when employees are given work restrictions, they should convey those restrictions to the front office. He will get a copy of the restrictions and also make a copy for the supervisor, the safety

manager and the plant superintendent to let them know the employee's restrictions so that they can be followed. Mr. Dian testified that if an injured worker feels that their restrictions are not being accommodated, they can go to him, the safety manager, the direct supervisor, or the union steward as a last resort. He explained that this is something that Respondent takes very seriously and, in Petitioner's case, he feels that he's made all efforts to accommodate Petitioner's restrictions. When Petitioner has come to him with issues regarding his restrictions, he has rectified them with Petitioner's supervisor.

Mr. Dian testified that he recently offered Petitioner a new accommodated position as a janitor after a janitor recently retired. He outlined the duties and Petitioner's supervisor and the safety manager asked Petitioner to review and sign it. *See* RX26. Petitioner indicated that he wanted to run that past his lawyer before he signed it and, to date, he has yet to return the form so at this point he's not working as a janitor. Petitioner is currently working in the paint shop picking up some things on the premises performing duties that will keep him within his restrictions. Mr. Dian testified that when Petitioner first came in his restrictions were basically one line and then he could come back and say I cannot do this job to which he responded that he is not a doctor and he directed Petitioner back to your doctor and modify those restrictions, and he did that a few times.

On cross-examination, Mr. Dian testified that the janitor position does not involve lifting objects that are heavier than 50 pounds in most cases, but when it is required Respondent would have someone without restrictions perform that activity. He also testified that every time they have a supervisors meeting, the supervisors are told to make sure that they're aware of everything that is going on out there and make sure they are reporting injuries in a timely fashion.

Additional Information

Petitioner testified that he was released back to work with permanent restrictions, which Respondent has accommodated.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

In support of the Arbitrator's decision relating to Issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

In consideration of the record as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident at work on March 1, 2014. Petitioner testified about his injury and symptoms, which are corroborated by contemporaneous medical records related to the right shoulder from both Meridian, as directed by Respondent, and Petitioner's treating physician, Dr. Verma. Petitioner's right shoulder symptoms did not abate and he eventually underwent two surgeries resulting in permanent work restrictions. Notably, there is no evidence that Petitioner suffered from any prior right shoulder symptoms or underwent medical treatment to the right shoulder. Based on the foregoing, the Arbitrator finds that the medical evidence as a whole supports Dr. Verma's determination that Petitioner's right shoulder condition was caused by the accident at work. Thus, the Arbitrator finds that Petitioner's current condition of ill being in the right shoulder is causally related to the accident at work on March 1, 2014 as claimed.

No evidence was presented whatsoever that Petitioner sustained any injury to the neck or to the left shoulder. Petitioner did not testify regarding any injury to the neck or cervical spine. Moreover, Dr. Verma, Petitioner's treating physician, specifically opined that Petitioner did not have any condition in the neck causally related to any injury at work. Thus, the Arbitrator finds that Petitioner has failed to prove any causal connection between any neck condition and his accident at work. By extension, all compensation and benefits claimed related to Petitioner's neck or the left shoulder are denied.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (*citing University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (1st Dist. 2001).

As explained above, Petitioner has failed to establish a causal connection between any neck condition and the accident at work. Thus, Petitioner's claim for payment of medical expenses from Pain & Spine Institute, Medorizon, and Metro Health Solutions is denied. The treatment rendered was either non-certified by Utilization Review and/or relates to the cervical spine. Expenses from Pain & Spine Institute for dates of service from November 4, 2016 through March 24, 2017 and the November 21, 2016 bill from Medorizon are specifically denied as these relate to treatment for neck pain or cervical spine treatment. The remaining outstanding charges from Medorizon pertain to a shoulder injection administered on March 14, 2016, which was not found to be reasonable or necessary per Utilization Review.

The remaining medical bills relate to Petitioner's right shoulder condition, which is causally related to his accident at work and are for reasonable and necessary medical care to alleviate him of the effects of his injury. Thus, Respondent shall pay the reasonable and necessary medical services, reduced pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also 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.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of the injury, the Arbitrator finds the following:

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011. Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at the hearing, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to Subsection i of Section 8.1b (b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gave this factor no weight.

With regard to Subsection (ii) of Section 8.1b (b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a Welder for 30 years with some years of anticipated employment ahead of him. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (iii) of Section 8.1b (b), the Arbitrator notes the parties' stipulation that Petitioner was 51 years old at the time of accident. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (iv) of Section 8.1b (b), the Petitioner's future earning capacity, the Arbitrator notes that no evidence was proffered regarding any loss Petitioner's future earning capacity as a result of this injury. The Arbitrator therefore gives this factor greater weight.

With regard to Subsection (v) of Section8.1b (b), evidence of disability corroborated by treating medical records, the Arbitrator notes that Petitioner has established that he sustained an injury resulting in extended conservative treatment followed by surgery for right shoulder impingement, a complete tear of the right rotator cuff, and an acute tear of the right rotator cuff tendon. After post-operative care, Petitioner's symptoms continued required a second surgery to address tendinosis with a partial tear near the insertion post rotator cuff repair, a chronic tear of intraarticular portion of the biceps tendon, and moderate osteoarthritis. Petitioner was ultimately released back to work with permanent restrictions by Dr. Verma and Respondent has accommodated Petitioner's restrictions. The Arbitrator therefore gives this factor greater weight.

Based on the above factors, and the totality of the record, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of person as a whole (right shoulder) pursuant to §8(d)2 of the Act.

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

PATRICK JORDAN,

Petitioner,

vs. NO: 19 WC 11557

CITY OF PEORIA,

Respondent.

20IWCC0708

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 February 14, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $813.87 per week for a period of 13.975 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused a 6.5% loss of use of the left leg.

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.

20IWCC0708

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 4 - 2020

L. Elizabeth Coppoletti

LEC/cak

D: 11/10/2020

43

L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JORDAN, PATRICK
Employee/Petitioner

Case# **19WC011557**

CITY OF PEORIA
Employer/Respondent

20IWCC0708

On 2/14/2020, 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:

5354 STEPHEN P KELLY
ATTORNEY AT LAW LLC
2710 N KNOXVILLE AVE
PEORIA, IL 61604

0980 HASSELBERG GREBE SNODGRASS
GREG A NORDSTROM
401 MAIN ST SUITE 1400
PEORIA, IL 61602

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

- [ ] 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

Patrick Jordan
Employee/Petitioner

v.

City of Peoria
Employer/Respondent

Case # **19** WC **11557**

Consolidated cases: **N/A**

20IWCC0708

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Peoria**, on **January 22, 2020**. By stipulation, the parties agree:

On the date of accident, **3/18/19**, 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 $**93,600.00**, and the average weekly wage was $**1,800.00**.

At the time of injury, Petitioner was **54** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner the sum of $**813.87**/week for a further period of **13.975** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **6.5% loss of use of the left leg**.

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

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

Signature of Arbitrator

February 12, 2020
Date

FEB 14 2020

FINDINGS OF FACT

Petitioner filed an Application for Adjustment of Claim on April 17, 2019, alleging an injury to his left knee on March 18, 2019. An arbitration was held on January 22, 2020, wherein the parties stipulated that the only issue in dispute was the nature and extent of the injury.

On the date of accident, the Petitioner was 54 years old, and serving as a street patrol officer for the City of Peoria Police Department. Petitioner has worked for the City of Peoria for 26 years.

On March 18, 2019, Petitioner was speaking with a parent about her son running ~~away~~. The boy, approximately 12 years old, was present for this conversation. During this conversation, the boy kicked the Petitioner in his left knee, causing the left knee to buckle. Petitioner then wrestled the boy to the ground and placed handcuffs on him. Petitioner immediately noticed pain in the left knee, mostly in the lateral lower left portion of the left knee, near his patella. Petitioner also noticed pain in the lower quadriceps area and swelling in the knee. Petitioner testified that he had no knee problems prior to March 18, 2019.

After the incident, the Petitioner drove himself to the emergency room and provided history of accident consistent with his testimony. The following day, Petitioner followed up with Dr. Charles Miller of OSF Orthopedics. On examination, Dr. Miller noted pain and swelling in the left knee and ordered an MRI. Petitioner was to remain off work until the MRI results were reviewed.

On April 2, 2019, Petitioner followed up with Dr. Miller to review the MRI results. The MRI showed distal quadriceps and proximal patellar tendinosis without full-thickness tears, articular cartilage loss especially within the femoral trochlea and mild chondromalacia of the medial patellar facet, and mild subcutaneous soft tissue edema in the anterior infrapatellar tissues. No meniscal or ligamentous pathology was seen on the MRI.

Dr. Miller's assessment was pain and swelling of the left knee, patellar tendinitis of the left knee, and quadriceps tendinitis. He told Petitioner the burning sensation and swelling he was experiencing could be related to persistent swelling in the Hoffa's fat pad or a focal bursitis. Dr. Miller continued Petitioner off work due to continued pain with ambulation.

Dr. Lawrence Splitter at OSF Occupational Health released Petitioner to return to work light duty beginning on April 29, 2019 with the following restrictions: no kneeling or squatting, no prolonged standing/walking, no running/jogging.

Petitioner underwent a four-month course of physical therapy at OSF Orthopedics from April through July of 2019, showing slow progress. Petitioner testified that physical therapy sessions lasted between 30 and 45 minutes, and that he would return to work light duty for the rest of the day. Petitioner testified he would have problems with his knee at the end of the day. Petitioner testified that the physical therapy sessions he attended in April and May of 2019 were unhelpful.

On June 27, 2019, Petitioner followed up with Dr. Miller complaining of significant pain with climbing stairs and prolonged walking. Petitioner reported that he did not trust his knee in performing the physically strenuous duties of a police officer, like engaging in a physical altercation. Dr. Miller opined Petitioner's pain was related to aggravation of chondromalacia patellae. Dr. Miller recommended work hardening before Petitioner returned to full duty. He also referred Petitioner to Dr. Stephen Orlevitch of OSF Orthopedics for an opinion regarding possible surgical intervention.

Petitioner was examined by Dr. Stephen Orlevitch on July 16, 2019. On examination, Dr. Orlevitch found Petitioner had mild crepitation in his patellofemoral joints bilaterally. His articular cartilage showed greater than 50% cartilage loss and fissuring along the anteromedial and anterolateral femoral trochlea and chondromalacia of the patella as well. Dr. Orlevitch noted Petitioner had been slow to improve to the point where Petitioner felt he could run. Dr. Orlevitch had difficulty explaining Petitioner's protracted return to full duty and noted the work injury could exacerbate patellofemoral degenerative changes. Dr. Orlevitch found that Petitioner was not a candidate for surgery and recommended a corticosteroid injection to address the patellofemoral arthritis, and possibly up to two or three injections.

On July 1, 2019, Petitioner was seen by Dr. Adam Yanke of Midwest Orthopaedics at Rush for a Section 12 exam. Petitioner reported minimal improvement with conservative care, complained of pain and swelling in the left knee, and rated his pain at 7/10 to 5/10. Petitioner complained of exacerbation of pain with ambulation and prolonged sitting. Petitioner affirmed some catching sensations and denied experiencing any locking events in his left knee. Dr. Yanke diagnosed Petitioner with an anterolateral knee contusion related to the incident of March 18, 2019, with a secondary diagnosis of aggravation of patellofemoral arthritis.

Petitioner testified, and the medical records confirm, that he declined to undergo the prescribed course of injections as he had heard bad reviews and was concerned that they could prolong the injury. Petitioner began work hardening in August of 2019. Petitioner testified that work hardening lasted between three and four hours per day, and his pain would increase from a "3" at the beginning of work hardening to a "4" at the end of work hardening. Petitioner testified that following work hardening, when he went home for the night, he needed to ice the swelling in his left knee.

On September 16, 2019, Petitioner followed up with Dr. Miller. On examination, Dr. Miller found that the chondromalacia patellae/patellofemoral arthritis complaints had resolved with the prescribed conservative course of care. Dr. Miller noted that Petitioner's left knee was mildly tender to palpation over the anterolateral fat pad, and there was mild pain with patellar grind. Dr. Miller also found that the Petitioner's left knee was

ligamentously stable with full range of motion within normal limits, painless, and with no effusion. Dr. Miller released Petitioner to return to work full duty the following day.

Petitioner testified that full-duty police work is a physically demanding job which requires him to be able to run, jump fences, climb stairs, and face confrontational situations. Petitioner further testified he can perform all aspects of his job and has not sought any medical treatment for his left knee since his release to full duty. Petitioner also notices swelling in his left knee at the end of the day. He also testified that he mainly feels an ache in the fat pad area at the end of a long day, and notices less frequently occurring pain in the area above the patella near the quadriceps, and in the area at the base of the patella.

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision relating to the nature and extent of the injury, the Arbitrator finds as follows:

Section 8.1b of the Illinois Workers' Compensation Act requires consideration of the following enumerated factors in determining an employee's permanent partial disability:

i. AMA Impairment Rating;
ii. Occupation of the injured employee;
iii. Age of the employee at the time of the injury;
iv. Employee's future earning capacity; and
v. Evidence of disability corroborated by the treating medical records

Applying the factors set forth in Section 8.1b of the Act, the Arbitrator finds the following:

Regarding subsection (i) Impairment: No AMA impairment report or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

Regarding subsection (ii) Occupation: The Petitioner was employed as a police officer for the City of Peoria Police Department at the time of the accident. Police work is a physically demanding and dangerous occupation. Petitioner testified that he must be prepared for physical confrontations, making arrests, detaining people, and placing himself in dangerous situations and places while performing his duties on street patrol. The City of Peoria Police Officer Job Description, RX. 1, also notes the following job requirements: Frequent standing and walking, detaining suspects, and dealing with a variety of other situations that require an officer. The Arbitrator therefore gives significant weight to this factor.

Regarding subsection (iii) the Petitioner's Age: The Petitioner was 54 years old at the time of the accident and was 55 years old on the date of hearing. The Petitioner still has a number of working years in his future as a police officer. The Arbitrator gives considerable weight to this factor.

Regarding subsection (iv) the Petitioner's future earning capacity: The Petitioner returned to work full duty as a police officer and testified he did not lose any earnings as a result of his injury. Petitioner did not present any evidence that the injury affected his future earning capacity. The Arbitrator gives no weight to this factor.

Regarding subsection (v), Evidence of disability corroborated by the treating medical records: The treating records substantiate Petitioner's subjective complaints arising from the traumatic injury to his left knee exacerbating the degenerative disease already present in the left knee. Since returning to work full duty on September 17, 2019, Petitioner testified that he notices swelling at the end of the day. He also testified that he mainly feels an ache in the fat pad area of his left knee at the end of a long day. Petitioner also noted less

frequent pain in couple other areas, above the patella near the quadriceps, and at the base of the patella. As the treating medical records corroborate Petitioner's traumatic knee injury, subsequent six-month course of conservative treatment and return to full duty work, the Arbitrator gives significant weight to this factor.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all the factors as stated in the Act, in which consideration is not given to any single factor as the sole determinant. Based on the above factors and the record in its entirety, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **6.5% loss of use of the left leg** pursuant to Section 8(e) of the Act. Respondent shall pay Petitioner the sum of $813.87/week for a period of 13.975 weeks.

IT IS SO ORDERED BY:

Adam Hinrichs, Arbitrator
Illinois Workers' Compensation Commission
February 12, 2020

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

DAVID L. BISHOP,

Petitioner,

vs. NO: 17 WC 31596

GMS MINE REPAIR & MAINTENANCE,

Respondent.

20IWCC0709

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 April 30, 2020 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 18 4/7 weeks, representing August 23, 2015 through December 30, 2015, that being the stipulated period of temporary total incapacity for work under §8(b) of the Act. Respondent shall have a credit of $12,591.44 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $610.20 per week for a period of 32.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused a 75% loss of use of the right index finger.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the Wayne County Ambulance bill, pursuant to Sections 8(a) and 8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $19,800.00. 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: DEC 4 - 2020

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

LEC/mck

D: 11/18/2020

43

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BISHOP, DAVID L
Employee/Petitioner

Case# **17WC031596**

GMS MINE REPAIR & MAINTENANCE
Employer/Respondent

20IWCC0709

On 4/30/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% 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:

0536 RON D COFFEL & ASSOC
ATTORNEY AT LAW
502 W PUBLIC SQ POB 366
BENTON, IL 62812

5990 LITCHFIELD CAVO
GREG KELTNER
222 S CENTRAL AVE SUITE 110
ST LOUIS, MO 63105-3527

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
NATURE AND EXTENT ONLY

David L. Bishop
Employee/Petitioner

v.

GMS Mine Repair and Maintenance
Employer/Respondent

Case # 17 WC 31596

Consolidated cases: n/a

20IWCC0709

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 Mt. Vernon, on March 6, 2020. By stipulation, the parties agree:

On the date of accident, August 22, 2015, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $44,777.00; the average weekly wage was $1,017.00.

At the time of injury, Petitioner was 37 years of age, single, with 1 dependent child(ren).

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

Respondent shall be given a credit of $12,591.44 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $12,591.44.

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 $610.20 per week for 32.25 weeks because the injuries sustained caused the 75% loss of use of the right index finger as provided in Section 8(e) of the Act.

Respondent shall pay the Wayne County Ambulance bill, or the balance owed, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

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

William R. Gallagher, Arbitrator

April 23, 2020
Date

APR 30 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on August 22, 2015. According to the Application, Petitioner sustained an injury to his "Right Index Finger" when "A cover on a Joy 1227 miner cover fell on hand" (Arbitrator's Exhibit 2). At trial, the only disputed issue was the nature and extent of disability. Respondent paid the bills for medical services provided to Petitioner; however, Petitioner tendered into evidence a bill from Wayne County Ambulance in the amount of $812.79. The total bill was $1,904.00 and Rockwood Casualty (Respondent's insurer) paid $1,091.21 leaving a balance of $812.79 (Arbitrator's Exhibit 1; Petitioner's Exhibit 5). At trial, the Arbitrator noted that it appeared as though payment had been made to Wayne County Ambulance pursuant to the fee schedule and Wayne County Ambulance was balance billing.

Petitioner worked for Respondent as an underground mechanic. On August 22, 2015, Petitioner was working on a mining machine when a steel cover which weighed approximately 250 pounds fell on his right hand.

Petitioner was initially treated at Hamilton Memorial Hospital. X-rays were obtained of the right index finger which revealed a comminuted fracture of the proximal phalanx, a pulmar angulation across the fracture and possible nail avulsion and laceration. Petitioner was diagnosed with a severely angulated proximal phalanx fracture. Because of the seriousness of the injury, Petitioner was transferred to Barnes/Jewish Hospital (Petitioner's Exhibit 1).

At Barnes/Jewish Hospital, x-rays were obtained of Petitioner's right index finger. They revealed a comminuted, displaced, ulnar angulated fracture which appeared to be abutting the metacarpal phalangeal joint. Significant soft tissue swelling was also noted (Petitioner's Exhibit 2).

Petitioner was subsequently treated by Dr. Ryan Calfee, a hand/upper extremity surgeon. Dr. Calfee performed surgery on August 31, 2015. The procedure consisted of internal fixation with a titanium plate and five screws (Petitioner's Exhibit 2).

Dr. Calfee continued to treat Petitioner following surgery. When he saw Petitioner on September 8, 2015, he ordered physical therapy (Petitioner's Exhibit 3).

Petitioner received physical therapy from September 16, to December 3, 2015. At the time of his final visit of December 3, 2015, Petitioner advised he continued to have pain in his right index finger which was worsened by cold weather and more intense in the early morning. Petitioner also stated he had numbness at the tip of the finger and the strength of his right index finger was less than the left. The therapist recommended Petitioner obtain a splint to help with extension. The therapist also noted Petitioner either did not meet or only partially met the short-term and long-term functional goals (Petitioner's Exhibit 4).

Petitioner continued to be seen by Dr. Calfee and was last seen by him on January 26, 2016. At that time, Petitioner had swelling and tenderness in the right index finger at the PIP joint. Dr. Calfee recommended Petitioner continue range of motion exercises, but noted Petitioner would

have pain in the finger which would be permanent. However, he opined Petitioner was at MMI and discharged him from care. In regard to Petitioner's ability to return to work, Dr. Calfee recommended "full activity as tolerated" but did not indicate any specific work restrictions (Petitioner's Exhibit 3).

At trial, Petitioner testified that shortly after the accident he was laid off by Respondent. Petitioner did not return to work as an underground mechanic.

Petitioner worked for Compliance Staffing Agency from February, 2016, through July, 2017. Petitioner's job duties included shoveling and running equipment. Petitioner did use hand tools to work on belts and motors.

Petitioner worked for M Class Mining from July, 2017, through November, 2017. Petitioner was employed as a belt mechanic. Petitioner worked on the belts which are used or removal coal out of the mines. Petitioner was required to use both hand and power tools.

Petitioner subsequently became employed by Hamilton County Coal as a buggy driver. Petitioner was still employed in that capacity at the time of trial. Petitioner's pre-employment physical was received into evidence at trial. At that time, Petitioner informed the examiner of his right hand injury, but represented he had no limitations in regard to the use of his right hand (Respondent's Exhibit 3). Petitioner testified he drove the buggy by steering it with his left hand and using his right middle, ring and little fingers to operate the levers. Petitioner earns $25.75 per hour as a buggy driver, but stated he would be able to earn $32.00 an hour if he could continue to work as an underground mechanic.

At trial, Petitioner testified he experienced swelling of his right index finger every day. The Arbitrator observed Petitioner's right index finger and compared it to his left index finger. The right index finger was visibly swollen. Petitioner stated he has constant throbbing pain, tightness and reduced strength in his right index finger. Petitioner said he could not work as a mechanic because his right index finger is "useless." Petitioner stated he was unable to grasp hand tools and said his finger sticks out to the sides whenever he attempts to do so. Petitioner's right index finger injury has also impacted his ability to perform household chores; he can no longer play baseball; he has to use his middle finger when shooting guns and can only fish using his other three fingers. Petitioner is right hand dominant.

Petitioner's counsel computed what he believes to be the amount permitted to be charged by Wayne County Ambulance pursuant to the fee schedule and submitted it with his proposed decision. According to these computations, the amount allowed pursuant to the fee schedule was $1,212.46. Respondent paid $1,091.21, leaving a balance of $121.25.

Conclusions of Law

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 75% loss of use of the right index finger.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

At the time of the accident, Petitioner worked as an underground mechanic. This was a job which required extensive use of both hands and Petitioner was right hand dominant. While Dr. Calfee did not impose any specific work restrictions, he directed Petitioner to work "as tolerated." Petitioner credibly testified that he was not able to return to work as an underground mechanic. Petitioner's current work as a buggy driver requires the use of his right hand, but Petitioner relies more on the other three fingers. The Arbitrator gives this factor significant weight.

Petitioner was 37 years old at the time of the accident and 41 years old at the time of trial. Petitioner presently has approximately 25 years before he will attain normal retirement age. Petitioner will have to live with the effects of this injury for the remainder of his working and natural life. The Arbitrator gives this factor significant weight.

Petitioner was earning $25.75 per hour as a buggy driver and testified he would have been able to earn $32.00 an hour as an underground mechanic. However, the only evidence presented was Petitioner's testimony. The Arbitrator gives this factor moderate weight.

Petitioner testified he has constant pain, swelling and weakness in the right index finger. Petitioner's complaints are corroborated by the records of Dr. Calfee and the physical therapist. The Arbitrator gives this factor significant weight.

The Arbitrator concludes Respondent is liable for payment of the Wayne County Ambulance bill.

Respondent shall pay the Wayne County Ambulance bill, or the balance owed, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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 Permanent Disability	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MELISSA ISLEY,

Petitioner,

vs. NO: 14 WC 4027

STATE OF ILLINOIS, STATE POLICE,

Respondent.

20IWCC0710

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, modifies the Decision of the Arbitrator as set forth below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Conclusions of Law

As detailed in the decision for companion case 10 WC 7041, the Commission finds Petitioner's permanent disability is properly assigned to the 2009 accident. See *City of Chicago v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 258, 265, 947 N.E.2d 863 (2011). As such, the Commission vacates the Arbitrator's award of 2% loss of the use of the person as a whole in case 14 WC 4027. Petitioner's permanent disability is addressed in case 10 WC 7041.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 4, 2019, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of permanent partial disability benefits of 2% loss of use of the person as a whole is hereby vacated. Permanent disability benefits are awarded in companion case 10 WC 7041.

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

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

DATED: DEC 4 - 2020

L. Elizabeth Coppoletti

LEC/mck

O: 11/10/2020

Stephen Mathis

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D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ISLEY, MELISSA
Employee/Petitioner

Case# **14WC004027**

STATE OF ILLINOIS-STATE POLICE
Employer/Respondent

20IWCC0710

On 12/4/2019, 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 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:

1824 STRONG LAW OFFICES
RYAN L MEIKAMP
3100 N KNOXVILLE AVE
PEORIA, IL 61603

2202 ILLINOIS STATE POLICE
801 S 7TH ST
SPRINGFIELD, IL 62794

0000 ASSISTANT ATTORNEY GENERAL
NDUBUISI "VINCENT" OBAH
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

DEC - 4 2019

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

Melissa Isley
Employee/Petitioner

v.

State of Illinois-State Police
Employer/Respondent

Case # **14** WC 4027

Consolidated cases: _____

20IWCC0710

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Geneva**, on **8/20/19**. 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 **1/14/14**, 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 $92,880.00; the average weekly wage was $1,786.15.

On the date of accident, Petitioner was **41** 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 $**N/A** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**N/A**

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $721.66/week for 10 weeks, because the injuries sustained caused the 2% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

11/29/2019
Date

DEC 4 - 2019

Findings of Fact

Melissa Isley (hereinafter referred to as "Petitioner") testified that she worked for the Illinois State Police (hereafter referred to as "Respondent") as an acting special agent working on the special enforcement team. Petitioner testified that on January 14, 2014, she fell on ice at the police station while carrying evidence from her police care into the police station.

Petitioner testified that landed on her buttocks and back and also struck her left elbow on the ground. Petitioner was initially seen by Dreyer Medical Clinic on January 15, 2014. Petitioner testified that she had mild mid back and low back pain along with spasms in her low back along with left elbow, wrist and shoulder pain. X-rays were performed that showed a mild wedge compression deformity of the T12 vertebral body.

Petitioner sought care at Fox Chiropractic Center on January 14, 2014. At that visit, Petitioner reported left mid back pain, left low back pain, left lower back stiffness and bilateral neck stiffness along with left elbow and wrist pain. Petitioner also reported that her mid back felt very tight.

Petitioner treated at Fox Chiropractic through March 2014. Petitioner's condition did not improve so she contacted her family doctor, at Dreyer Medical Clinic. A bone scan and MRI of the thoracic spine was recommended to determine if Petitioner aggravated a previously diagnosed wedge compression fracture at T12. Petitioner underwent the bone scan study on April 4, 2014, which was normal. Petitioner also underwent the thoracic spine MRI which was negative.

Petitioner continued treating at Fox Chiropractic for her pain. Petitioner testified that the treatment improved her symptoms over several months. Petitioner testified that she continues to treat at Fox Chiropractic Center to maintain her condition.

The Arbitrator found the 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 related to issue (L), the nature and extend of Petitioner's injury, the Arbitrator makes the following conclusions:

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.* Considering these factors in light of the evidence submitted at trial, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of Section 8.1b(b), the reported level of impairment pursuant to Section 8.1b(a), the Arbitrator notes that neither party submitted into evidence an AMA impairment rating. Thus, the Arbitrator considers the parties to have waived their right to do so and assigns no weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the injured employee, the Arbitrator notes that Petitioner was employed as a state trooper and she continues to work in

that capacity. As such, the Arbitrator assigns some weight to this factor in determining the extent of permanent partial disability;

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 41 years old at the time of the accident. Petitioner has a significant portion of her work life remaining and, therefore, will continue to be required to work with the effects of this injury. As such, the Arbitrator assigns some weight to this factor in determining the extent of permanent partial disability;

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, Petitioner proffered no evidence that his income levels were compromised as a result of injury. As such, the Arbitrator assigns no weight to this factor in determining the extent of permanent partial disability;

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds that Petitioner's ongoing complaints were supported by the medical records. As such, the Arbitrator assigns significant weight to this factor in determining the extent of permanent partial disability.

In consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner suffered permanent partial disability to the extent of 2% of person as a whole pursuant to § 8(d)2 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 Temporary Disability, Permanent Disability	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MELISSA ISLEY,

Petitioner,

vs. NO: 10 WC 31984

STATE OF ILLINOIS, STATE POLICE,

Respondent.

20IWCC0711

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, modifies the Decision of the Arbitrator as set forth below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Correction

The Commission observes the awarded periods of temporary total disability encompass 29 weeks, and the decision is corrected to so reflect.

Conclusions of Law

As detailed in the decision for companion case 10 WC 7041, the Commission finds Petitioner's permanent disability is properly assigned to the 2009 accident. See *City of Chicago v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 258, 265, 947 N.E.2d 863 (2011). As such, the Commission vacates the Arbitrator's award of 17% loss of the use of the person as a whole in case 10 WC 31984. Petitioner's permanent disability is addressed in case 10 WC 7041.

20IWCC0711

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 4, 2019, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $910.50 per week for a period of 29 weeks, representing April 15, 2008 through August 4, 2008 and March 3, 2009 through June 1, 2009, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of permanent partial disability benefits of 17% loss of use of the person as a whole is hereby vacated. Permanent disability benefits are awarded in companion case 10 WC 7041.

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

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

DATED: DEC 4 - 2020

L. Elizabeth Coppoletti
L. Elizabeth Coppoletti

LEC/mck

O: 11/10/2020

Stephen Mathis

43

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ISLEY, MELISSA
Employee/Petitioner

Case# **10WC031984**

STATE OF ILLINOIS-STATE POLICE
Employer/Respondent

20IWCC0711

On 12/4/2019, 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 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:

1824 STRONG LAW OFFICES
RYAN L MEIKAMP
3100 N KNOXVILLE AVE
PEORIA, IL 61603

2202 ILLINOIS STATE POLICE
801 S 7TH ST
SPRINGFIELD, IL 62794

0000 ASSISTANT ATTORNEY GENERAL
NDUBUISI "VINCENT" OBAH
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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

DEC - 4 2019

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

Melissa Isley
Employee/Petitioner

v.

State of Illinois-State Police
Employer/Respondent

Case # **10** WC **31984**

Consolidated cases: _____

20IWCC0711

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Geneva**, on **8/20/19**. 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 **10/5/07**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**71,019.00**; the average weekly wage was $**1,365.75**.

On the date of accident, Petitioner was **35** 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 $**N/A** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**N/A**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $910.50 week for 29 2/7 weeks, commencing 4/15/08 through 8/04/08 and 3/03/09 through 6/01/09 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $636.15/week for 85 weeks, because the injuries sustained caused the 17% 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

11/29/2019
Date

DEC 4 - 2019

Findings of Fact

Melissa Isley (hereafter referred to as "Petitioner") testified that she has been employed by the Illinois State Police (hereafter referred to as "Respondent") since June 3, 2001. Petitioner testified that she had been working as an acting special agent since October of 2007. Petitioner testified that she was required to operate a Ford Mustang while in full uniform including her duty belt and bullet proof vest.

Petitioner testified that she started to develop pain and spasms I her low back and left leg from frequently exiting and entering the Ford Mustang vehicle she was required to operate. Petitioner sought medical treatment from Dr. Schulthies, her family doctor, on October 19, 2007. At that time, Petitioner reported that she was having low back pain for several months and developed numbness and tingling in her left leg within the past couple of days. Petitioner was diagnosed with lower back pain, leg paresthesia and she was advised to obtain an MRI of the low back. She was also referred to see an orthopedic surgeon for a consult.

On November 1, 2017, Petitioner was seen at Bonutti Clinic, an orthopedic clinic. At that time, Petitioner reported a history of being assigned to drive a Mustang, as a state trooper, and wearing her protective gear was causing her back pain in and out of the vehicle on a repetitive basis. Petitioner reported pain in her left buttock radiating in to the back of her leg down to her left foot. The examination revealed a positive straight leg raise on the left, weakness and spasms in the lumbar spine. Petitioner was diagnosed with discogenic pathology at L5-S1 and S1 radiculopathy. At that time, and MRI was ordered.

Petitioner underwent the MRI on November 2, 2007 which showed a central and left paramedian disk extrusion at L5-S1 resulting in compression of the bilateral S1 nerve roots along with a disk bulge/protrusion and annular tear L4-5.

Petitioner was referred to Dr. Fred Geisler, a spine surgeon. Petitioner was seen by Dr. Daniel Laich, of Dr. Geisler's office, on January 3, 2008. Petitioner reported low back pain which radiated down the left leg in to the left foot. Physical exam findings showed anatomic radicular pain along with a positive straight leg raise on the left. Following the initial consultation physical therapy and epidural steroid injections were recommended.

Petitioner attended physical therapy, at ATI, from January 7, 2008 through January 29, 2008 with little or no improvement. Petitioner was referred to Dr. James Wilson, a pain management physician, by Dr. Laich for epidural steroid injections. Petitioner underwent

epidural steroid injections on February 14, 2008 and March 5, 2008. Petitioner's condition did not improve after the injections.

Petitioner returned to Dr. Geisler's office on March 13, 2008. At that time, surgery was recommended after the failure of conservative treatment. On April 15, 2008, Petitioner underwent a left L5-S1 microdiskectomy at Rush Copley Medical Center in Aurora, Illinois.

Following the surgery, Petitioner was taken off of work. Petitioner returned to Dr. Laich on April 28, 2008. At that time, Petitioner reported nerve type pain. Lyrica was prescribed, and post-operative physical therapy was recommended.

Petitioner underwent physical therapy and returned to Dr. Laich on July 10, 2008. At that time, Petitioner reported that she was doing better but that she continued to report low back pain and left leg tightness as well as sacroiliac joint issues as existed prior to the surgery. Petitioner was referred to pain management for an SI joint injection.

Petitioner underwent a bilateral sacroiliac joint injection with Dr. James Wilson on July 16, 2008. Petitioner returned to Dr. Laich in August of 2008 and reported some improvement of her symptoms. At that time, Petitioner was released to return to work full duty.

Petitioner continued to experience back pain after returning to work. In December of 2008, Petitioner returned to Dr. Laich. Petitioner reported continued left leg and lower back pain similar to what she had experienced prior to the surgery. Petitioner denied any new injury but continued to complain of low back pain with flexion. Physical therapy was recommended.

After completing physical therapy, Petitioner returned to Dr. Laich on January 26, 2009. Petitioner reported left leg and lower back pain had greatly increased. Petitioner was unable to heel toe walk and she had pain with flexion. At that time, an MRI was ordered.

Petitioner underwent the MRI on January 28, 2009. Petitioner followed up with Dr. Laich who reviewed the MRI and found that MRI continued to show a disk protrusion at L4-5 and a disk herniation at L5-S1 with neuro compromise. At that time, Petitioner was diagnosed with recurrent disk herniation at L5-S1 and a second surgery was recommended.

Petitioner underwent a second microdiskectomy on March 3, 2009 at Rush Copley Medical Center. Petitioner was taken off work at that time. On May 11, 2009, Petitioner followed up with Dr. Laich. Petitioner reported increased flexibility and mobility. Petitioner underwent physical therapy at Accelerated Rehab.

Petitioner returned to Dr. Laich in May of 2009. At that time, additional physical therapy was recommended, and Petitioner was released back to work, full duty.

Petitioner followed up with Dr. Laich on June 26, 2009. At that time, Petitioner continued to report back pain and left leg complaints. Additional physical therapy was recommended, and Petitioner was referred to Dr. Richard Feeley, a physical medicine doctor, to see if additional treatment was warranted.

On July 7, 2009, Petitioner sustained another injury to her lumbar spine. See Case number 10 WC 7041.

The Arbitrator found the testimony of the 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 "L," whether Petitioner is entitled to TTD benefits or maintenance benefits, Arbitrator finds as follows:

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

Petitioner claims to be entitled to TTD benefits from April 5, 2008 through August 4, 2008 and from March 3, 2009 through June 1, 2009, representing 30 1/7 weeks. Respondent does not dispute causally connection nor responsibility for Petitioner's medical treatment. Based upon Petitioner's testimony, review of the medical records and Dr. Laich's testimony, the Arbitrator finds that was temporarily and totally disabled from April 15, 2008, the time of her initial microdiskectomy surgery, through August 4, 2008, when Petitioner was released from

care. The Arbitrator further finds that Petitioner was temporarily and totally disabled from March 3, 2009 thought June 1, 2009 following her second microdiscectomy.

In support of the Arbitrator's related to issue (L), the nature and extend of Petitioner's injury, the Arbitrator makes the following conclusions:

The Arbitrator notes that Respondent in this matter stipulated to accident and medical causation regarding these surgeries and finds that Petitioner was doing well following the second procedure and had been released to return to work without restrictions. As such, the Arbitrator finds that Petitioner sustained permanent partial disability, as a result of the 2 lumbar spine diskectomies, and suffered permanent partial disability to the extent of 17% of man as a whole pursuant to § 8(d)2 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 Permanent Disability	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MELISSA ISLEY,

Petitioner,

vs. NO: 10 WC 7041

STATE OF ILLINOIS, STATE POLICE,

Respondent.

20IWCC0712

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, modifies the Decision of the Arbitrator as set forth below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Findings of Fact

The Commission incorporates herein the Findings of Fact as set forth in the Decisions of the Arbitrator in companion cases 10 WC 31984 and 14 WC 4027.

Conclusions of Law

Petitioner filed three Applications for Adjustment of Claim, each alleging an injury to her lumbar spine: 10 WC 31984 – repetitive trauma injury manifesting on October 5, 2007; 10 WC 7041 – acute trauma on July 9, 2009; and 14 WC 4027 – acute trauma on January 14, 2014. The matters were consolidated for hearing and the Arbitrator thereafter issued three separate decisions apportioning Petitioner's permanent disability between her three claims. The

Commission notes apportioning permanent disability among claims is permissible in only limited circumstances:

> Where a claimant has sustained "separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, unless there is some evidence presented at the consolidated hearing that would permit the Commission to delineate and apportion the nature and extent of permanency attributable to each accident, it is proper for the Commission to consider all the evidence presented to determine the nature and extent of the claimant's permanent disability as of the date of the hearing. See *Baumgardner v. Illinois Workers' Compensation Comm'n*, No. 1-10-0727WC, 409 Ill. App. 3d 274, 947 N.E.2d 856, 2011 Ill. App. LEXIS 328 at *12, 349 Ill. Dec. 842 (Ill. App. April 11, 2011)." *City of Chicago v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 258, 265, 947 N.E.2d 863 (2011).

We do not find this to be such an instance.

Petitioner's undisputed October 5, 2007 repetitive trauma injury resulted in two surgeries, the first on April 15, 2008, and the second on March 3, 2009. PX8. On May 28, 2009, Dr. Laich directed Petitioner to remain in physical therapy but allowed her to return to full duty as of June 1, 2009. PX5. On June 26, 2009, Dr. Laich again ordered ongoing physical therapy. PX5. Less than two weeks later, on July 7, 2009, Petitioner sustained a second undisputed lumbar spine injury. To be clear, there had been no finding of maximum medical improvement relative to the 2007 injury before Petitioner sustained her second work injury.

The July 7, 2009 accident resulted in a third surgery, this occurring on August 26, 2009. PX8. Following this surgery, Petitioner underwent an extensive course of physical therapy, aquatic therapy, chiropractic care, and acupuncture. She was returned to clerical duty in August 2010 and ultimately released to resume full duty as of October 27, 2010. PX5. Over the next three and a half years, Petitioner worked full duty while undergoing occasional acupuncture/chiropractic treatments, essentially for maintenance/palliative purposes.

This status quo continued until the January 14, 2014 accident. After an initial evaluation coupled with lumbar x-rays obtained at the direction of Dr. Laich, Petitioner underwent a five-month course of aggressive chiropractic/acupuncture treatments followed by a tapering back to her baseline of as-needed treatments. PX13, PX16.

The Commission emphasizes Petitioner's treatment from her first accident had not concluded prior to her second accident. Moreover, Petitioner's testimony as to her residual symptoms relates back to 2010, when her condition stabilized following surgery and post-operative care for the 2009 accident. Further, following her January 14, 2014 injury, Petitioner's condition ultimately returned to its pre-accident baseline. Therefore, the Commission finds Petitioner's permanent disability as of the date of hearing is properly assigned to the 2009 accident (10 WC 7041).

Petitioner underwent significant invasive care, including multiple lumbar spine surgeries: 1) L5-S1 microdiscectomy and thermal annuloplasty; 2) L5-S1 microdiscectomy and thermal annuloplasty; and 3) L4-5 and L5-S1 anterior discectomy, L5-S1 fusion, and L4-5 artificial disc placement. The Commission finds Petitioner had a decent surgical outcome: after extensive post-operative therapy, she returned to full duty with no permanent restrictions and has been released from care with the exception of maintenance acupuncture/chiropractic care. Petitioner does have residual complaints, which she credibly detailed as follows:

> I have nerve damage in my left leg so there is - - I have distinct weakness in this leg. Like I can't lift my heel all the way off the floor as far as I can with my right. My ankle is weak so I have to be careful about where I walk, how I walk, what kind of shoes I wear.
> I still have nerve pain in my toes. I get pain in the piriformis is your butt [*sic*]. I get pain there still.
> As far as like my back because I have a fusion so that doesn't move correctly. It kind of keeps the rest of my body from moving correctly. That is why I have to have massage therapy so from where the fusion is up, then my muscles don't move right. They get tight and that kind of stuff... T. 26-27.

As to changes in her activities:

> So being a police officer, you run - - a lot of times you're training and just staying in shape, running and that type of thing. Because of the nerve damage in my leg, like I can't run anymore. I could run like a block or two but the nerve damage - - once my leg is fatigued, it just doesn't work right. I have trouble with foot drop and that kind of stuff once my leg is fatigued.
> I have to be careful about other exercises that I do. I have to be careful about making sure that I do things that are appropriate for my back and not reinjure myself and those kind of things. T. 27-28.

The Commission finds Petitioner's permanent disability as of the hearing is 37.5% loss of use of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 4, 2019, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 187.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 37.5% loss of use of the person as a whole.

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

20IWCC0712

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

DATED: DEC 4 - 2020

L. Elizabeth Coppoletti

LEC/mck

O: 11/10/2020

43

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ISLEY, MELISSA
Employee/Petitioner

Case# **10WC007041**

STATE OF ILLINOIS-STATE POLICE
Employer/Respondent

20IWCC0712

On 12/4/2019, 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 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:

1824 STRONG LAW OFFICES
RYAN L MEIKAMP
3100 N KNOXVILLE AVE
PEORIA, IL 61603

2202 ILLINOIS STATE POLICE
801 S 7TH ST
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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.

DEC - 4 2019

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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Melissa Isley
Employee/Petitioner

v.

State of Illinois-State Police
Employer/Respondent

Case # **10** WC **07041**

Consolidated cases: _____

20IWCC0712

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Geneva**, on **8/20/19**. 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. [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 7/07/09, 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 $76,973; the average weekly wage was $ 1,480.25.

On the date of accident, Petitioner was **37** 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 **$N/A** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$N/A** for other benefits, for a total credit of **$N/A**.

Respondent is entitled to a credit of $98,763.50 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 112.5 weeks, because the injuries sustained caused the 22.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

11/29/2019
Date

DEC 4 - 2019

Findings of Fact

Elissa Isley (hereafter referred to as "Petitioner") testified that she worked for the Illinois State Police (hereafter referred to as "Respondent") as a trooper. Petitioner testified that after returning to work after undergoing two microdiskectomies (*See IWCC case #10 WC 31984)* she reinjured her lumbar spine while attempting to restrain and subject on July 7, 2009.

Petitioner testified that she was helping serve a search warrant when she twisted her low back reinjuring her low back. On July 16, 2009, Petitioner was examined by Dr. Laich, who had previously performed Petitioner's two prior microdiskectomies. Petitioner reported low back and left leg pain following a new injury. Petitioner was examined and had a positive straight leg raise test on the left, low back pain and left lower extremity radicular complaints with flexion. An MRI was taken which showed a new large extruded L5-S1 disk as well as the prior protrusion at L4-5. Petitioner was diagnosed with recurrent left lower extremity radiculopathy and low back pain with new onset following the recent injury. A CT scan was ordered. Petitioner underwent the CT scan on July 23, 2009. After reviewing the CT scan, Dr. Laich recommended surgery.

On August 26, 2009, Petitioner underwent a L4-5 and L5-S1 diskectomy with L5-S1 fusion at Rush Copley Medical Center. Petitioner also underwent a disk replacement procedure at L4-5. Petitioner was taken off work following the procedure.

Petitioner followed up with Dr. Laich in October of 2009. Diagnostic studies were taken and reviewed and found to be normal.

Petitioner returned to Dr. Laich on November 19, 2009 and reported that less nerve pain and some improvement in her foot and ankle weakness. Physical therapy was recommended. Petitioner participated in physical therapy from December 1, 2009 through January 8, 2010.

On January 18, 2010, Petitioner returned to Dr. Laich. At that time, Petitioner reported a slight improvement with her left leg strength and pain. Additional physical therapy was recommended.

Petitioner returned to Dr. Laich in February 2010 reporting a slight increase in her back pain as well as left lower extremity issues. She was recommended to remain off work and continue with physical therapy. In March of 2010, Petitioner returned to Dr. Laich who recommended additional physical therapy.

Thereafter, Petitioner was referred to Dr. Freely for post-operative pain management. Petitioner was seen by Dr. Feeley, on June 9, 2010, who recommended additional physical therapy. In June of 2010, Petitioner returned to her treating and reported improvements with her left foot with therapy. Additional physical therapy was recommended.

On July 13, 2010, Petitioner returned to her treating doctor and reported that her symptoms had improved. The examination showed a negative straight leg raise test. A new CT scan was ordered. Petitioner was advised to follow up with Dr. Feeley.

Petitioner returned to Dr. Laich on August 19, 2010 reporting an increased in nerve pain after a delay in obtaining approval of Dr. Feeley's treatment. Petitioner was diagnosed with left lower extremity radiculitis and kept off work.

On September 17, 2010 Petitioner returned to Dr. Laich reporting increased pain levels and improvement with her left ankle and foot strength. Petitioner was recommended to continue treatment with Dr. Feeley and she was released to work light duty.

Petitioner followed up with Dr. Laich on October 15, 2010 reporting improvement of her symptoms. At that time, Petitioner was released back to work, full duty, and told to continue with her home exercise program.

Petitioner returned to Dr. Laich on October 22, 2010 reporting intermittent low back and left leg pain. Petitioner was advised to continue treating with Dr. Feeley and return in August 2011 for a 2-year post-operative evaluation. Dr. Laich also recommended chiropractor treatment as needed.

Petitioner returned back to Dr. Laich on August 18, 2011. At that time, Petitioner reported residual low back and left leg pain but that her strength continued to improve. Petitioner reported improvement after acupuncture treatment. Diagnostic studies were performed that day which showed normal post-operative findings. It was noted that Petitioner continued to have a minimally decreased sensation in her L5-S1 distribution.

Petitioner underwent chiropractic and acupuncture treatment with Fox Chiropractic Clinic from December 27, 2010 intermittently until May 2011.

Petitioner testified that she continues to complain of nerve damage in her left leg and that she is unable to lift her left heel all the way off the floor and she continues to experience weakness in her left ankle. Petitioner also testified that she also continues to experience pain

intermittently in her toes and buttocks. Petitioner testified that she is unable to run for long distances and experiences extreme fatigue in her left leg and drop foot problems.

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 related to issue (L), the nature and extend of Petitioner's injury, the Arbitrator makes the following conclusions:

The sole issue in dispute in this case is the nature and extent of Petitioner's injury. Petitioner underwent a 2-level lumbar surgical procedure which included a total disk replacement at L4-5 and a vertebral fusion procedure at L5-S1.

Petitioner testified that she continues to complain of nerve damage in her left leg and that she is unable to lift her left heel all the way off the floor and she continues to experience weakness in her left ankle. Petitioner also testified that she also continues to experience pain intermittently in her toes and buttocks. Petitioner testified that she is unable to run for long distances and experiences extreme fatigue in her left leg and drop foot problems. Petitioner was able to return to work full duty without restrictions.

As such, the Arbitrator finds that Petitioner suffered permanent partial disability to the extent of 22.5% of man as a whole pursuant to § 8(d)2 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)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
WILLIAMSON		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEVEN WILLI,

Petitioner,

vs. NO: 16 WC 4710

STATE OF ILLINOIS,
CENTRAL MANAGEMENT SERVICES,

Respondent.

20IWCC0713

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issue of 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 April 16, 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.

DEC 4 - 2020

DATED:
DDM/tdm
O: 11/10/20
052

D. Douglas McCarthy

Stephen Mathis

DISSENT

I view the evidence differently with respect to Section 8.1b(b) factors (iv), and (v) of the Act. Therefore, I respectfully dissent.

(iv) the employee's future earning capacity

Petitioner testified he did not return to work at his prior injury capacity but instead undertook a two-week search for work which was unsuccessful. T. 18. Petitioner ceased his employment search due to an unrelated condition which required surgery. *Id.* The Arbitrator highlighted this failed job search and attached moderate weight to the factor presumably in favor of an increased permanent disability.

As there is no evidence Petitioner's earnings were negatively impacted by his injury, I find this factor weighs in favor of decreased permanent disability.

(v) evidence of disability corroborated by the treating medical records

In analyzing the evidence of disability as corroborated by the treating medical records, the Arbitrator highlighted "Due to the Petitioner's medically documented injuries and all the testimony within the record, the Arbitrator therefor gives ***significant weight*** to this factor." (Emphasis in the original). What the Arbitrator failed to do is follow the dictates of the Act- compare the complaints testified to by Petitioner with those contained in the medical records. I find the medical records do not wholly support Petitioner's subjective complaints.

During Petitioner's final evaluation examination with Dr. Gornet on September 23, 2019, Petitioner voiced complaints of pain throughout his entire body. Dr. Gornet found "[g]iven his diffuse complaints of pain throughout his body, [Petitioner] understands that I would not look for a spinal source for this." Dr. Gornet referred Petitioner to his primary care physician for further possible treatment. PX4. I find this factor weighs in favor of decreased permanent disability.

Having weighed the evidence and analyzed the Section 8.1b(b) factors, I find Petitioner sustained 30% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

Therefore, I respectfully dissent.

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WILLI, STEVEN
Employee/Petitioner

Case# **16WC004710**

STATE OF ILLINOIS/CMS
Employer/Respondent

20IWCC0713

On 4/16/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% 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

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

0558 ASSISTANT ATTORNEY GENERAL
AARON 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
801 S 7TH ST
SPRINGFIELD, IL 62794-9208

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

APR 16 2020

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

20IWCC0713

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

STEVEN WILLI
Employee/Petitioner

v.

State of Illinois/CMS
Employer/Respondent

Case # **16** WC **4710**

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 **HERRIN**, on **MARCH 12, 2020**. By stipulation, the parties agree:

On the date of accident, **NOVEMBER 19, 2015**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**71,988.80**, and the average weekly wage was $**1,384.40**.

At the time of injury, Petitioner was **53** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **ALL TTD PAID** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of **ALL TTD PAID**. (*See* AX 1).

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

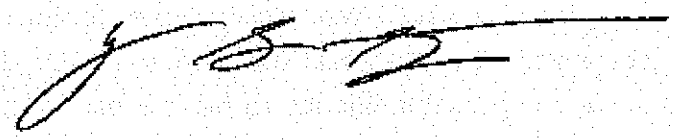
ORDER

Respondent shall pay Petitioner the sum of **$755.22**/week for a further period of **225** weeks, as provided in Section **8(d)2** and Section **8.1b** of the Act, because the injuries sustained caused **a 45% loss of use of the person-as-a-whole**. and;

Respondent shall pay Petitioner compensation that has accrued from **SEPTEMBER 14, 2017** through **MARCH 12, 2020**, 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

APRIL 15, 2020
Date

APR 16 2020

STEVEN WILLI v. STATE OF ILLINOIS/CMS

16 WC 4710

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried in Herrin before Arbitrator Steffenson on March 12, 2020. The issue in dispute was the nature and extent of the injury. (Arbitrator's Exhibit 1). The parties requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act and agreed to receipt of this Arbitration Decision via email. (Arbitrator's Exhibit (*hereinafter*, AX) 1 and Transcript at 4-5).

FINDINGS OF FACT

On the date of the accident, Petitioner was a 53-year-old carpenter foreman for the Respondent. (AX 1 and Transcript (*hereinafter*, T.) at 11-12). The parties stipulated that on November 19, 2015, Petitioner sustained compensable injuries to his low back when, while bending down and straining his back to remove large portable bleachers, the center section of the bleachers fell on Petitioner, knocked him down, and injured his low back. (AX 1 and T. at 11-12). Petitioner provided a history that the bleachers weighed approximately 2,000 pounds. (Petitioner's Exhibit 3) Prior to this incident, Petitioner had no injuries, claims, or surgeries to his low back, and he was working full duty. (T. at 13, 16)

Petitioner presented to a chiropractor, Dr. Richard Zimmerman, on January 13, 2016, where the history of the injury at work was documented. (Petitioner's Exhibit (*hereinafter*, PX) 3). Petitioner had complaints of back pain rated 10/10 and pain down his bilateral buttocks, legs, and feet rated 9/10. (PX 3). His pain was so severe that he was having trouble sleeping and getting comfortable, and it was causing him to lose his balance. *Id.* He was using ice and heat every day and taking 600 mg of Ibuprofen every 4 hours without much improvement. (*Id.*). Dr. Zimmerman noted that the pain had been constant ever since the accident, but that Petitioner had not "been able to receive any care anywhere due to it being workers [sic] comp and not being approved." (*Id.*). While his pain was severe, Petitioner had not missed any work, but had now reached the point where he didn't "know what to do." (*Id.*).

Physical examination revealed decreased range of motion, pain with flexion and extension, pain with bending, and pain that radiated down the legs to the foot with rotation.

(PX 3). Soto-Hall sign was positive with localized pain, Valsalva's test for radicular pain exhibited localized pain, and there was pain to palpation at the lumbar spine, thoracic spine, and sacrum. (PX 3). There was decreased strength in the left knee, both ankles, and feet. (*Id.*). There was moderate hypesthesia on the left side at L1 through L5 and S1, and his motor skill toe-walk was performed poorly. (*Id.*).

Dr. Zimmerman's chiropractic opinion was that Petitioner suffered a strain/sprain of the lumbar spine, lumbosacral spine, and pelvis; but he felt that Petitioner needed an MRI prior to any physical treatment being rendered because Petitioner had been in pain for nearly two months. (PX 3).

On April 11, 2016, Petitioner presented to Dr. Matthew Gornet, a board-certified orthopedic spine specialist, with complaints of low back pain that radiated down the left buttock, left hip, and left leg, along with numbness and tingling. (PX 4). Petitioner reported his symptoms were exacerbated by bending, lifting, prolonged sitting, and standing. (PX 4). Dr. Gornet took his history of the injury and noted that Petitioner did not recall any prior significant problems with his low back. (*Id.*).

Dr. Gornet's physical examination revealed pain in Petitioner's low back, left buttock, and left hip; a mild decrease in EHL function on the left at 4/5, 1+ deep tendon reflexes, and decreased sensation to the L5 dermatome on the left. (PX 4). An MRI was performed, which revealed a foraminal herniation at L5-S1, the fragment of which had migrated caudally and was in contact with a nerve. (PX 4). Dr. Gornet prescribed medications and recommended a transforaminal steroid injection. (*Id.*). He also opined Petitioner's symptoms were causally related to his work accident. (*Id.*).

After undergoing the injection therapy, Petitioner returned to Dr. Gornet with continued complaints of radiating pain that affected all aspects of his life. (PX 4). Dr. Gornet performed a discogram and CT, which showed a provocative disc at L5-S1 with a posterior annular tear, bilateral foraminal annular tears and protrusions resulting in severe bilateral foraminal stenosis. (PX 4 and PX 7). Dr. Gornet then recommended a fusion surgery. (PX 4).

On September 14, 2016, and September 16, 2016, Dr. Gornet performed a staged anterior decompression and fusion at L5-S1 with laminotomy, foraminotomy, and posterior fusion at the same level. (PX 4). Dr. Gornet noted intraoperatively that there was a large midline central annular tear with a herniation within the tear. (PX 4). This was removed until no further decompression of the dura was noted. (*Id.*). He also placed LT cages and screws and decompressed the nerve root. Following surgery, Petitioner was kept off work and continued to follow up with Dr. Gornet. (*Id.*).

Despite improvement from surgery, Petitioner still reported left-sided groin pain to Dr. Gornet on follow-up. (PX 4). On December 19, 2016, Dr. Gornet noted Petitioner was experiencing fullness in his abdomen over his incision and ordered an abdominal CT, which was done the same day, and showed what may have been a subtle dehiscence of the anterior rectus fascia with a seroma. (PX 4 and PX 7). Petitioner was referred to Dr. Tom Charles, who told him that there was a significant risk of revision. (PX 4). Dr. Gornet then noted although Petitioner had improved, he was still experiencing symptoms with increased activity. (PX 4). He directed Petitioner to undergo six (6) to eight (8) more weeks of work conditioning and referred him for a CT scan. (*Id.*).

The September 14, 2017 CT scan revealed a solid fusion, however Dr. Gornet opined Petitioner could not return to his physically intense carpentry position. (PX 4 and PX 7). He placed Petitioner at maximum medical improvement (MMI) with permanent restrictions of no lifting greater than 40 pounds. (PX 4 and T. at 16).

Thereafter, on October 24, 2017, Petitioner, pursuant to Respondent's Section 12 request, met with Dr. David Robson. (Respondent's Exhibit 2). Dr. Robson's physical examination revealed that Petitioner suffered from an abnormal, antalgic gait and tenderness to palpation over the left lower back and abdomen. (Respondent's Exhibit (*hereinafter*, RX) 2). Dr. Robson opined there was a causal relationship between Petitioner's objective findings and his work injury, and that his medical treatment had been reasonable and necessary. (RX 2). He also agreed with Dr. Gornet that Petitioner was at MMI and that his 40-pound lifting restrictions should be permanent. (*Id.*). Dr. Robson's recommended plan for treatment for Petitioner was "acceptance of his condition." (*Id.*).

Subsequently, Petitioner has returned to Dr. Gornet on more than one occasion with complaints of ongoing pain. (PX 4). Dr. Gornet has discussed with Petitioner ways of managing his pain with exercises, and he also recommended following up with his primary care physician to ensure that there were not any other medical issues, such as cancer, that were causing his symptoms. (PX 4).

Due to his permanent restrictions, Petitioner was unable to return to his former position with Respondent and engaged in a job search. (T. at 18 and PX 12). Petitioner reported that while the surgery initially improved his condition, said improvement did not last, and things have since gotten worse. (T. at 15-16). He currently experiences back pain with radiating numbness and tingling down his left leg. (T. at 17). Regarding his range of motion, he testified that everything he does is "slow, methodical, [and] planned." (T. at 19). Petitioner stated he cannot pick something up off the floor without getting down on one knee to do so. (T. at 19). He uses ice and heat daily to manage his symptoms. (T. at 17). He testified that he does not like taking medicine and tries to "keep ahead of the pain" but being away from his house causes

him to "max out," and he takes eight (8) doses of Ibuprofen 200 mg per day along with Tylenol as needed. (T. at 19-21). His hobbies of hunting, fishing, and side work for fraternal organizations have all been adversely affected, as has playing with his grandchildren. (T. at 21, 25-26).

CONCLUSIONS OF LAW

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

Issue: *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;

(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 notes Petitioner was employed by the Respondent as carpenter foremen at the time of the injury and, after the imposition of a 40-pound lifting restriction, he was unable able to return to work after said injury. The Arbitrator therefore gives ***moderate weight*** to this factor.

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

iii. The Arbitrator notes Petitioner was 53 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:

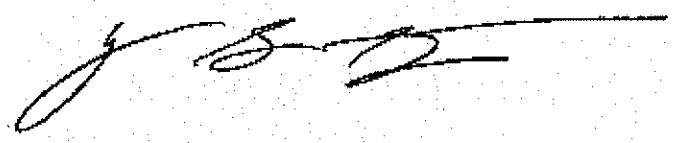
iv. The Arbitrator notes the Petitioner both was unable to return to his position as a carpenter foreman and unsuccessful in securing new employment after two (2) weeks of job searching. (PX 12). As such, the Arbitrator therefore gives ***moderate weight*** to this factor.

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 injuries to his lower back, and he received medical care, including chiropractic care, injection therapy, and an L5-S1 fusion surgery to relieve his symptoms. However, after this surgical intervention, Petitioner continues to experience back pain with radiating numbness and tingling down his left leg. He also reports his lower back range of motion has been impaired and forced him to modify or avoid many of his movements and activities. Due to the Petitioner's

medically documented injuries and all the testimony within the record, 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 **45% loss of use of the person-as-a-whole** pursuant to Section 8(d)2 and Section 8.1b of the Act.



Signature of Arbitrator

APRIL 15, 2020
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

DANIEL GOEPPNER,

Petitioner,

vs. NO: 16 WC 34863

RG CONSTRUCTION SERVICES, INC,

20IWCC0714

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical, prospective medical, 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 further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 5, 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 $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: DEC 4 - 2020

D. Douglas McCarthy

DDM/tdm
O: 10/7/20
052

Stephen Mathis

SPECIAL CONCURRENCE/DISSENT

I concur with the Majority's decision in all respects save its finding regarding Petitioner's left knee condition. I find Petitioner failed to prove an accident which caused injury to his left knee and, therefore, failed to prove a causal relationship between the "accident" and Petitioner's condition of ill-being regarding his left knee. Therefore, I respectfully dissent.

The fact Petitioner sustained an accident on July 20, 2016 is undisputed. What is disputed are the injuries stemming from this accident. Petitioner testified in an attempt to avoid being struck by a board, he moved quickly and "felt a pop in my right knee." T. 23 (10/16/19). Petitioner further testified he was struck by the board causing him to fall onto both knees where he "felt immediate pain in my right knee." *Id.* Petitioner described his injury and resulting condition immediately following the accident stating "I noticed that the pain that was going through my right knee. And I was starting to like feel my knee, and I could feel it like it was starting to swell up." T. 23-24 (10/16/19).

Mr. Thomas Roche was called to testify by Petitioner. Mr. Roche testified he worked with Petitioner for approximately two years prior to Petitioner's accident. T. 14 (03/15/19). Mr. Roche witnessed the accident testifying "The sheet hit [Petitioner]. I would say more in his back, kind of jolted him, knocked him to the ground." T. 16 (03/15/19). Mr. Roche was not a 100% but felt Petitioner hit both knees on the ground. *Id.* Following the accident, Mr. Roche confirmed

Petitioner complained of his right knee and voiced no complaints regarding his left knee. T. 25 (03/15/19).

Immediately following the accident, Petitioner sought treatment at Palos Health; the following history is documented:

> The patient today suffered a right knee injury. He currently is experiencing severe pain predominantly to the medial knee area. He cannot easily bear weight. Needed a ride to arrives [*sic*] here for evaluation. The pain is severe made worse with movement or weightbearing. Is predominantly at the joint line itself. Denies any calf or thigh pain. The mechanism of injury was a sudden shift of his way to the left to avoid impact with a falling object. He experienced immediate pain when he pushed off. He also struck the front of the knee to the ground when he fell. He has minimal anterior or patellar pain at this time. PX2.

Right knee x-rays were performed. Petitioner was provided with a right knee immobilizer and crutches. As Petitioner voiced no complaints regarding his left knee, no diagnosis nor treatment was provided. *Id.*

Thereafter, on July 28, 2016, Petitioner presented to Dr. Rendondo complaining of bilateral knee pain for *several years* worsening over the past seven days which Petitioner associated to an accident at work. PX3. Petitioner provided no history to Dr. Rendondo regarding the specific mechanism of injury. *Id.*

On January 16, 2017, Dr. Troy Karlsson examined Petitioner pursuant to Section 12 of the Act at Respondent's request. On April 3, 2017, Dr. Karlsson provided his testimony via evidence deposition. RX7. Dr. Karlsson testified Petitioner did not sustain injury to his left knee due to the accident of July 20, 2016. RX7, p. 20. Dr. Karlsson based his opinion on Petitioner's failure to voice any complaints regarding the left knee immediately following the accident as well as Petitioner's failure to seek treatment. *Id.* Dr. Karlsson further explained Petitioner's fall on to his knee or knees would cause a temporary increase in symptoms but would not aggravate nor cause the need for surgery (total knee replacement). RX7, p. 47-48.

Petitioner's treating physician, Dr. Steven Chudick, agreed with this opinion. On January 8, 2018, Dr. Chudick provided his opinions via evidence deposition. PX6. Dr. Chudick testified as follows: "The injuries to these knees, honestly, usually falling on the knee, when I see people that have permanent aggravations or arthritis and subsequent need for treatment doesn't usually happen from the direct blow to the knee." PX6, p. 60. Dr. Chudick went on to testify Petitioner's left knee condition was caused by a twisting event which occurred on July 20, 2016. *Id.*

The Majority, in adopting the opinion of the Arbitrator, fails to appreciate the mechanism of injury and the bases of the conflicting medical experts' opinions. In establishing a causal relationship, the Majority:

> finds persuasive Dr. Chudick's testimony, on redirect, that both an injured person and a physician providing urgent care would tend to focus on the primary complaint and that a secondary complaint might not be documented until later. If, as the initial records of July 20, 2016 reflect, Petitioner could not bear weight and needed to be transported to the hospital, it stands to reason he did not use or tax his left leg until later. The Arbitrator is unable to conclude that an eight-day delay is so significant as to preclude a finding of causation. *Supra*, p. 22, ¶ 4, Arbitration Decision.

This finding, though, ignores the actual basis of Dr. Chudick's opinion- Petitioner sustained a twisting injury to his left knee.

I find Dr. Chudick's testimony on causation and the basis for the same to be speculation. "A medical expert witness may not base his opinion on guess, conjecture, or speculation. [Citation omitted]." *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146, 728 N.E.2d 1126 (1999). Dr. Chudick predicates his opinion on the assumption Petitioner suffered a twisting injury to his left knee. Dr. Chudick testified Petitioner shifted his body weight to his left and "imagined" Petitioner was standing on both feet, so there must have been a twisting component to the left knee. PX6, p. 69. What Dr. Chudick imagines is not relevant.

The facts establish Petitioner moved quickly and felt a pop in his right knee. T. 23. More importantly, the medical records immediately following the accident memorialize the actual mechanism of injury- "he experienced immediate pain when [Petitioner] pushed of [his right knee]." PX2. Such history is wholly consistent with Petitioner's testimony of a pop in his right knee. These medical records fail to memorialize any left knee complaints much less a twisting injury to the left knee. Again, such is completely consistent with Petitioner's testimony at trial which is devoid of any left knee injury or complaints immediately following his accident of July 20, 2016. Dr. Chudick's opinion is not supported by the record and is, therefore, of little persuasive value. I find Petitioner failed to prove a causal relationship between his accident of July 20, 2016 and his condition of ill-being as it relates to his left knee. I would vacate any benefits awarded associated with the left knee condition.

For the above-stated reasons, I respectfully dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

GOEPPNER, DANIEL P
Employee/Petitioner

Case# **16WC034863**

RG CONSTRUCTION SERVICES INC
Employer/Respondent

20IWCC0714

On 12/5/2019, 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 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:

5669 ALEKSY BELCHER
MATTHEW B WALKER
350 N LASALLE ST SUITE 750
CHICAGO, IL 60654

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT B ULRICH
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60603

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)

Daniel P. Goeppner
Employee/Petitioner

v.

RG Construction Services, Inc.
Employer/Respondent

Case # 16 WC 34863

Consolidated cases: N/A

20IWCC0714

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **3/15/19 and 10/16/19**. 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 **Respondent seeks credit for permanency advance of $4,651.08**

FINDINGS

On the date of accident, **7/20/16**, 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 $**79,594.84**; the average weekly wage was $**1530.67**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of $**16,910.32** for TTD, $**0** for TPD, $**0** for maintenance, and $**4,651.08** for other benefits (permanency advance), for a total credit of $**21,561.40**. This amount is not inclusive of medical bills paid. See below.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,020.45/week for 169 weeks, commencing July 21, 2016 through the hearing of October 16, 2019, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $101,839.64 (PX 7), as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for medical bills already paid as of October 16, 2019. RX 2.

Respondent shall authorize and pay for prospective care in the form of the right total knee replacement recommended by Dr. Redondo.

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.

Molly C Mason

Signature of Arbitrator

12/5/19
Date

DEC 5 - 2019

Daniel Goeppner v. RG Construction Services, Inc.
16 WC 34863

Summary of Disputed Issues

The parties agree that Petitioner began working as a laborer for Respondent in 2005. They also agree that Petitioner sustained a work accident on July 20, 2016. Petitioner testified that, immediately before the accident, he and his co-worker, Tommy Roche, were transferring a 150-pound sheet of lead board from a wheeled cart to the stack they had already created when he heard Roche say "look out!" Petitioner testified he "made a quick move to [his] left" before being struck in the back by another piece of lead board that had fallen. He felt his right knee "pop" when he shifted. The impact "slammed" him to the ground. He testified he fell forward, striking both knees against the concrete slab. He felt an immediate onset of right knee pain and swelling. Roche, who testified pursuant to subpoena, acknowledged that, following the accident, Petitioner complained of right knee pain and did not mention his left knee.

Petitioner saw a physician at an immediate care facility on the day of the accident. The records from this facility reflect right knee complaints. The examining physician ordered right knee X-rays. PX 2. When Petitioner next sought care, eight days later, his longtime orthopedic surgeon, Dr. Redondo, noted 5/10 bilateral knee pain of several years' duration that had worsened over the previous seven days. Dr. Redondo also noted that "the problem started after an injury at work." PX 3.

Petitioner acknowledged undergoing a right anterior cruciate ligament reconstruction in 1991 and a left anterior cruciate ligament reconstruction the following year. T. 14. Dr. Redondo performed these surgeries. PX 3. [Respondent offered into evidence information from the Commission's database showing that, in 1994, following a work accident of October 1, 1991, Petitioner received settlements representing 35% loss of use of each leg from a previous employer. RX 9.] Petitioner also acknowledged returning to Dr. Redondo in 2013 due to right knee soreness that was affecting his ability to walk and work. At that visit, the doctor warned Petitioner he "might" have to change jobs and that continuing to work as a laborer would make it more likely that he would require knee replacements at a younger age. Petitioner testified he continued performing his usual laborer duties for Respondent thereafter. He denied being subject to any restrictions or losing any time from work due to knee problems between his hiring in 2005 and the work accident.

Petitioner never resumed working after the accident. He underwent conservative care initially. After Dr. Redondo recommended bilateral knee replacements, he opted to have his left knee addressed first so that he could continue driving himself to appointments during a period when his wife was working. Dr. Redondo administered a series of right knee Supartz injections in 2019 but Petitioner did not obtain relief.

In his records, Dr. Redondo opined that the accident aggravated the underlying osteoarthritis.

Three examining physicians also addressed the issue of causation. Drs. Fletcher and Karlsson, Respondent's examiners, viewed the accident as causing only a temporary aggravation of the underlying right knee condition. They agreed with the need for replacement surgery, regardless of causation. Petitioner's examiner, Dr. Chudik, opined that the accident permanently aggravated Petitioner's pre-existing bilateral osteoarthritis and brought about the need for the replacements.

The disputed issues include causal connection, medical expenses, temporary total disability from July 21, 2018 through the continued 19(b)/8(a) hearing of October 16, 2019 and prospective care in the form of a total right knee replacement.

Arbitrator's Findings of Fact

At the initial hearing of March 15, 2019, Thomas Roche, Petitioner's co-worker at the time of the accident, testified pursuant to subpoena.

Roche testified he has lived in Homer Glen, Illinois, for fifteen years. He was personally served with a subpoena. T. 3/15/19, p. 11.

Roche testified he has worked for Respondent for four years and four months. He works as a truck driver and laborer. He is familiar with Petitioner. He worked with Petitioner for about two years. T. 3/15/19, p. 13.

Roche testified he was with Petitioner at the time of Petitioner's accident on July 20, 2016. On that day, he and Petitioner were working at a University of Chicago jobsite in Orland Park, Illinois. They had been given the task of moving about 500 to 600 sheets of lead board from the ground floor to various points inside the building. Roche testified that lead board is used for walling rooms where X-rays are performed. A sheet of lead board is half drywall and half lead. The sheets come in different sizes. One sheet can range in weight between 100 and 150 pounds. T. 3/15/19, p. 14.

Roche testified that he witnessed Petitioner's accident. Immediately before the accident, he and Petitioner were transferring sheets of lead board from a cart to the ground. When they put the second to last sheet on the ground, they must have bumped the cart because the cart jolted, causing the last sheet to fall over. Roche described the movement of the last sheet as a "straight fall." He saw the sheet falling before Petitioner saw it. He said "get out of the way" but "not in time." T. 3/15/19, p. 15. The sheet hit Petitioner, "more in the back," jolting him and knocking him to the ground. The following exchange then occurred:

"Q: When he hit the ground, how did he hit the ground?

A: His knees.

Q: Did he hit with both knees?

A: I would say – I'm not going to say I'm 100 percent sure, but his knees hit first.

Q: So his knees hit the ground first?

A: Yes."

T. 3/15/19, p. 16. Shortly thereafter, in response to a question asking whether Petitioner struck one knee or both knees, Roche stated: "I can't say I'm 100 percent sure, knees first." T. 3/15/19, p. 17.

Roche identified PX 1 as a statement he gave to a private investigator. The investigator wrote out this statement, using his (Roche's) words. T. 3/15/19, p. 20. Roche testified he signed both pages of the document on August 13, 2018. He read the statement the same day. The statement was accurate when he signed it. It remains accurate. It states that the lead board struck Petitioner in the back and he was knocked down to both his knees and struck the concrete. T. 3/15/19, p. 21. Petitioner landed on a concrete floor. T. 3/15/19, p. 21. PX 1.

Roche testified that, immediately after the accident, Petitioner tried to get up and said: "Tom, my knee hurts. Something is wrong." T. 3/15/19, p. 21. The men then called their foreman, who came to the scene and decided that Petitioner needed to be taken to a medical facility. T. 3/15/19, p. 22.

Under cross-examination, Roche testified that the investigator contacted him by phone. He spoke with the investigator twice. He is not sure of the dates but, if he signed the statement on August 13, 2018, he first spoke with the investigator a day or two before that date. The investigator did not show him any documents. He was not under oath when he gave the statement. The written statement is a summary of "exactly what" he told the investigator. It is "pretty much word for word." The investigator asked him no questions other than those in the statement. Before he gave the statement, the investigator told him the case was going to go to trial. T. 3/15/19, p. 24. He did not know the issues involved in the case. Roche testified he does not know whether Petitioner had abrasions on either hand or either knee after the accident. He does not know whether Petitioner ripped any of his clothing. After the accident, Petitioner told him his right knee was hurting. Petitioner did not tell him he was feeling any pain in his left knee. T. 3/15/19, p. 25.

Petitioner was the sole witness at the continued hearing of October 16, 2019.

Petitioner testified he was born on July 27, 1961. He lives in Tinley Park, Illinois. He has been married for 22 years. T. 10/16/19, pp. 8-9.

Petitioner testified he is not currently employed. Respondent was his last employer. He began working as a laborer for Respondent in October 2005. He was a member of Local 4.

Petitioner testified he performed several functions for Respondent. He was primarily a scaffold builder. The task of building scaffolds involved lifting heavy items, including planks, components, outriggers and screw jacks. The planks were the heaviest items he lifted. Each plank weighed between 75 and 100 pounds. He lifted the planks on his own. Building a scaffold also involved pushing material up to workers who were at a higher level. T. 10/16/19, p. 11. His other laborer tasks included mixing plaster, performing general clean-up and transferring work materials such as drywall and lead board from the delivery truck to each floor of a construction project. T. 10/16/19, p. 12.

Petitioner identified PX 8 as a job description that he wrote out for Dr. Chudik, in connection with the doctor's examination. PX 8 accurately describes the tasks he performed while working as a laborer for Respondent. T. 10/16/19, pp. 13-14.

Petitioner acknowledged undergoing a right anterior cruciate ligament reconstruction in 1991 and a left anterior cruciate ligament reconstruction the following year. T. 10/16/19, p. 14. Between the time of these surgeries and the accident of July 20, 2016, there were times when he would feel pain in his knees, particularly at the end of a workday during which he spent a lot of time carrying planks. T. 15.

Petitioner acknowledged consulting his surgeon, Dr. Redondo, in 2013 due to right knee pain. He asked this doctor to check whether his knees were getting worse. T. 10/16/19, p. 15.

Dr. Redondo recorded the following history in his note of March 4, 2013:

> "51-year-old male well-known to me who I did bilateral ACL reconstructions [sic] in 1991. He has done very well until recently, but he is having increasing pain and disability with difficulty working as a result of the knee pain. He is here for evaluation."

Dr. Redondo noted that Petitioner reported taking Advil or Aleve as needed for bilateral knee pain.

On examination, Dr. Redondo described Petitioner as having "obvious deformity to both knees" with some synovitis and well-healed incisions. He noted a range of motion from 0 to 130 degrees and valgus alignment. He also noted generalized tenderness but no gross instability. He described the anterior, posterior and medial cruciate ligaments as intact. He obtained X-rays of both knees. He interpreted the films as showing "advanced degenerative changes of three compartments of the knee joints, bone-on-bone osteoarthritis but retained hardware from the previous ACL reconstruction."

Dr. Redondo went on to discuss Petitioner's treatment options:

"The patient wants to take over-the-counter medications for now. He does not want intra-articular cortisone injections or surgical intervention. At this point, I told him he might [have] to change jobs as a laborer. The longer he does it for a period of time, the more likely it is he is going to end up with total knee replacements at a relatively young age of 51. He should wait as long as possible before surgical intervention. If he changes jobs, he might be able to last longer. The patient will consider it and get back to me at a later date."

RX 3.

Petitioner acknowledged that Dr. Redondo recommended he change jobs but he continued working as a laborer because he needed to continue working to support his family. T. 10/16/19, p. 16.

Petitioner testified he was not subject to any knee-related restrictions between the time Respondent hired him, in October 2005, and his 2016 work accident. During this interval, he performed all of his assigned duties. He never missed a day of work due to knee issues. T. 10/16/19, p. 16. He continued performing full duty for Respondent during the weeks preceding the accident. T. 10/16/19, pp. 16-17. Before the accident, he performed general clean-up at a jobsite in Evanston. He also erected and dismantled scaffolding at a jobsite in Peoria. He denied sustaining any injuries at either of these jobsites. T. 10/16/19, pp. 17-18.

Petitioner testified he was working at a jobsite in Orland Park on July 20, 2016. He and "Tommy," his co-worker, were given the task of moving sheets of lead board that had been stacked on forklifts and delivering them, via a wheeled cart, to individual rooms. Petitioner testified that lead board is used to line the walls of X-ray rooms. It resembles drywall but has lead inside it, on one far end. Each sheet weighs about 150 pounds. T. 10/16/19, pp. 18-20. He and Tommy had to work together to move one sheet at a time. Tommy would grab one end of the sheet while he grabbed the other. There was a handle on the cart. They would get on either side of the loaded cart and push it. They completed two to three rooms "with no problem." They then wheeled the cart to the next room and started stacking the lead board in the middle of the floor. T. 10/16/19, pp. 21-22.

Petitioner testified that, before he and Tommy moved each sheet of lead board, they made eye contact with one another and asked "are you ready?" They took these precautions because of the weight that was involved. When they got to the second to last sheet, and were placing that sheet on the pile, Tommy suddenly said "look out!" Petitioner testified he made a quick move to his left when he heard Tommy say this. That is when he felt the remaining sheet hit him in the back and slam him to the concrete floor. T. 10/16/19, p. 22. When he made the quick shift to his left, he felt a pop in his right knee. After landing on the floor, he felt an

immediate onset of pain in his right knee. His right knee started to swell. He fell "face down," initially landing on both knees. T. 10/16/19, pp. 23-24.

Petitioner testified that Tommy went to get a Respondent foreman, Mike Richman. Tommy came back to the scene, accompanied by Richman. Petitioner testified that Richman asked about his knee and asked how the accident happened. Petitioner testified that he and Tommy told Richman how the accident occurred. Richman asked Petitioner if he wanted to go to a hospital. Petitioner said "yes." Tommy drove him to Palos Health. T. 10/16/19, pp. 25-26.

Records from PCC Immediate Care Center reflect that Petitioner saw Dr. Wilson on July 20, 2016. Dr. Wilson documented a right knee injury occurring one hour earlier. He recorded the following history:

> "The patient today suffered a right knee injury .....The mechanism of injury was a sudden shift of his [weight] to the left to avoid impact with a falling object. He experienced immediate pain when he pushed off. He also struck the front of the knee to the ground when he fell."

Dr. Wilson noted that Petitioner was experiencing severe pain predominantly to the medial knee area. He also noted that Petitioner could not easily bear weight. He recorded a history of a right anterior cruciate ligament repair twenty-five years earlier, indicating that this previous surgery "[has] not interfered with his work." He noted that Petitioner did not currently have any treating orthopedist.

On right knee examination, Dr. Wilson noted no abrasions or skin injury, significant medial joint line swelling and tenderness, increased pain with minor valgus stress, an inability to fully extend, even with support, no flexion past 130 degrees and no obvious effusion.

Dr. Wilson did not make any notations concerning the left knee. He ordered right knee X-rays and prescribed Ibuprofen. RX 4. He indicated that the examination findings seemed "most consistent with a medial collateral strain or tear." The X-rays showed no acute fractures or dislocations, changes consistent with the prior anterior cruciate ligament repair, moderate tricompartmental joint space narrowing and osteophyte formation, chondrocalcinosis within the medial and lateral compartments and a small joint effusion. PX 2, p. 5. Records in PX 2 reflect that a nurse applied an immobilizer to Petitioner's right knee and gave Petitioner crutches. PX 2, p. 8. Dr. Wilson provided Petitioner with a list of orthopedic surgeons and directed him to remain off work until "seen by ortho doctor." PX 2, p. 17.

Petitioner saw his previous knee surgeon, Dr. Redondo, on July 28, 2016. The doctor noted complaints of 5/10 pain in both knees starting after an injury at work. In an addendum, he noted:

> "Patient with bilateral knee pain for several years. Patient's

> pain worse over the last 7 days. No treatment has been given. Patient status post ACL reconstructions right knee in 1991 and left knee in 1992. The surgeries were performed by Dr. Redondo."

On right knee examination, Dr. Redondo noted a range of motion of 5/130 degrees, well-healed incisions, minimal swelling, a varus deformity, no instability, generalized tenderness and crepitus to range of motion. He described his left knee examination findings as "same as his right knee exam." He described his hip examination as unremarkable. He ordered bilateral knee and hip/pelvis X-rays. He described the knee X-rays as showing "severe osteoarthritis of both knees, bone-on-bone medial compartments with varus deformity and retained hardware in both knees secondary to previous ACL reconstruction." He described the hip/pelvis X-rays as showing mild osteoarthritis. He injected both knees with Orthovisc and provided bilateral medial unloader knee braces. He prescribed an OA unloader brace and directed Petitioner to return in three to four weeks. PX 3.

Petitioner returned to Dr. Redondo on August 25, 2016. The doctor noted he reported 40% improvement following the bilateral knee injections. The doctor recommended and administered Orthovisc injections into both knees. PX 3.

On September 1, 8 and 15, 2016, Dr. Redondo's assistant, Nick Patel, PA-C [hereafter "Patel"], administered additional Orthovisc injections into both knees. On September 1, 2016, Patel noted 20% improvement. On September 8 and 15, 2016, he noted that Petitioner was "0% better since last visit." PX 3.

On October 13, 2016, Petitioner returned to Dr. Redondo and indicated the injections provided "no help at all." The doctor noted that Petitioner reported being unable to work or engage in recreational activities. He discussed knee replacement surgery, noting that Petitioner wanted to have his left knee replaced first. PX 3.

Petitioner testified that Dr. Redondo asked him which knee he wanted to have replaced first. He chose his left knee because his wife was working at that time and he realized he would need his right leg to drive a car and get himself to therapy. T. 31.

At Respondent's request, Dr. Fletcher conducted a Section 12 examination of Petitioner on October 28, 2016. In his report of January 23, 2017 (Fletcher Dep Exh 2), Dr. Fletcher recorded a consistent history of the work accident and prior ACL reconstructions. He noted that Petitioner reported landing on both knees. He indicated that Petitioner "did experience knee pain before the work accident as his legs would get fatigued toward the end of the day." He noted that Petitioner had not returned to work since the accident and rated his current pain level at 4-6/10. Dr. Fletcher described Petitioner's gait as abnormal. He noted a bilateral varus deformity with crepitus bilaterally. He described the range of motion in both knees as normal.

Dr. Fletcher described Petitioner as having X-ray evidence of advanced osteoarthritis. He indicated that knee replacement surgery was "inevitable." He noted that Petitioner "does not have a weight issue exacerbating his situation."

Dr. Fletcher opined that the work accident was, at worst, a temporary aggravation of a pre-existing condition. He described Petitioner's current symptoms as "just a natural progression of that condition that pre-existed the work injury." In his view, Petitioner would have needed the replacements absent the accident. He indicated it was "unclear exactly how the left knee was injured." He found knee replacement to be reasonable for Petitioner's osteoarthritic condition. He indicated Petitioner would be able to return to work as a laborer assuming he had a good outcome from the bilateral knee replacement surgery.

Dr. Fletcher described Petitioner as alert and cooperative.

At Respondent's request, Dr. Karlsson conducted a Section 12 examination of Petitioner on January 16, 2017. In his report of that date, Dr. Karlsson indicated he examined both of Petitioner's knees. The doctor's account of the work accident is consistent with Petitioner's testimony except that he described a lead board sheet as weighing 200 pounds. He documented a history of the prior bilateral anterior cruciate ligament repairs. He indicated that Petitioner described himself as "doing great" after these surgeries and having no knee problems or knee treatment in recent years.

Dr. Karlsson indicated that Petitioner complained of diffuse, approximately equal pain in both knees, for which he was taking Ibuprofen twice daily, and an inability to work or walk more than a couple of blocks.

Dr. Karlsson described Petitioner as "walk[ing] with valgus knees" and having a "lateral thrust to both knees, 1+ on the left and trace on the right." On bilateral knee examination, he noted a range of motion from 0 to 120 degrees, no effusion, no atrophy, 5/5 strength, trace joint line tenderness and negative McMurray, drawer, varus/valgus stress and patellar testing. He obtained X-rays of both knees. He interpreted the films as showing "severe medial joint line arthritis to both knees with complete loss of the medial clear space" and erosion into the femur on both sides, chronic changes with subchondral cysts in the medial femur and tibia, evidence of the prior ACL reconstructions and tricompartmental osteophytes.

Dr. Karlsson indicated he reviewed the images of the July 20, 2016 right knee X-rays, the initial note from Palos Community Hospital, post-accident notes from Dr. Redondo and Dr. David Fletcher's note of December 9, 2016.

Dr. Karlsson diagnosed Petitioner with severe degenerative osteoarthritis in both knees. He found "no evidence that this is in any way related to [Petitioner's] employment." He noted that the X-rays showed no acute changes but rather chronic osteoarthritic changes of long standing. He noted that, while Petitioner indicated he injured both knees when he fell, the

initial records contained no mention of left knee complaints. He did not view Petitioner's left knee condition as related to his employment or the July 20, 2016 accident.

Dr. Karlsson recommended that Petitioner undergo bilateral knee replacements, either at one time or staged. He did not link the need for the replacements to Petitioner's work or the work accident. He indicated that Petitioner would require treatment regardless of the accident. He characterized the treatment to date as reasonable and necessary. He opined that, since Petitioner was able to work prior to the accident, despite his severe degenerative changes, he would have been able to return to work "after a period of rest of several weeks" following the accident. He found Petitioner to be at maximum medical improvement from the accident but not from his degenerative osteoarthritis. Karlsson Dep Exh 2.

Petitioner testified that Dr. Karlsson spent "no more than five minutes" examining him. T. 33.

Dr. Karlsson testified by way of evidence deposition on April 3, 2017. RX 7. Dr. Karlsson testified he is a board certified orthopedic surgeon. He identified Karlsson Dep Exh 2 as his current Curriculum Vitae. He attended medical school at Columbia University. RX 7, pp. 5, 7-8. He practices general orthopedic surgery. The body parts he treats most frequently are the knees, shoulders and hips. Knee problems comprise about 40% of his practice. RX 7, p. 6. He performs knee replacements. RX 7, p. 7. He devotes 5% of his practice to independent medical examinations and depositions, 90% of which are for respondents. RX 7, p. 7.

Dr. Karlsson testified he examined Petitioner on January 16, 2017. He has no independent recollection of the examination. RX 7, p. 8.

Dr. Karlsson's testimony concerning Petitioner's history and his examination findings was consistent with his report. With respect to the X-ray findings, he testified that, at the inner sides of the knees, where Petitioner had completely lost the cartilage, Petitioner had "gone beyond wearing out the cartilage . . . to the point where he was actually wearing little grooves into the thigh bone on both sides." RX 7, p. 13. There was really no difference, appearance-wise, between the X-rays taken on July 20, 2016 and the X-rays he took in his office. RX 7, pp. 14-15. When Petitioner saw Dr. Redondo on October 13, 2016, his range of motion was from 10 degrees to 115 degrees. A normal range of knee motion is from 0 degrees to anywhere between 120 and 150 degrees, depending on the person's build. Petitioner exhibited a varus deformity, meaning he appeared bowlegged. Dr. Karlsson opined that the treatment through October 13, 2016 was reasonable and necessary but unrelated to Petitioner's work or the accident. RX 7, pp. 17-19.

Dr. Karlsson also opined that the condition he and Dr. Redondo diagnosed was unrelated to Petitioner's work or the accident. There was no evidence of acute changes on X-ray. There was "no large piece of cartilage or bone that had been knocked off." The overwhelming finding was chronic, severe degenerative arthritis. RX 7, pp. 19-20.

Dr. Karlsson further opined that Petitioner's left knee was not injured in the accident. The initial records contain no mention of the left knee and only the right knee was X-rayed. Petitioner was "treated with a brace to one side which, if anything, would indicate he didn't have problems on the other side." RX 7, p. 20. The right knee X-ray findings of July 20, 2016 were similar to the right knee X-ray findings of January 16, 2017. RX 7, p. 23. The findings pre-dated the work accident. The changes seen on the X-rays took years to develop. RX 7, p. 24.

Dr. Karlsson testified it would be appropriate for Petitioner to undergo knee replacement surgery. Such surgery is performed on knees "with much less change" than the changes in Petitioner's knees. RX 7, pp. 24, 26. The prior ACL reconstruction surgeries created a "high likelihood of damage to the articular surface." Even with the best ACL reconstruction, "you can't get the dynamics of the knee to be perfect." RX 7, p. 25. There is increased stress on the articular surface and some increased risk of arthritis. RX 7, p. 25. The kind of varus deformity Petitioner has is "a known risk factor for arthritis." It puts greater stress on the inner aspect of the knee. RX 7, p. 25.

Dr. Karlsson testified he questions Petitioner's statement that, following the ACL surgeries, his knees were asymptomatic until the work accident of 2016. That would not be consistent with the degree of change shown on his X-rays. RX 7, pp. 23-24.

Dr. Karlsson testified he has prepared no reports other than his report of January 16, 2017 and his "quick" report. RX 7, p. 26.

Under cross-examination, Dr. Karlsson testified he is not in possession of the records he referenced in his report. He chose to discard them. RX 7, p. 27. He reviewed the records before and after he examined Petitioner. RX 7, p. 28. He looked at the report concerning the July 28, 2016 X-rays but not the X-rays themselves. RX 7, p. 31. Dr. Redondo described Petitioner as having a varus deformity but he did not quantify the degree. RX 7, p. 32. If he had treated Petitioner after July 20, 2016, he would have taken the same conservative approach Dr. Redondo took. RX 7, p. 33. Some people who have bone-on-bone arthritis get a fair amount of benefit from a steroid injection. RX 7, pp. 33-34. Some patients will want to undergo injections for several months to forestall a replacement. RX 7, p. 34. He was not provided with the operative reports concerning the ACL surgeries. Nor was he provided with any interim reports covering the period between 1991 and 2016. RX 7, p. 35. He did not review a job description and does not know how long Petitioner worked for Respondent. RX 7, pp. 36-37. Even a sedentary person who is 25 years old does not have cartilage that looks like that of a teenager. RX 7, p. 39. He does not know Dr. Fletcher. RX 7, p. 39. He agrees with Dr. Fletcher's causation opinion. RX 7, p. 40. In his opinion, Petitioner would be a candidate for knee replacements, regardless of the accident, at such point that he felt conservative care was no longer beneficial. RX 7, p. 41. Based on Petitioner's history and his own knowledge of physiology, when Petitioner fell to the ground it would have been more likely for him to strike both knees. RX 7, p. 43. There is no evidence indicating Petitioner received proper instruction in the use of crutches at the Emergency Room. RX 7, p. 45. The fall could have resulted in "temporary pain" but it would not have had a long lasting effect. The pain from the fall could last longer in

someone who has arthritis. The fall did not contribute in any way to the need for the knee replacement surgery. RX 7, p. 48. Whether he factors the accident in or not, he could not predict when Petitioner would have needed his knees replaced. RX 7, p. 49. Some patients who request knee replacement surgery do so because of pain. Others complain of loss of use. RX 7, p. 55. With the level of changes causing wear into the thigh bone, Petitioner would have had to be in pain before the accident. RX 7, p. 57. The degree of varus and valgus deformity he observed could not have developed in the six months between the accident and his examination. RX 7, p. 57. He has seen worse arthritis in the knee of a 25-year-old than he has seen in the knee of a 70-year-old laborer. Work activity can adversely affect the joints but it does not always do so. RX 7, pp. 60-61. Dr. Fletcher noted severe crepitus but he himself did not. That finding can wax and wane. RX 7, p. 62.

On redirect, Dr. Karlsson, over Petitioner's counsel's objection, looked at documents provided by Respondent's counsel and confirmed they are the documents he reviewed in connection with his examination. RX 7, pp. 64-66. Petitioner's complaints were consistent with the medial collateral ligament strain diagnosed in the Emergency Room. RX 7, p. 66.

Under re-cross, Dr. Karlsson testified that the 8- or 9-page note from Dr. Fletcher that Respondent's counsel handed to him is the note he reviewed in connection with his examination. RX 7, pp. 66-67.

On March 11, 2017, Petitioner returned to Dr. Redondo and reported worsening symptoms. The doctor noted a pain rating of 6/10. He also noted that Petitioner reported injuring both knees at work on July 20, 2016 and being able to perform heavy lifting without difficulty before this injury. He indicated that Petitioner had undergone examinations by two different physicians, both of whom agreed with the need for knee replacement surgery "but not secondary to injury at work."

Dr. Redondo noted that he "told [Petitioner] that he had a previously existing condition aggravated by injury July 20, 2016."

Dr. Redondo described his bilateral knee examination findings as unchanged. He obtained bilateral knee and hip X-rays. He interpreted the knee X-rays as showing severe osteoarthritis with bone-on-bone changes in the medial compartment with varus alignment and retained hardware from the previous ACL reconstructions. He interpreted the hip X-rays as showing mild osteoporosis of both hips.

Dr. Redondo diagnosed "post-traumatic osteoarthritis of both knees." He again found causation, indicating the work accident aggravated a pre-existing condition and rendered Petitioner unable to work as a construction laborer. He noted that Petitioner wanted to undergo bilateral knee replacements, starting with the left knee. PX 3.

At his attorney's request, Petitioner underwent an examination by Dr. Chudik on April 12, 2017. T. 33. Petitioner testified that Dr. Chudik spent 30 to 35 minutes with him. T. 34.

Dr. Redondo operated on Petitioner's left knee on April 28, 2017, performing a left total knee replacement, hardware removal and bone grafting. PX 3. T. 34.

At the first post-operative visit, on May 3, 2017, Patel noted that Petitioner reported doing well but rated his pain at 4-10. He also noted that Petitioner expressed concern about bruising at the anterior and posterior left thigh region. Patel examined the left knee. He recommended that Petitioner continue knee replacement protocol and deep vein thrombosis protocol and return the following week for staple removal. PX 3.

On May 8, 2017, Patel removed the staples and prescribed therapy and Norco. He directed Petitioner to remain off work. PX 3.

Petitioner began a course of post-operative physical therapy on May 15, 2017. The evaluating therapist noted that Petitioner reported having had left knee pain "for a few years." She also noted that Petitioner reported being struck from behind by a piece of lead board while working on July 20, 2016 and being unable to resume working thereafter due to pain and knee buckling.

Petitioner testified the therapists focused on his left leg. T. 35.

On June 19, 2017, Petitioner returned to Patel and reported he was "doing well." Patel noted a pain rating of 2/10. On left knee examination, he noted moderate swelling with effusion, no signs of infection and a range of motion from 0 to 95 degrees. He aspirated 35 cc of blood-tinged fluid from the left knee. He prescribed Norco and a Medrol Dosepak. He ordered a Dynasplint brace and directed Petitioner to continue therapy. PX 3.

A therapy note dated June 30, 2017 reflects that Petitioner's left knee had been feeling "really good" but that he experienced pain and swelling after taking a one-mile walk with his wife. PX 3.

A therapy progress note dated July 7, 2017 reflects that Petitioner rated his left knee pain at 3/10 with activity. The therapist noted that Petitioner had "poor control with stair descent." PX 3.

Petitioner saw Patel again on July 10, 2017. Patel noted that Petitioner denied pain and described himself as doing well. On left knee re-examination, Patel noted minimal swelling, no signs of infection and a range of motion from 0 to 120 degrees. He obtained left knee X-rays. He interpreted the films as showing a well-aligned and fixated replacement, with no signs of loosening. PX 3. The following day, Patel issued a note directing Petitioner to remain off work. PX 3.

Dr. Fletcher testified by way of evidence deposition on July 14, 2017. Dr. Fletcher identified Fletcher Dep Exh 1 as his current Curriculum Vitae. He attended medical school at

Rush University. He did a residency in occupational medicine at Walter Reed Army Medical Center and elsewhere. He is board certified in occupational and preventative medicine. RX 8, pp. 5-6. Occupational medicine is an "eclectic" specialty that focuses on causation and injury prevention. RX 8, p. 6.

Dr. Fletcher testified he devotes 80 to 90% of his time to patient care and 10 to 20% of his time doing medical/legal work. RX 8, p. 7. Of the medical/legal work he performs, about half is for claimants and half for respondents. RX 8, p. 7. He has done work for Respondent's counsel in the past. RX 8, p. 8.

Dr. Fletcher testified he sees Petitioner's type of injury on an almost daily basis in his practice. He does not completely recall his examination of Petitioner and needs to rely on his report (Fletcher Dep Exh 2). RX 8, pp. 8-9. Petitioner's wife sat in on the examination. In his report, he documented the records he reviewed prior to the examination. The date of the first record he reviewed was July 28, 2016. RX 8, pp. 11-12. He reviewed the images of the X-rays taken on that date. They showed "bone on bone" changes. In his opinion, these changes predated the work accident. RX 8, p. 12. The X-rays did not show any acute injury. RX 8, p. 13.

Dr. Fletcher testified he diagnosed bilateral osteoarthritis. The ACL surgeries Petitioner had in the past can cause a traumatically-induced osteoarthritis. Osteoarthritis is a progressive condition. RX 8, pp. 14-15. Petitioner reported having knee pain before the accident. Dr. Redondo described Petitioner as having had knee pain for several years. RX 8, p. 15. It is his opinion that Petitioner's osteoarthritis predated the work accident. With respect to both knees, the accident did not cause or aggravate Petitioner's condition. If Petitioner's injury was limited to his right leg, yet he underwent bilateral knee replacements, the left knee replacement would obviously be unrelated to the accident. RX 8, p. 19. As of his October 2016 examination, Petitioner needed bilateral knee replacements. RX 8, p. 19. Petitioner has a bona fide condition that requires care, regardless of the causation dispute. RX 8, p. 19. He would not impose any restrictions on Petitioner secondary to the work accident. RX 8, p. 20.

Under cross-examination, Dr. Fletcher acknowledged he has never performed a knee replacement. RX 8, p. 20. For 21 years, until 2013, he conducted a CME seminar called "Work Injury" that attorneys attended. He is currently active in WCRI, which gets most of its funding from the insurance industry. He has been very open concerning his opinions that changes in the fee schedule has "severely affected access to care" and that utilization review has hurt workers. RX 8, pp. 23-24. Petitioner provided a history to him by completing a questionnaire. One of the questions on this form is: who is your contact person at work? He asks examinees this question in the event he needs to obtain a job description. When he examines workers on behalf of respondents, he makes recommendations as to what investigation should be done. RX 8, pp. 26-27. He did not need to review Petitioner's job description because he has been taking care of laborers for 30 years. He uses the questionnaire for all Section 12 examinees. He has the examinees complete it and then he reviews it with them. RX 8, pp. 30-32. It is his opinion that the accident caused a contusion-like temporary aggravation that resolved within a few days. RX 8, p. 34. Petitioner told him that his knee pain before the accident was "pretty

constant." RX 8, p. 34. The effect of the natural aging process is variable, depending on a person's activity level. RX 8, p. 36. Workers who stress their lower extremities by carrying heavy boards could potentially experience a greater degree of erosion of the integrity of their joints. RX 8, pp. 36-37. Petitioner would have needed bilateral knee replacements by 2017, regardless of the accident. RX 8, p. 38. He has not reviewed any knee-related treatment records generated between 1991 and the work accident. RX 8, p. 39. By the time he saw Petitioner, Petitioner had undergone some injections. He would expect that these injections would have diminished Petitioner's pain but, based on the X-rays, Petitioner needed replacement surgery. The injections "buy time" for people with advanced osteoarthritis. RX 8, p. 40. He is aware that business wants Illinois law to provide that an accident must be the principal cause of a condition. He is not familiar with the Sisbro decision. RX 8, pp. 41-42.

On redirect, Dr. Fletcher testified that nothing he was asked under cross-examination prompted him to change his opinions. Petitioner told him he had been experiencing knee pain for years. RX 8, pp. 46-47.

A therapy note dated July 25, 2017 reflects that Petitioner complained of occasional left knee stiffness but was making gains. PX 3.

Petitioner was discharged from therapy on July 27, 2017. PX 3. Petitioner agreed with a note in the records indicating he was discharged for financial reasons. He had an insurance problem at that time. No one wanted to cover his treatment so he "pulled out" of therapy. T. 36.

On September 11, 2017, Petitioner saw Dr. Redondo. The doctor noted that Petitioner rated his pain at 2/10. In an addendum, he noted that Petitioner reported "left knee swelling with minimal pain every time he does aggressive activities." He described Petitioner as "concerned about the recurrent swelling and recurrent aspirations that he has had."

On left knee examination, Dr. Redondo noted a range of motion from 0 to 120 degrees, no erythema or warmth, a large joint effusion, a painless range of motion, no instability and quadriceps strength of 4+/5. He diagnosed "recurrent joint effusions after total knee replacement." He aspirated 50 cc of clear fluid from the knee and recommended that Petitioner continue therapy. He continued to keep Petitioner off work.

Dr. Redondo did not indicate that he examined Petitioner's right knee but he noted no abnormalities on "right lower extremity" or bilateral upper extremity examination. PX 3.

Petitioner testified his left knee was "totally swollen up" and "puffy" when he saw Dr. Redondo on September 11, 2017. T. 37.

Petitioner saw Patel on two occasions in October 2017. On October 9th, Patel noted that Petitioner denied left knee pain and reported improvement in his activity levels. He described Petitioner as "happy with surgery outcome." On left knee re-examination, he noted minimal

swelling, a range of motion from 0 to 120 degrees and quadriceps strength of 4-/5. He recommended that Petitioner return in six months. On October 18th, however, he noted that Petitioner complained of left knee swelling secondary to "doing a lot more activity over the past weekend." On left knee re-examination, he noted mild swelling, a range of motion from 0 to 120 degrees and quadriceps strength of 4-/5. He performed an ultrasound inspection, which was negative for an effusion. He recommended a 5-day course of anti-inflammatory medication. PX 3.

Petitioner testified that, after October 2017, he did not return to Dr. Redondo's office until August 1, 2018 because he was struggling financially and there was an ongoing dispute as to who was going to pay for his care. T. 37-38.

Dr. Chudik testified by way of evidence deposition on January 8, 2018. PX 6. Dr. Chudik testified he attended medical school at the Pritzker School of Medicine at the University of Chicago. He did an orthopedic residency thereafter and then underwent fellowship training in shoulder and sports medicine at Cornell University. After he completed that training, in 2002, he returned to Illinois and went into private practice. He teaches at Loyola University. PX 6, pp. 4-6. At Hinsdale Orthopaedics, where he practices, he sees between 150 and 200 patients per week and performs 10 to 20 surgeries per week. His surgical practice is divided 50/50 between shoulders and knees. He performs several knee replacements each week. PX 6, p. 7.

Dr. Chudik identified Chudik Dep Exh 1 as his current CV. PX 6, p. 8.

Dr. Chudik indicated he would need to refer to his report to recall the details of his examination of Petitioner. PX 6, p. 9. He reviewed the reports of Drs. Fletcher and Karlsson, along with treatment records, a list of Petitioner's job duties, a job description and a chronology in connection with the examination. PX 6, p. 10.

Dr. Chudik testified he has experience treating work injuries. Almost all of his patients have sustained injuries due to sports, work, motor vehicle accidents or overuse. PX 6, p. 11.

Dr. Chudik testified that Petitioner was 55 as of his April 26, 2017 examination. Petitioner complained of activity-related bilateral knee pain as well as knee swelling and giving way. Petitioner reported being struck in the back by a falling lead board on July 20, 2016. Petitioner indicated he fell directly onto both knees after being struck. Petitioner reported having gone to Palos Hospital and then Dr. Redondo, who eventually recommended bilateral knee replacements. PX 6, pp. 12-14. Petitioner told him that, before the accident, he would tire after working for 8 to 10 hours but was able to manage. Petitioner indicated he was not able to work as a laborer after the accident. PX 6, p. 14. Petitioner reported having undergone ACL reconstructions by Dr. Redondo, on the right in 1991 and on the left in 1992. Petitioner indicated that both of these surgeries were due to work injuries. PX 6, p. 15.

Dr. Chudik testified he does not recall anyone recommending bilateral knee replacements to Petitioner before the accident. A person can have arthritis radiographically

and yet not be a candidate for replacement surgery. If a person is able to work and perform daily activities, he would not be a candidate. It would not surprise him, however, if Petitioner was told, before the accident, that he would eventually need bilateral knee replacements. Once an ACL injury occurs, whether the ligament is reconstructed or not, that predisposes a person to developing significant arthritis. PX 6, p. 16.

Dr. Chudik testified that, when he conducted his examination, he determined there was no neurological or peripheral vascular source for Petitioner's knee pain. He noted scars on both knees, stemming from the ACL surgeries. On right knee examination, he also noted an obvious effusion and slight varus alignment, which is a normal anatomic finding for most males. The left knee was also swollen and there was fluid on it. On palpation of both knees, he noted tenderness along the lateral patellofemoral joint and tibiofemoral joint. Petitioner did not have full extension. It was minus two degrees. Petitioner had a functional amount of flexion at 125 degrees but the flexion was not complete. PX 6, pp. 18-19.

Dr. Chudik testified he reviewed outside studies and also obtained bilateral knee X-rays. Those X-rays showed tricompartmental arthritis with evidence of the prior ACL reconstructions and hardware. PX 6, p. 20.

Dr. Chudik discussed the complaints noted in the hospital, on the date of Petitioner's accident, and those noted by Dr. Redondo eight days later. Acutely, it appeared the right knee was the most significant on the date of the accident. By the time Petitioner saw Dr. Redondo, he was complaining of both knees. PX 6, p. 23.

Dr. Chudik testified he sees patients in follow up from the Emergency Room every day. Dr. Redondo's note is clearly that of an orthopedist. PX 6, p. 25.

Dr. Chudik testified that the care Petitioner underwent through the date of his examination was reasonable and necessary. PX 6, p. 30. As of that examination, Petitioner was a candidate for bilateral knee replacements. PX 6, p. 31.

Dr. Chudik opined that the work accident aggravated Petitioner's bilateral knee arthritis and led to the need for care, including the injections and recommended surgeries. PX 6, p. 31. He bases this opinion on the following: 1) his experience treating similar injuries; 2) the medical records he reviewed; 3) the objective pathology noted on X-rays and examination; 4) Petitioner's ability to perform full duty before the accident; and 5) the manner in which the accident changed the function of the knee. PX 6, p. 32. The aggravation was permanent in nature. PX 6, p. 32. If the aggravation had been temporary, either the steroid injections of the hyaluronic acid injections would have returned Petitioner to his baseline and previous employment. PX 6, p. 32. There is no evidence suggesting Petitioner returned to baseline after the accident and before his examination. PX 6, p. 33. He agrees with Petitioner's treating surgeon that the accident accelerated the need for knee replacements. He recommended that Petitioner undergo staged replacements. PX 6, p. 34. With Petitioner having undergone ACL reconstructions and having pre-existing arthritis, there is reasonable evidence he would have

developed end-stage arthritis requiring treatment. At age 55, Petitioner is still at the age where he might have required knee replacements in the future. PX 6, p. 34.

Dr. Chudik testified he has not seen Petitioner or spoken with him since the examination. He has not reviewed any additional records since he issued his report. PX 6, p. 34.

Under cross-examination, Dr. Chudik acknowledged that the initial Emergency Room records contain no mention of the left knee. The records contain an account of the accident, with Petitioner reporting that he struck the front of his knee against the ground when he fell. The word "right" is not mentioned in that sentence although it would appear the reference is to the right knee. PX 6, pp. 44-45. The records do not reflect whether Petitioner struck or twisted his left knee. PX 6, pp. 39-40. Petitioner's left knee was not X-rayed at the Emergency Room. PX 6, p. 41. When he saw Petitioner, Petitioner reported falling onto both knees. In his opinion, the two histories are not inconsistent. The Emergency Room note does not state that Petitioner did not fall onto both knees. Dr. Chudik acknowledged that, in his report, he described the Emergency Room records as stating that Petitioner fell and struck the front of his right knee on the ground. PX 6, p. 45. Dr. Redondo did not describe the work accident in his note of July 28, 2016. PX 6, pp. 46-47. The severe osteoarthritis of both knees demonstrated on the X-rays of July 28, 2016 did not start on July 20, 2016. PX 6, p. 48. Petitioner still had cartilage in his knees as of that date but his bilateral osteoarthritis was significant prior to the work accident. PX 6, p. 49. The need for replacement surgery "has nothing to do with [a patient's] radiographic findings." There are people with bone-on-bone arthritis who continue to work and play sports. PX 6, p. 49. Petitioner's osteoarthritis was "probably there for years." PX 6, p. 50. The ACL reconstructions in 1991 and 1992 increased the chance of Petitioner needing knee replacements in the future. PX 6, p. 50. He did not review the ACL reconstruction operative reports but he does not believe they would cause him to change his opinion. An ACL injury changes the dynamic of the knee. PX 6, p. 51. Even the best ACL reconstructions probably fail to totally restore the mechanics to normal. PX 6, p. 52. The varus alignment is a normal finding. He cannot say this created an increased risk of developing osteoarthritis. PX 6, pp. 52-53. All males and some females tend to have more of a varus alignment just as their normal alignment. It is not known whether people who have neutral knees develop less arthritis. PX 6, p. 53. X-rays would show a fracture but are otherwise not sensitive enough to show acute injuries to cartilage, menisci or soft tissue. PX 6, p. 54. Petitioner's X-rays show significant arthritis but do not, in and of themselves, demonstrate the need for replacement surgery. The need for surgery is related to a change in function and abilities and pain. PX 6, p. 56. The X-rays help a physician determine that a patient's limitations are due to arthritis and not another factor. PX 6, p. 57.

On redirect, Dr. Chudik testified that "the hard part" of the case is that the Emergency Room doctor did not mention anything about the left knee. It cannot be determined whether the Emergency Room doctor looked at the left knee or asked Petitioner any questions about it. PX 6, p. 59. In his own report, he gave the Emergency Room physician the benefit of the doubt by indicating that Petitioner fell onto his right knee. The Emergency Room records simply state

Petitioner fell onto his knee. They do not specify right or left. PX 6, p. 59. "Most people, when they fall to the ground, both knees come to the ground." A person does not typically stop at one knee. PX 6, p. 60. Moreover, most of the patients he sees who have permanently aggravated knee arthritis do not aggravate their condition via direct blows to the knee. More often, the aggravations result from the kind of twisting event Petitioner described, "an indirect mechanism of the knee that usually disrupts more cartilage shearing or meniscus." After an accident, there is "always one injury that's more severe than the rest." This is the injury that is focused on. The others get omitted. Over the ensuing days, the most acute injury becomes less painful, swelling sets in and other injuries that might not have presented themselves become apparent. PX 6, p. 61. An evaluation by an orthopedic surgeon occurring eight days after an accident is "the most reliable source of information to try to make difficult decisions concerning causation." PX 6, p. 61. In his practice, he sees this kind of scenario time and time again. The history obtained by an orthopedist after an initial history by a non-orthopedist is always expanded and more thorough. PX 6, pp. 61-62.

Under re-cross, Dr. Chudik testified that the Emergency Room records describe the mechanism of injury as a sudden shift of Petitioner's weight to his left to avoid impact. That suggests a twisting injury of both knees. PX 6, p. 68. Dr. Chudik acknowledged that the Emergency Room physician did not use the word "twisted" in his history. PX 6, p. 71. Petitioner did not use the word "twisted" when he talked with him so the word "twisted" does not appear in his report. PX 6, p. 71.

On further redirect, Dr. Chudik testified that he can reasonably assume Petitioner twisted his knees because the Emergency Room physician indicated that Petitioner suddenly shifted his weight to the left to avoid impact. "To shift side to side with both feet on the ground requires rotational forces at the knee." PX 6, p. 72.

On August 1, 2018, Petitioner returned to Dr. Redondo. Petitioner rated his left knee pain at 4/10 and his right knee pain at 8/10. He also complained of some left hip and groin pain developing during the last several months. He attributed the left knee pain to favoring his left leg because of his right knee pain and deformity. On examination, Dr. Redondo noted a range of motion from 0 to 115 degrees in both knees. He also noted varus alignment, swelling and generalized tenderness in the right knee. He administered a cortisone injection to the left hip as a diagnostic test. He also injected the right knee. He indicated he was awaiting approval of a right total knee replacement. He attributed Petitioner's persistent left knee complaints to Petitioner "favoring the left knee because his right knee is so painful and deformed." He indicated he did not believe Petitioner would get better until he underwent a right total knee replacement. PX 3.

Petitioner testified his right knee was "locking up" as of his August 1, 2018 visit to Dr. Redondo. When his right knee locks, it swells up. He has been taking Duexis, 800 milligrams, to address the swelling. T. 39. He tends to lean when he walks and experiences left hip pain. The hip injection did not help. T. 39.

On March 12, 2019, Patel issued a note directing Petitioner to remain off work "until to be determined." PX 3. T. 40.

At Respondent's request, Dr. Karlsson re-examined Petitioner on April 30, 2019. In his report of the same date, Dr. Karlsson indicated that Petitioner denied any knee reinjuries since the original examination in January 2017 and acknowledged undergoing a left knee replacement sometime in 2018. Dr. Karlsson also noted that Petitioner described his left knee as "doing much better" following the replacement and post-operative therapy. He indicated that Petitioner had undergone a right knee injection in March 2019, with that measure helping "somewhat," and that he planned to have his right knee replaced. He noted that Petitioner denied left knee pain but reported occasional "snapping" of the left knee when walking. He noted that Petitioner reported intermittent pain on both the inner and outer aspects of the right knee, along with a sensation of "locking."

Dr. Karlsson noted that Petitioner reported having retired, due to his knee problems, 1 ½ years prior to the re-examination.

Dr. Karlsson described Petitioner as cooperative throughout the re-examination. He noted a range of motion from 0 to 120 degrees in both knees and "trace" medial joint line tenderness in the right knee. He described Petitioner's gait as normal. He indicated that Petitioner's left leg alignment had been surgically corrected to neutral. He noted a varus deformity and "lateral thrust" to the right knee.

Dr. Karlsson obtained bilateral knee X-rays. He described the left knee films as showing a total knee arthroplasty in good position. He described the right knee films as showing severe tricompartmental osteoarthritis and evidence of the prior ACL reconstruction.

With respect to the left knee, Dr. Karlsson described Petitioner as "status post knee replacement with a knee that is functioning well," with normal alignment on X-ray and normal stability. With respect to the right knee, he diagnosed tricompartmental osteoarthritis with varus deformity and erosion of the medial femoral condyle due to wear, "manifest since 2013," based on Dr. Redondo's note of that year.

Dr. Karlsson again opined that the work accident had no effect on Petitioner's underlying, pre-existing degenerative condition.

Dr. Karlsson then addressed the need for work restrictions, irrespective of causation. With respect to the replaced left knee, he opined that Petitioner would have to keep his kneeling, squatting and crawling to a minimum. With respect to the right knee, he indicated that restrictions would be based on Petitioner's symptoms. If Petitioner was experiencing pain, he might have to be at a sedentary job until after he has the knee replaced.

Dr. Karlsson described all of the treatment he reviewed as reasonable but, with the exception of the initial Emergency Room visit and the July 28, 2016 visit to Dr. Redondo,

unrelated to the work injury. He saw no need for any additional left knee care. He found it reasonable for Petitioner to proceed with a right knee replacement.

Based on the complaints and findings that Dr. Redondo recorded on March 4, 2013, Dr. Karlsson indicated he felt vindicated in previously opining that Petitioner must have had knee complaints before the work accident. RX 10.

Petitioner's counsel scheduled Dr. Redondo's evidence deposition for July 2, 2019. RX 11. The deposition did not proceed.

Dr. Redondo administered five right knee Supartz/Synvisc injections between June 24, 2019 and August 7, 2019. Petitioner testified these injections did not help in the same way that the left-sided injections helped before he had his left knee replaced. After each right knee injection, his knee would feel okay for only a short period, like a day. Right after that he would lose power in his knee. He would definitely like to have his right knee replaced. He is still off work. Respondent has not paid him any benefits other than the $16,910.32 documented on the stipulation sheet. His current sources of income include Social Security disability payments and his laborers' union pension payments. He did not want to retire but he needed money so he applied to take his pension. But for the work accident, he would not have retired. T. 43. He was approved for Social Security disability on January 30, 2018. T. 44.

Petitioner testified that workers' compensation paid some of his medical bills. Medicare and his laborers' union paid other bills, as did his wife's group carrier, Blue Cross. Medicare started picking up some of his medical expenses in August 2019. T. 45.

Under cross-examination, Petitioner acknowledged telling Dr. Redondo in 2013 that he was experiencing increased pain in both knees and having difficulty walking and working. T. 55-56. He was taking maybe one Ibuprofen a day at that time. T. 56. Dr. Redondo recommended that he stop working as a laborer. T. 56. He does not recall the doctor saying he would end up needing knee replacements. Petitioner testified that, as of March 4, 2013, he himself did not believe he needed to have his knees replaced. T. 56-57.

Petitioner acknowledged that, when he went to the Emergency Room on the day of the accident, he underwent right knee X-rays and was given a brace for his right knee. T. 58. No left knee treatment was undertaken. When he saw Dr. Redondo on July 28, 2016, he told him how he had been injured and that he had been having knee pain for the last several years. T. 59. There was a gap in his post-accident treatment between October 13, 2016 and March 11, 2017. He does not recall telling Dr. Redondo in October 2017 that he was doing well. T. 59. He does not recall telling the doctor his left knee had been doing well until he performed a lot more activity over the weekend. T. 59-60. He recalls undergoing a left knee ultrasound in October 2017 because of activity that resulted in increased swelling. T. 60. He does not know the results of the ultrasound. He underwent a left knee replacement in April 2017. "Right now" he has no left knee pain. T. 61. He is not taking any pain medication for his left knee. He would rate his left knee pain as zero. T. 62. In July 2017, he told Dr. Redondo's assistant he

experienced tremendous improvement after the left knee replacement. After the replacement, Dr. Redondo primarily examined his left knee but occasionally looked at his right knee. T. 62-63. There was another gap in his care between October 2017 and August 2018. He does not recall Dr. Redondo's assistant telling him "see you in six months" on October 9, 2017. T. 64-65. He would not dispute the doctor's records if they say he was supposed to return in six months for X-rays. T. 65. He continues to perform household chores, including laundry, vacuuming, washing dishes and cutting the grass. T. 65. He uses a "push" gas-powered mower. His front lawn is about 100 feet x 15 feet. His back yard is a little bigger. T. 66-67. No doctor has written out a restriction saying he cannot cut grass. T. 67. He tries not to take pain medication. He does not wear a sleeve on his right knee. He does not use crutches. T. 68. He continues to drive, using his right foot to brake. He is not subject to any driving restrictions. T. 68.

On redirect, Petitioner testified that the work-related knee issues he discussed with Dr. Redondo before the accident were different from those he discussed when he first started testifying. T. 69. When he saw Dr. Redondo before the accident, he asked the doctor whether he could do therapy to make his knees feel better. T. 70. If Dr. Redondo's assistant told him, in October 2017, to return in six months, it would have been insurance issues that prevented him from returning in April 2018. He does not dispute the doctor's records. The doctor created the records. T. 71-72.

Arbitrator's Credibility Assessment

Petitioner's lengthy tenure with Respondent weighs in his favor, credibility-wise.

Neither of Respondent's examiners noted any symptom magnification.

Overall, the Arbitrator found the causation opinions voiced by Drs. Redondo and Chudik more persuasive than those voiced by Respondent's examiners. Of the four physicians who addressed causation, Dr. Redondo was most familiar with Petitioner's surgical history and presentation, having treated Petitioner since the early 1990s. Dr. Redondo saw Petitioner on multiple occasions over a lengthy period of time. Dr. Chudik, who regularly performs knee replacements, fully appreciated the nature of Petitioner's laborer job. Dr. Fletcher, Respondent's first examiner, is an occupational medicine specialist, not a surgeon. He claimed to have an understanding of the tasks Petitioner performed before the accident but acknowledged he did not review any job description. Dr. Karlsson, Respondent's second examiner, is an orthopedic surgeon but admitted having no understanding of the duration or nature of Petitioner's employment by Respondent. Petitioner credibly testified that Dr. Karlsson spent only five minutes with him.

Dr. Chudik's testimony concerning the mechanism of injury was particularly persuasive. He focused on the fact that Petitioner abruptly shifted his weight, likely twisting in the process, to avoid being struck by the falling lead board. He explained that this kind of movement is more likely to aggravate knee arthritis than any direct blow to the knee. He deftly used his own experience in seeing patients in follow-up from Emergency Room visits to explain why the

earliest records might mention only one body part while an orthopedist's subsequent note, drafted about a week later, might mention a second as well.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between his undisputed work accident and his bilateral knee condition of ill-being?

The parties agree that Petitioner sustained an accident on July 20, 2016, while working as a laborer for Respondent. They also agree that Petitioner had significant bilateral knee osteoarthritis before this accident and that the Immediate Care records dated July 20, 2016 mention right knee but not left knee complaints. Petitioner contends that the accident permanently aggravated his osteoarthritis, rendering him unable to continue working as a laborer and bringing about the need for treatment, including the left knee replacement he has undergone and the right knee replacement he seeks. Respondent, in reliance on its examiners, contends that the accident only temporarily aggravated Petitioner's right knee osteoarthritis, with that condition returning to baseline as of July 28, 2016, and that Petitioner did not injure his left knee.

The Arbitrator finds that the undisputed work accident permanently aggravated Petitioner's underlying bilateral knee osteoarthritis, abruptly rendering Petitioner unable to continue working and bringing about the need for treatment including, ultimately, bilateral knee replacements. In so finding, the Arbitrator relies in part on the foregoing analysis of the causation opinions rendered in this case. The Arbitrator also relies on the following: 1) Petitioner's credible testimony that he was physically able to perform the strenuous duties of a laborer, despite his knee condition, up to the time of the accident; 2) Petitioner's credible testimony that he shifted his weight abruptly after hearing his co-worker shout out a warning; 3) the fact that the Palos Health records of July 20, 2016 describe Petitioner as unable to easily bear weight and needing to be transported from the jobsite; and 4) the fact that the same records describe Petitioner ~~as experiencing~~ immediate pain when "pushing off" and suddenly shifting his weight "to avoid impact with a falling object" (PX 2, p. 11).

The Arbitrator finds it reasonable to infer that, when Petitioner heard Roche shout out a warning, he had reason to fear he was about to be struck by an object weighing 150 pounds. His goal was to get himself out of the way, even if he had to move awkwardly.

The Arbitrator recognizes that left knee symptoms are not documented until eight days after the accident. As noted earlier, the Arbitrator finds persuasive Dr. Chudik's testimony, on redirect, that both an injured person and a physician providing urgent care would tend to focus on the primary complaint and that a secondary complaint might not be documented until later. If, as the initial records of July 20, 2016 reflect, Petitioner could not bear weight and needed to be transported to the hospital, it stands to reason he did not use or tax his left leg until later. The Arbitrator is unable to conclude that an eight-day delay is so significant as to preclude a finding of causation.

The Arbitrator also relies on established precedent in finding causation via an aggravation theory. It has long been held that an injured worker seeking benefits under the Act need not establish that a work accident was the sole, or even a primary, cause of his condition. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003). An employer takes an employee as it finds him. St. Elizabeth's Hospital v. IWCC, 371 Ill.App.3d 882 888 (2007). In the instant case, Respondent hired Petitioner more than a decade after he underwent significant bilateral ACL reconstructions. No one affiliated with Respondent contradicted Petitioner's testimony that, between his hiring in 2005 and the 2016 accident, he successfully performed physical tasks such as scaffold construction and repetitive lifting of 150-pound objects despite his knee condition. No witness came forward to suggest that Petitioner took time off or avoided certain tasks due to that condition. The years that Petitioner put in between his 2013 visit to Dr. Redondo and the accident inured to Respondent's benefit as well as his own. Petitioner credibly testified that the accident brought about an abrupt change in his ability to continue working. In Schroeder v. IWCC, 2017 Ill. App. LEXIS 350 (4th Dist. 2017), the Appellate Court emphasized that, if it were to hold that the "chain of events" principle only applied to a claimant who was in a condition of absolute good health, "that holding would contradict years of Illinois precedent concerning pre-existing condition." If anything, the facts of the instant case more strongly support a finding of causation than those of Schroeder. The claimant in Schroeder learned, while she was off work in the spring of 2013, that she needed a third lumbar spine surgery, a fusion. She declined that surgery and instead resumed working as a truck driver for the same company she had worked for in the past. She drove successfully for about six months before slipping and falling on ice after dropping off her trailer. Like Petitioner, she landed on a concrete surface and required assistance with walking. After an initial Emergency Room visit, she returned to Dr. Yazbak, her surgeon, who took her off work and eventually performed the surgery he had recommended months earlier, although he testified he modified his technique in deference to a change in Petitioner's symptoms. The arbitrator found that the accident merely temporarily aggravated a significant pre-existing condition. The Commission reversed, "observ[ing] that the arbitrator failed to note that the claimant was able to work full time following the spring of 2013 when [her surgeon] expressed concern about [her] condition." The Appellate Court upheld this result. Petitioner, in contrast, never stopped working and continued performing his laborer duties for three years after his 2013 visit to Dr. Redondo. Dr. Redondo, unlike Dr. Yazbak, did not prescribe a specific surgery at that time. The Appellate Court's holding in Schroeder supports a finding of causation in the instant case.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims the bills in PX 7. Respondent disputes this claim based on its causation defense. The Arbitrator has found in Petitioner's favor on the issue of causation. Respondent's examiners agreed that the treatment Petitioner underwent was appropriate, regardless of causation. The Arbitrator awards the medical expenses in PX 7, subject to the fee schedule and with Respondent receiving credit for any payments it has made. RX 2.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims he was temporarily totally disabled from July 21, 2016 through the hearing of October 16, 2019. Respondent disputes this claim based primarily on its causation defense. The Arbitrator has found in Petitioner's favor on the issue of causation. The Arbitrator views Petitioner's causally related right knee condition as unstable, given the pending recommendation for replacement surgery. Interstate Scaffolding, Inc. v. IWCC, 236 Ill.2d 132 (2010). Respondent's examiners agree this surgery is appropriate, although they do not view the need for the surgery as related to the work accident.

The Arbitrator finds that Petitioner was temporarily totally disabled from July 21, 2016 through the hearing of October 16, 2019. Respondent is entitled to credit for the $16,910.32 in benefits it paid. Arb Exh 1.

Is Petitioner entitled to prospective care?

Petitioner seeks prospective care in the form of the right total knee replacement recommended by Dr. Redondo.

The Arbitrator has previously found in Petitioner's favor on the issue of causation. Although Drs. Fletcher and Karlsson agreed on the need for replacement surgery, regardless of causation, Respondent raises an alternative argument, i.e., that Dr. Redondo's note of September 11, 2017 establishes Petitioner does not need to have his right knee replaced. Essentially, Respondent maintains that, on September 11, 2017, Petitioner's right knee was asymptomatic. Respondent cites the negative "right lower extremity" examination findings of that date. PX 3, p. 47. The Arbitrator views the electronic records of Dr. Redondo and his assistant (PX 3) differently. At some visits, the doctor or his assistant listed findings under the heading "left knee examination." At other visits, they listed findings under two headings: "left knee examination" and "right knee examination." The note of September 11, 2017 specifically mentions left knee examination findings. It also lists, in a rote fashion, negative right lower extremity findings and bilateral upper extremity findings but there is no indication the doctor examined the right knee. It makes sense that the doctor would have been focused on the left knee since he had just performed a left knee arthroplasty a few months earlier.

Respondent also cites gaps in treatment as a basis for denying the surgery Petitioner seeks. Petitioner credibly attributed these gaps to the payment dispute that was going on between his group carrier and the workers' compensation insurance carrier.

The Arbitrator awards prospective care in the form of the right knee replacement recommended by Dr. Redondo.

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

ERIK VITOLS,

Petitioner,

vs. NO: 18 WC 8453

VILLAGE OF SCHAUMBURG,

Respondent.

20IWCC0715

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical, temporary total disability benefits (TTD), and permanent partial disability benefits (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 the person-as-a-whole and finds that Petitioner sustained 12.5% loss of the person-as-a-whole as the result of his work-related injury.

The Commission assigns greater weight to subsection (v) of Section 8.1(b) of the Act. The evidence establishes that Petitioner sustained a right shoulder injury resulting in a right shoulder arthroscopic debridement, loose body removal, and subacromial decompression. Petitioner was eventually placed at maximum medical improvement and released back to work full-duty. During his last examination on March 12, 2019, Petitioner had full range of motion and his strength was noted as 5/5. He had a negative Hawkins test, a negative impingement test, and a negative empty beer can test. Petitioner reported that he is capable of lifting up to several hundred pounds at work and has shoulder discomfort that will come and go. Based upon the evidence, the Commission finds that an award of 12.5% loss of use of the person-as-a-whole is proper. All else is affirmed

20IWCC0715

and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 30, 2020, 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 $1,256.67 per week for a period of 5-6/7 weeks, (April 18, 2018 through May 28, 2018), that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $775.18 per week for a period of 62.5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused 12.5% loss of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $21,946.52 for medical expenses under §8(a) and 8.2 of the Act. These are charges that have not been paid by Petitioner's group carrier and to which the provisions of Section 8(j) do not apply.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall be given a credit of $27,743.09 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent 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: DEC 4 - 2020

D. Douglas McCarthy

DDM/tdm
O: 11/18/20
052

Stephen Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VITOLS, ERIK
Employee/Petitioner

Case# **18WC008453**

VILLAGE OF SCHAUMBURG
Employer/Respondent

20IWCC0715

On 1/30/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0147 CULLEN HASKINS NICHOLSON ET AL
CHARLES G HASKINS JR
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT B ULRICH
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60603

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

Erik Vitols
Employee/Petitioner

Case # **18WC008453**

v.

Consolidated cases: **None**

Village of Schaumburg
Employer/Respondent

20IWCC0715

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 **December 17, 2019 and January 22, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **05/08/2017**, 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 $**98,020.00**; the average weekly wage was $**1,885.00**.

On the date of accident, Petitioner was **34** years of age, ***married*** with **1** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,256.67/week for 5-6/7 weeks, commencing 04/18/2018 through 05/28/2018, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $21,946.52, as provided in and subject to limitations of Sections 8(a) and 8.2 of the Act. These are charges that have not been paid by Petitioner's group carrier and to which the provisions of Section 8(j) do not apply.

Respondent shall be given a credit of $27,743.09 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 $775.18/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.

David A. Kane
Signature of Arbitrator

January 30, 2020
Date

JAN 30 2020

Attachment to Arbitration Decision

Erik Vitols
Employee/Petitioner

Case No. 18WC008453

v.

Village of Schaumburg
Employer/Respondent

20IWCC0715

FINDINGS OF FACT

Erik Vitols has been employed by the Village of Schaumburg as a Firefighter/Paramedic since February of 2012. He is right hand dominant.

Prior to May 8, 2017 he had never noticed anything unusual about his right shoulder nor had he ever had any medical treatment to that body part.

He has periodically treated with Castle Chiropractic for a variety of conditions.

Petitioner is a weightlifter. He lifted weights prior to being employed by the Village of Schaumburg. He lifts weights at home on occasion. He also lifts weights at the firehouse. The main reason for him working out is to be fit to perform his essential job functions. Weightlifting is part of his physical fitness routine at the firehouse. Weights are provided by the Respondent.

On May 8, 2017 he was assisting in removal of a heavier patient from a residence when the stretcher took an unexpected drop/moved awkwardly. Petitioner indicated that he jerked up to try to stabilize the

patient and immediately thereafter felt pain in his right shoulder. (See also PX1 – Supervisor's Accident Investigation Report).

Lieutenant Nick DiGioia testified at Petitioner's request that he was Petitioner's supervisor on May 8, 2017 and he confirmed that the stairs were somewhat abnormal and there was abnormal drop of the stretcher. He heard Firefighter Vitols make a noise/groan, stating that "didn't feel good." When the Firefighters returned to the firehouse Petitioner's Exhibit #1 was completed.

Lieutenant DiGioia testified that following the lifting incident of May 8, 2017 and for the remainder of 2017 Firefighter Vitols would indicate that he was still experiencing discomfort and pain in the right shoulder.

Lieutenant DiGioia confirmed that he completed a Witness Statement on January 9, 2018 (RX4).

Firefighter Vitols indicated that he continued working up until approximately January 8, 2018 and during this period of time he also continued to see Castle Chiropractic. During this period of time he was feeling pain and discomfort with various movements. The pain would subside at times. He was trying to minimize lifting, in particular overhead lifting, and would utilize ice, anti-inflammatories and rest. When activity increased or when he performed awkward lifting at work, the pain would return.

Petitioner offered as Petitioner's Exhibit 6 the records of Castle Chiropractic. The records show that he initially was seen on September 5, 2012 (PX6, pg. 4). Treatments focused on the low back and mid back into November of 2012 (PX6, pp. 7-15). Thereafter Petitioner had two visits in 2013 for spinal issues (PX6, pp. 16-17). There were no charts for the year 2014. Beginning January 27, 2015 and continuing through May 4, 2017 Petitioner had a number of relatively consistent treatments and all records document complaints of and treatment to the spinal regions (PX6, pp. 18-134).

On May 31, 2017 Petitioner additionally complained to Castle Chiropractic of experiencing pain in his right anterior shoulder near his biceps tendon (PX6, pg. 135). He complained of pain in his right arm from work and lifting. The pain had been up and down but was not going away and the Petitioner wanted to try some wave therapy for his right shoulder that was initiated on May 31, 2017 (PX6, pg. 136). Petitioner had been receiving this therapy for his spine.

The records of Castle Chiropractic for visits prior to May 8, 2017 do not reveal any complaints concerning the right shoulder or treatments thereto. Following the May 31, 2017 visit to Castle Chiropractic, Mr. Vitols either complained of his right shoulder or the therapist noted right shoulder issues on examination on the following visits in 2017 (page references are to the page of the chart contained in Petitioner's Exhibit 6): May 31 (pp. 135-136), June 2 (pg. 137), June 3 (pg. 138), June 5 (pg. 139), June 6 (pg. 141), June 14 (pg. 144), June 29 (pg. 150), June 30 (pg. 151), July 5 (pg. 152), July 6 (pg. 153), July 1 (pg. 156), July 20 (pg. 157), July 27 (pg. 158),

August 2 (pg. 159), August 8 (pg. 160), August 22 (pg. 162), September 13 (pg. 164), September 26 (pg. 169), October 18 (pg. 172), November 21 (pg. 175) and December 2 (pg. 177).

On October 12, 2017 Petitioner underwent MRI study ordered by Dr. Castle. The impression was suspected osteochondral/labral lesion at the anterior/inferior aspect of the labrum (PX6, pg. 5-6).

Following the accident of May 8, 2017 Mr. Vitols had to modify his weightlifting routine. If it caused pain he did not do it. He did a lot of lower body work. This was verified by Lieutenant DiGioia.

By January 8, 2018 Petitioner indicated that the pain in his shoulder would not go away after long periods of rest and it got to the point where he felt something needed to be done to correct the problem. Petitioner did not want to live with the pain anymore.

On January 8, 2018 he notified Lieutenant DiGioia who completed the Employer's First Report of Injury, Illinois Form 45 (PX2).

As instructed by Respondent, Petitioner was seen on that date by the Northwest Community Hospital Outpatient Treatment Center where he presented with a history of pain in his shoulder since May 8, 2017 when lifting a patient and the cart jerked. He reported that the pain had never really gone away and he wanted to get it checked out (PX7, pg. 11). X-ray was performed of the right shoulder and was interpreted as unremarkable

(PX7, pg. 4). He was referred to orthopedic surgery (PX7, pg. 13) and told to go to Dr. Levin.

On January 11, 2018 Petitioner was seen by Dr. Mark Levin. Petitioner gave history of the May 2017 incident. Dr. Levin's examination found a tenderness along the long end of the biceps and of the bicipital groove as well as normal strength and motion. The doctor felt Petitioner might have biceps tendonitis or other inflammatory conditions and recommended steroid injection and formal therapy. Dr. Levin reported that Mr. Vitols opted to treat with his own personal doctor. Dr. Levin stated that based upon the history and lack of treatment since May of 2017 that the doctor could not relate the current condition to the injury of May, 2017 (RX1).

Petitioner opted to treat with Dr. Gregory Portland of the Illinois Bone & Joint Institute and first saw the doctor on January 29, 2018. Petitioner presented with the same history that he had presented to Northwest Community Hospital and to Dr. Levin. The doctor conducted examination and reviewed the MRI. Dr. Portland reported that the empty beer can test was positive, the whipple test was positive, Hawkins test was positive and the impingement test was positive. The doctor felt there was a partial right rotator cuff tear and right shoulder labral tear. The doctor wanted him to continue light duty and perform physical therapy (PX8, pp. 4-5). Petitioner returned on March 5, 2018 and reported some progress with therapy; however, he complained of pain when reaching as well as night pain. Dr. Portland recommended another couple of weeks of therapy to see if he improved. If not, surgery would be recommended (PX8, pg. 6).

Petitioner was seen at Respondent's request by Dr. Biafora on February 22, 2018. Dr. Biafora reviewed the records of Northwest Community Hospital Treatment Center, the Employers First Report of Injury (PX2), the records of Dr. Levin and the chart of Dr. Portland stemming from the January 9, 2018 visit. The doctor also reviewed initial physical therapy records from Athletico as well as the MRI report. Dr. Biafora was provided and reviewed records from Castle Chiropractic dated September 5, 2012 through February 15, 2018.

Dr. Biafora concluded that the shoulder condition was not related to the work injury described by Mr. Vitols as there was no indication in the records that he reviewed where Mr. Vitols presented with right shoulder complaints related to the described incident of May 2017 prior to the completion of the "Employer's First Report of Injury" dated January 10, 2018. Additionally, there was no indication in the chiropractic records of any one incident or traumatic event at the onset of symptoms (RX2, pg. 4).

Dr. Biafora did indicate that the treatment by Dr. Portland and therapy were appropriate and that additional treatment would be necessary, including the possibility of surgery. (RX2, pg. 4-5).

Petitioner followed up with Dr. Portland on April 3, 2018. As Petitioner continued to report pain when reaching away from his body or overhead as well as occasional pain when sleeping at night and based upon the lack of improvement with therapy the doctor recommended surgical intervention. Dr. Portland did review the report of Dr. Biafora and the doctor indicated

that he disagreed with Dr. Biafora's findings. The doctor indicated that his medical opinion was that the condition of the shoulder was consistent with the history presented by Firefighter Vitols (PX8, pp. 7-8).

On April 18, 2018 Petitioner underwent surgery at the Ravine Way Surgery Center consisting of extensive arthroscopic debridement, removal of loose body and subacromial decompression (PX8, pg. 19). Post-operative diagnoses were: large chondral defect of humeral head; areas of chondral defects with unstable chondral flaps, glenoid; tearing of the anterior inferior labrum; cartilaginous loose bodies of the right shoulder; and right shoulder impingement.

Thereafter, Petitioner followed up with Dr. Portland on a variety of dates and ultimately underwent physical therapy. Petitioner was seen on August 7, 2018 and was released to return to regular duties (PX8, pg.15).

Petitioner was allowed to perform restricted duty prior to that date with the exception of the period of April 18, 2018 through May 28, 2018 when he was totally off of work following the surgery. The light duty consisted of helping out in the EMS department reading reports and also helping the Fire Marshal do inspections. Petitioner utilized sick time for the period of time he was off of work following the surgery.

Petitioner indicated that at work he is required to deal with various weights including lifting patients or pulling charge hoses. He literally can be required to lift into the hundreds of pounds.

Petitioner's final visit to Dr. Portland was on March 12, 2019 when he reported that he experiences pain when he is required to lift very heavy amounts at work. The doctor cautioned that he had significant chondral wear in his shoulder and flare ups can occur especially with increases in activity and lifting. He was provided Medrol Dosepak and home exercises (PX8, pg.16).

Petitioner indicates that he presently notices shoulder discomfort that comes and goes. It is not constant but it does exist. Petitioner still experiences pain when he sleeps. He experiences aches, pains and discomfort.

Petitioner offered as Petitioner's Exhibit #3 the billing of Illinois Bone & Joint Institute which reflects a balance due of $255.70 and also reflects payments by the group insurance carrier.

Petitioner offered as Petitioner's Exhibit #4 the billings of Athletico Physical Therapy. The billings of Athletico Physical Therapy showed outstanding balance of $16,549.00. The outstanding balances were for services after February 22, 2018. Charges on that date and before were resolved through workers' compensation. The billing reflects payments by the group carrier.

Petitioner offered as Petitioner's Exhibit #5 the itemization of BlueCross BlueShield showing amounts paid by BlueCross BlueShield totalling $36,666.51.

Respondent offered as Respondent's Exhibit #3 the Schaumburg Fire Department – Standard Operating Procedure for Accidents. That document states it was revised on May 14, 2018. Lieutenant DiGioia indicated that in May, 2017 that he did not believe that it was required to obtain statement from the injured worker or witnesses. The procedures outlined in RX4 indicate that Employee Statements and Witness Statements should be obtained.

CONCLUSIONS OF LAW

1. Accident

Based upon the testimony of the Petitioner and Lieutenant DiGioia as well as Supervisor's Accident Investigation Report (PX1) (Petitioner's Exhibit #1), the Arbitrator concludes that Petitioner sustained accidental injuries arising out of and in the course of his employment.

2. Notice

Based upon the testimony of Lieutenant DiGioia as well as Petitioner's Exhibit #1, Supervisor's Accident Investigation Report, the Arbitrator concludes that Petitioner provided timely notice of the accident to Respondent.

3. Causation

Petitioner testified that he had no prior issues or problems with his right shoulder. Petitioner further testified that he experienced pain in his right shoulder immediately after the incident removing the patient from resident on May 8, 2017.

Lieutenant DiGioia, Petitioner's supervisor, was present at the scene and confirmed Petitioner's testimony. Additionally, Lieutenant DiGioia indicated that following incident of May 2017 and for the remainder of the year of 2017 that Firefighter Vitols would indicate to him that he was continuing to experience discomfort and pain in the right shoulder.

The records of Castle Chiropractic reveal no complaints or mention of the right arm or shoulder prior to the visit of May 31, 2017, which was the first visit at Castle following the May 8, 2017 accident. Petitioner at that visit complained of pain in his right arm from work and lifting. Thereafter, Mr. Vitols complained of right shoulder pain on numerous occasions during the remainder of 2017.

Dr. Levin, who examined on the referral from Northwest Community Hospital Treatment Center, stated that based upon the history and lack of treatment after May of 2017 that he could not relate the current condition to the injury of May 2017.

Dr. Biafora's opinion was based upon the fact that there was no indication in the records that were presented to him for review wherein Mr. Vitols related the shoulder complaints to the May 8, 2017 accident prior to the completion of the Employer's First Report of Injury dated January 10, 2018. Additionally, there was no specific mention in the chiropractic records of the incident.

The Arbitrator notes that it is obvious that Dr. Biafora was neither presented with the fact that the Supervisor's Accident Investigation Report was completed on the date of accident (PX1), nor the fact that Lieutenant DiGioia confirmed Petitioner's testimony that he had had problems with the arm on a consistent basis following the May 8, 2017 accident.

Dr. Portland did review Dr. Biafora's findings and disagreed with the doctor's conclusions. Dr. Portland felt that there was no evidence of malingering, no history of pervious injury and that the injury was consistent with the mechanism of the occurrence of May 8, 2017.

Based upon the above, the Arbitrator concludes that a causal relationship exists between the accident of May 8, 2017 and the condition of ill-being in Petitioner's right shoulder.

4. Medical

Petitioner had been treating for a significant period of time with Castle Chiropractic. The charts contained in Petitioner's Exhibit #6 consistently make reference to the diagnoses that existed prior to the accident of May 8, 2017 and are obviously unrelated to the shoulder injury. It appears that Petitioner was receiving the same type of treatment both before and after the accident. While Petitioner's right arm may have received additional consideration from the message therapist or the medical providers at Castle Chiropractic, it is impossible to quantify or ascertain what was specifically related to the shoulder. Accordingly, the Arbitrator is not awarding any of the charges from Castle Chiropractic and is not awarding any type of 8(j) credit, including hold harmless.

Petitioner underwent a period of therapy and then ultimately underwent surgery under the care of Dr. Portland. Dr. Biafora felt that this treatment plan was appropriate. Petitioner offered as Petitioner's Exhibit #3 the billing of Illinois Bone & Joint Institute which showed two charges of $5,397.52 with adjustments and payment by group insurance leaving a balance of $255.70. The Arbitrator awards $255.70 subject to the limitations contained in Section 8.2 of the Act.

Petitioner offered as Petitioner's Exhibit #4 the billing of Athletico Physical Therapy. The charges show bills due of $16,549.00. In reviewing the bill it is obvious that a number of charges were paid by group insurance. Additionally, there were a number of charges for visits that, for whatever reason, were not paid by group insurance. The balance of these charges would be $16,549.00. The Arbitrator awards the sum of $16,549.00 subject to the limitations contained in Section 8.2 of the Act.

Additionally, Petitioner stipulates that Respondent is entitled to a credit under Section 8(j) for any payments made. Pursuant to the terms of 8(j) the Respondent shall hold Petitioner harmless as to any reimbursement claims made by BlueCross BlueShield, as far as payments made by the group carrier for services listed on Petitioner's Exhibit #4, with the exception of any payments made to Castle Chiropractic. The total charges paid by BlueCross BlueShield, excluding those to Castle Chiropractic, total $27,743.09.

5. Temporary Total Disability

Petitioner was off of work for the period of April 18 through May 28, 2018. In light of the Arbitrator's findings relative to accident, notice and causation, the Arbitrator finds Respondent liable for temporary total disability for that period which totals 5-6/7 weeks of compensation.

6. Nature and Extent

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a Firefighter/Paramedic at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that this is a heavier physical demand level job and the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 34 years old at the time of the accident. Based upon the fact that Petitioner has a number of years remaining in his work life, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that there is no decrease in earning capacity and 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 Petitioner's ongoing issues with certain lifting activities including overhead and away from his body as well as soreness when sleeping at night. 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 15% loss of use of the person pursuant to §8(d)2 of the Act.

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

MONICA CHARLIER,

Petitioner,

vs.

NO: 08 WC 53741

STATE OF ILLINOIS,
ILLINOIS DEPARTMENT OF
REHABILITATION SERVICES,

20IWCC0716

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 3, 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.

20IWCC0716

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.

DEC 4 - 2020

DATED:
o-11/24/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHARLIER, MONICA A
Employee/Petitioner

Case# **08WC053741**

IL DEPT OF REHABILITATION SERVICES
Employer/Respondent

20IWCC0716

On 12/3/2018, 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 2.47% 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:

2053 GEORGE L TAMVAKIS LTD
53 W JACKSON BLVD
SUITE 601
CHICAGO, IL 60604

6143 ASSISTANT ATTORNEY GENERAL
KRISTIN A LEASIA
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

DEC 3 - 2018

Brittany A. Cronin, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MONICA A. CHARLIER
Employee/Petitioner

v.

ILLINOIS DEPARTMENT OF REHABILITATION SERVICES
Employer/Respondent

Case # **08** WC **53741**

Consolidated cases: _____

20IWCC0716

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 **Doherty**, Arbitrator of the Commission, in the city of **Waukegan**, on **October 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 _____

FINDINGS

On **October 9, 2008**, 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 through January 12, 2009.

In the year preceding the injury, Petitioner earned **$24,440.00**; the average weekly wage was **$470.00**.

On the date of accident, Petitioner was **30** years of age, ***single*** with **4** 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. ARB EX 1

ORDER

Medical benefits
Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of her causally related injuries through January 12, 2009 pursuant to Sections 8(a) and 8.2 of the Act.
Respondent shall be given a credit for amounts paid, if any, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Temporary Partial Disability
Respondent shall pay Petitioner temporary partial disability benefits of $310.00/week for 13 4/7 weeks, commencing October 9, 2008 through January 12, 2009, as provided in Section 8(a) of the Act.

Permanent Partial Disability: Person as a whole (For injuries before 9/1/11)
Respondent shall pay Petitioner permanent partial disability benefits of $310.00/week for 25 weeks, because the injuries sustained caused the 5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Penalties
Respondent's request for penalties and fees under the Act is denied and no penalties or fees 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.

Carolyn M. Wheesy
Signature of Arbitrator

11/30/17
Date

DEC 3 - 2018

FINDINGS OF FACT

At trial, Petitioner testified that on October 9, 2008, she was employed by the Respondent State of Illinois, Department of Rehabilitation Services. Petitioner testified that on October 9, 2008, she was the caregiver for a patient who was paralyzed from the neck down. Petitioner testified that her job duties required her to care for all of the patient's needs during the day. Another family member of the patients assisted him during the hours that Petitioner was not working. Petitioner testified that her responsibilities included but were not limited to dressing, cleaning, feeding, transporting and meeting all the daily living needs of the patient. Much of her job required moving the patient in and out of bed and his wheelchair with the use of a lift. Petitioner estimated the patient weighed approximately 298 pounds.

While at work on the day of the incident, the patient had to be transported to an appointment, which Petitioner testified was included in her duties as care giver. Petitioner testified that after returning home from the appointment, the patient was using his wheelchair to travel up the ramp to his home when the battery malfunctioned. The wheelchair began to slide backward and Petitioner stood behind the chair with one leg on the ground and one leg on the ramp to stop the chair from moving backward. When she stopped the chair she felt a "twinge" in her left shoulder. She continued to work.

Once inside the residence, the Petitioner testified that she was going to transfer the patient into his bed. However, the wheelchair would not move. Petitioner testified that she went into the bedroom to get the lift but realized that even with the lift she would not be able to move the patient into the bedroom without hitting furniture and possibly injuring the patient while he was attached to the lift. As a result, Petitioner began moving furniture and while doing so she felt a pop in her left side upper chest. Petitioner testified that she was able to transfer the patient and then finish her first shift of that day. Petitioner left to go home. However, Petitioner's pain increased throughout the day and she later contacted the patient to say that she was not returning for her second shift that day. The patient arranged for other coverage and Petitioner then went to the ER at Condell hospital with her mother.

The ER paperwork dated October 9, 2008, the alleged date of accident, indicates Petitioner complained of headaches with occasional vomiting, as well as on-and-off chest pain for the preceding six days. (Petitioner's Exhibit "Pet. Ex." 9, pp. 118-123). Petitioner reported experiencing the headaches for one week, and chest pains and a runny nose for six days. (Pet. Ex. 9, pp. 120, 123). She reported nausea and vomiting from the preceding night. (Pet. Ex. 9, pp. 120, 123). Additional reported symptoms included a cough productive of greenish sputum and congestion, a sore throat, that it hurt Petitioner to take a breath, and that her chest pain was exacerbated by movement. (Pet. Ex. 9, pp. 120, 123). The ER notes indicate that her current history suggested a chest wall syndrome consistent with costochondritis. The notes also indicate a recent viral syndrome, and that Petitioner has a history of asthma. (Pet. Ex. 9, pp. 120, 123). Petitioner denied radiation of pain, difficulty breathing, or any recent chest wall strain or musculoskeletal component. (Pet. Ex. 9, pp. 120, 123). X-Rays of Petitioner's chest were taken which indicated moderate gaseous distention of the stomach, but that the chest was clear. Petitioner was diagnosed with costochondritis, bronchitis and migraine headaches. Petitioner was discharged from the hospital that same day, and given discharge information and instructions related to her diagnosis. (Pet. Ex. 9, pp. 118-123). No mention of the work related events of that day as testified to by Petitioner were contained in the ER records. Petitioner testified that her mother provided the history contained in the ER records and recorded by personnel. The records indicate that the history was provided by the patient. P. 118

The Petitioner subsequent gave notice to Respondent on October 12, 2008 of the accident to which the Respondent agrees. ARB EX 1, PX 4 and RX 1. The Report of Injury is not dated but the date of injury is listed as 10/9/08. Petitioner wrote "was pushing entertainment center and his bed to a new spot like [patient]

wanted and his battery had died on his chair so I had to move him in the chair." She listed the type of injury as "chest strain, shoulder and spine shifted." PX 4, RX 1.

On October 20, 2008, Petitioner presented to Advocate Condell Immediate Care Center. Petitioner reported that she was a homebound care nurse and was moving her patient's entertainment center on October 9 when she felt a "pop" and pull in her right anterior chest wall. (Pet. Ex. 10, pp. 171-184). Petitioner stated that she had not been working since the injury. (Pet. Ex. 10, pp. 171-184). Petitioner rated her pain at a 5/10, but reported that it had been at an 8/10. Petitioner was given a diagnosis of a chest wall strain and torn chest cartilage, and was instructed to take Voltaren, and ice her chest. (Pet. Ex. 10, pp. 171-184). Petitioner was cleared to return to work at a light duty capacity only, with a lifting restriction of five pounds. (Pet. Ex. 10, pp. 171-184). On October 22, 2008, Petitioner followed up at Condell Immediate Care. Petitioner reported straining her chest muscle while moving an entertainment center. (Pet. Ex.9, p. 95). Petitioner was kept on light duty work, and a diagnosis of torn chest cartilage was noted. (Pet. Ex. 9, p. 99).

Petitioner was again seen at Condell Immediate Care on November 20, 2008 for a recheck of her chest wall strain/costochondritis since moving furniture. PX 9, p. 86. Petitioner presented complaining of muscle spasms. Petitioner was released to work in a limited capacity with a lifting restriction of ten pounds, as well as limits on pushing and pulling. (Pet. Ex. 10, pp. 94, 139). Petitioner was further restricted from climbing or working on ladders. These restrictions were in effect from November 20 through November 28, 2008. (Pet. Ex. 10, pp. 94, 139). At this appointment, physical therapy was prescribed for Petitioner. (Pet. Ex. 10, pp. 143).

On November 25, 2008, Petitioner began physical therapy at Condell Medical Center to treat her chest wall strain. (Pet. Ex. 10, pp. 132). At her initial appointment, Petitioner indicated chest wall pain that radiated into her left shoulder. (Pet. Ex. 10, pp. 132) Petitioner completed her physical therapy at Condell on January 12, 2009. (Pet. Ex. 9, pp. 27; Pet. Ex. 10, pp. 68). At that time, Petitioner reported no complaints of pain in her chest wall area. Upon discharge from physical therapy, Petitioner was instructed to continue with her home exercise program. (Pet. Ex. 9, pp. 27; Pet. Ex. 10, pp. 68).

Finally, on November 28, 2008, Petitioner again followed up at Condell Immediate Care Center. Petitioner reported nausea that had begun the previous day, as well as vomiting beginning that morning. (Pet. Ex. 10, pp. 102, 108-115). Petitioner reported that she had been taking Ultram for pain from costochondritis and the chest wall strain, torn cartilage and pulled muscle in her chest from her October 9, 2008 accident. Petitioner also reported dizziness upon standing. (Pet. Ex. 10, pp. 102, 108-115). Petitioner was instructed to take Tylenol or Ibuprofen for the pain, to get rest and sufficient fluids, and to follow up for potential surgery for her chest wall pain. (Pet. Ex. 10, pp. 102, 108-115).

Petitioner did not see any physician for 1 year thereafter. She testified her failure to seek care was due to financial reasons. Petitioner next saw Dr. Leonard Ginzburg at Advocate Condell Acute Care on October 15, 2009. Petitioner presented with chest pain and tightness. (Pet. Ex. 9, pp. 7-10; Pet. Ex. 10, pp. 13-17). Dr. Ginzburg's notes indicate that Petitioner reported that her most recent chest pains began three days prior, and that there was "no history of similar episodes of chest pain." (Pet. Ex. 9, pp. 7-10; Pet. Ex. 10, pp. 13-17). Dr. Ginzburg gave Petitioner a primary diagnosis of asthma and asthma exacerbation, and stated that Petitioner needed her breathing treatment. (Pet. Ex. 9, pp. 7-10; Pet. Ex. 10, pp. 13-17).

Petitioner testified that she returned to the Respondent upon her release from medical care but was notified by the Respondent that her employment had been terminated. The Petitioner testified that she received unemployment benefits for approximately a year and a half before she was able to find new employment.

Petitioner currently resides in Florida. She testified that she still experiences pain in her left shoulder. She experiences difficulty in raising her arm over her head on occasion. She also still experiences spasms. The Petitioner also is prescribed EKG's to monitor her heart because of her chest injury.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

(C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? (F): Is Petitioner's present condition of ill-being casually related to the injury?

Based on a preponderance of the credible evidence submitted at trial, the Arbitrator finds that Petitioner sustained accidental injuries in the form of costochondritis and left shoulder strain arising out of and in the course of her employment as a home health care provider on 10/9/08. The Arbitrator further find those conditions causally related to her accident through her release from care on January 12, 2009. The Arbitrator finds that Petitioner's alleged condition of ill-being thereafter is not causally related to the accident of 10/9/08. In so finding, the Arbitrator notes the reference to Petitioner's accident at work while pushing furniture in the patient's home and the development of left shoulder and chest pain thereafter as contained in the majority of Petitioner's treating records. The lack of specific mention in the ER records of Petitioner's pulling furniture at work and the relation to her chest pains is not lost on the Arbitrator. However, a review of the ER records as a whole supports a finding of chest pain complaints diagnosed as costochondritis and made on the date of accident sufficient to support a finding of a work related accident shortly before the visit. This finding is further supported by the subsequent treatment records created a few days after the first visit (October 20) and the report of injury to Respondent (October 12) which all specifically mention a work related incident of pulling furniture on October 9, 2008. The Arbitrator further notes the rigorous physical nature of Petitioner's job and her testimony regarding the physical activities she performed for the patient on 10/9/08. The Arbitrator's finding of causal connection for Petitioner's condition through January 12, 2009 is also supported by the treating records indicating treatment provided for the work related diagnosed chest wall and left arm strain through discharge from PT. Again, in finding accident and causal connection in this matter, the Arbitrator places weight on the evidence in its entirety rather than on one treatment record.

(J): Were the medical services that were provided to the Petitioner reasonable and necessary?

Based on the findings of accident and causal connection, the Arbitrator further finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in connection with the care and treatment of her causally related injuries through January 12, 2009 pursuant to Sections 8 and 8.2 of the Act. Petitioner is not entitled to medical expenses incurred thereafter. Respondent shall receive credit for amounts paid.

(K): What amount of compensation is due for temporary total disability?

Petitioner sought medical treatment for this injury at Condell Medical Center on the accident date. Petitioner was discharged from the hospital on that same day and was instructed to follow up with the Condell physician. Petitioner continued to treat until her release, with restrictions, on January 12, 2009. Petitioner testified that from the date of accident through January 12, 2009, she was not released to return to work with the Respondent. As a result, Petitioner had been off work from October 9, 2008 through January 12, 2009 totaling 13 4/7 weeks.

Accordingly, the Arbitrator finds that Respondent shall pay Petitioner temporary total disability benefits for a period of 13 4/7 weeks commencing October 9, 2008 through January 12, 2009.

(L): What is the nature and extent of Petitioner's injury?

The Arbitrator finds that as a result of the accident on October 9, 2008, the Petitioner sustained permanent partial disability to her chest (torn chest cartilage) and her left shoulder (strain). The accident occurred pre-amendment to the Act. Based on Petitioner's testimony of difficulty raising her arm overhead and occasional left shoulder and chest pain the Arbitrator finds that Petitioner sustained 5% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

(M): Should penalties or fees be imposed upon the Respondent?

The Arbitrator finds that penalties and fees should not be imposed on Respondent in this matter and denies Petitioner's request for all fees and penalties under the Act. In so denying, the Arbitrator notes that although the ER records were sufficient to support a finding of accident when further buttressed by the record in its entirety, the Arbitrator finds that the same is not true to support an award of the requested penalties and fees. Specifically, the Arbitrator finds that Respondent's conduct in denying the claim was not so unreasonable, vexatious, frivolous or made in bad faith so as to warrant an award of penalties and fees in this matter.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL NELSON,

Petitioner,

vs.

20IWCC0717

NO: 17 WC 1967

COUNTY OF LAKE,

Respondent.

DECISION AND OPINION ON REVIEW

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

I. FINDINGS OF FACT

a. Accident and Treatment Records

Petitioner, an officer in the warrants division, sustained injuries to multiple body parts after a motor vehicle accident on November 7, 2016. As Petitioner was driving to the employee-designated gas pumps to refuel, a van struck his vehicle's left side. The impact caused Petitioner's vehicle to change directions and hit a nearby brick building. Petitioner testified that his body went left with the first impact, then right when his airbag hit his face, and then forward as he went over the curb into the building. He testified that the entire left side of his body struck his vehicle's left-sided door area. Petitioner further testified that he had over-flexed his left wrist gripping the steering wheel and had pain in both ankles when his vehicle came to rest.

Petitioner was taken by ambulance to Advocate Condell Medical Center ER. The ambulance report indicated that Petitioner complained of left wrist and right ankle pain at the scene. Although Petitioner testified that he told the ER doctor he had pain in both ankles, the treatment note shows that Petitioner complained of right ankle pain only, as well as left wrist and

20IWCC0717

right neck pain. Petitioner was diagnosed with left wrist and right ankle pain and placed off work.

Petitioner presented to his primary care provider, Dr. Dilip K. Shah, on November 9, 2016 with complaints of increased pain in his left shoulder, thoracic spine, neck, and left knee. He also noted headaches and pain in the left side of his body with his hip, shoulder, and wrist. Dr. Shah diagnosed Petitioner with left wrist pain, right ankle pain, a headache, cervicalgia, and left shoulder pain. He prescribed Flexeril and Motrin and referred Petitioner to Illinois Bone & Joint.

On November 14, 2016, Petitioner saw Dr. David Hamming of Illinois Bone & Joint and complained of left shoulder pain, left neck pain, left wrist pain, and left greater than right hip pain. Petitioner also had numbness radiating down into his fingers. Left wrist and left shoulder X-rays yielded normal results, while a pelvic X-ray revealed left greater than right cam impingement with resultant arthritic changes. Dr. Hamming's diagnoses were a left shoulder contusion, left wrist contusion, ulnar neuritis, left greater than right hip arthritic exacerbation with possible labral tears, and a neck strain. He gave Petitioner a left wrist brace and light duty restrictions of no lifting more than five pounds. Petitioner thereafter began physical therapy on November 29, 2016.

On December 30, 2016, a left wrist MRI revealed a ganglion cyst and a left hip MRI arthrogram revealed a superior labrum tear superimposed on femoroacetabular impingement morphology and osteoarthritic degenerative changes. After reviewing these studies, Dr. Hamming diagnosed Petitioner with left hip impingement and a labral tear, a left wrist ganglion cyst, and ongoing left shoulder pain on January 3, 2017. He indicated that Petitioner's upper extremity and hip issues were work-related to the accident.

On January 12, 2017, a left shoulder MRI arthrogram was obtained and showed no labral or rotator cuff tear. When Petitioner discussed the MRI results with Dr. Hamming on January 19, 2017, he stated that he wanted to be released back to work with the full use of his left arm, which Dr. Hamming approved. On January 31, 2017, Dr. Hamming reiterated that there were no shoulder restrictions but kept Petitioner on light duty for his hip. His diagnoses at that time were improving left shoulder pain with traumatic impingement and a left hip labral tear with impingement. For his hip, Dr. Hamming referred Petitioner to Dr. Mark Hamming.

Dr. M. Hamming diagnosed Petitioner with left hip femoroacetabular impingement with labral tearing and chondromalacia of the superolateral acetabulum on February 7, 2017. He noted that Petitioner's traumatic incident had incited his symptoms. After discussing the possibility of an injection or left hip surgery, Petitioner chose to proceed with the surgery.

Petitioner also sought a second opinion with Dr. M. Hamming for his left shoulder on February 16, 2017. Dr. M. Hamming opined that Petitioner's left shoulder MRI had shown some signal within the superior labrum, indicating a possible SLAP tear. He recommended an injection, but Petitioner wanted to defer the injection and give it time with his rehabilitation exercises.

On February 28, 2017, Petitioner returned to Dr. Shah and reported having memory issues since the airbag had hit his face. He also complained of difficulty sleeping, thinking straight, and concentrating post-accident. Dr. Shah diagnosed Petitioner with attention/concentration deficits.

Petitioner then underwent a left hip arthroscopy on March 16, 2017. When Petitioner followed up with Dr. M. Hamming on March 30, 2017, he reported doing well post-surgery and being off all medication. Dr. M. Hamming kept Petitioner off work and at partial weightbearing.

Shortly thereafter, Dr. Shah referred Petitioner to Dr. V. Geeta Bansal on April 4, 2017 for an evaluation of his attention/concentration deficit. A brain MRI obtained on April 10, 2017 further revealed no acute or significant intracranial process.

Petitioner next presented to Dr. Rhutav Parikh for a cervical evaluation upon referral from Dr. M. Hamming on April 13, 2017. Cervical X-rays were obtained and showed mild spondylolysis and straightening of the cervical spine with loss of natural lordosis likely due to myospasm. Dr. Parikh diagnosed Petitioner with a cervical strain with no radiculopathy and recommended physical therapy, a Medrol Dosepak, and continued off work restrictions for the hip as directed by Dr. M. Hamming. On April 28, 2017, Dr. M. Hamming kept Petitioner off work for his left hip but returned him to full weightbearing and discontinued his brace.

On May 11, 2017, Petitioner continued to complain to Dr. Parikh of persistent neck pain, as well as tightness with spasms. Dr. Parikh recommended tizanidine, icing, and continued off work restrictions per Dr. M. Hamming. He thereafter ordered a cervical MRI on May 25, 2017.

Also on May 25, 2017, Petitioner presented to Dr. Bansal of The Great Lakes Institute of Neurology and Psychiatry. Dr. Bansal diagnosed Petitioner with a mild traumatic brain injury, headaches, and neck pain. She stated that Petitioner's attention and concentration were mildly impaired likely from the traumatic brain injury and his neck and shoulder pain were also likely from the accident. Dr. Bansal recommended time off work and noted that Petitioner did not want medication at that time.

Petitioner next saw Dr. Shah on May 31, 2017 and complained of clicking in his throat, right ear pain, and right neck pain. Dr. Shah's diagnoses included cervicalgia, left hip joint disorders, left hip unilateral primary osteoarthritis, right ear otalgia, and attention/concentration deficits. He continued Petitioner's current management and referred him to an ENT doctor.

When Petitioner returned to Dr. M. Hamming on June 2, 2017, his left hip was doing well, but his left shoulder remained symptomatic with a possible SLAP tear and impingement. Dr. M. Hamming discussed an injection and surgery for the shoulder, but Petitioner was not interested in either. Instead, Petitioner wanted to try increasing his activity level to see how his shoulder would tolerate it. Dr. M. Hamming placed Petitioner back to work without restrictions for the left shoulder, but kept him on restrictions of no lifting, carrying, pushing, or pulling more than ten pounds for the left hip. He also referred Petitioner to Dr. Serafin DeLeon for his left wrist.

On June 5, 2017, a cervical MRI revealed minimal degenerative changes without canal or neural foraminal stenosis, incidental calcification at the odontoid process, and normal signal intensity in the paraspinal soft tissues without inflammation, edema, fluid, or mass lesion. The radiologist noted that the calcification was nonspecific and of uncertain etiology, but could reflect an os odontoideum or, less likely, a chronic fracture deformity. On June 8, 2017, Dr. Parikh interpreted the MRI as negative for soft tissue injuries, such as tears or active inflammation.

However, Dr. Parikh found Petitioner did have small disc protrusions at C4-C5 and C5-C6 with no stenosis or radiculopathy. A neck CT of the soft tissue was also obtained on June 20, 2017, revealing no gross acute abnormality.

Petitioner next presented to Dr. DeLeon for a left wrist evaluation on June 12, 2017. Dr. DeLeon diagnosed Petitioner with a left dorsal ganglion cyst and recommended an excision procedure, which was subsequently performed on July 6, 2017.

On July 7, 2017, Petitioner told Dr. Shah that he was now having left Achilles tendon and ankle pain as well as right hip pain with clicking. Dr. Shah diagnosed Petitioner with left Achilles tendinitis and numbness in the left fourth and fifth fingers. Shortly thereafter, on July 14, 2017, Dr. M. Hamming recommended Votaren gel and an ankle brace. A left ankle X-ray ray obtained on the same day also showed a small ossification adjacent to the deltoid insertion off the distal tip of the medial malleolus, which was likely a traction enthesophyte. No acute findings or displaced fractures were found. Also on the same day, Petitioner returned to Dr. DeLeon and reported feeling well after his ganglion cyst excision. Dr. DeLeon restricted him to no lifting with the left hand.

On July 18, 2017, Petitioner reported to Dr. M. Hamming that he initially had tingling in his left ring and small digit after the accident that had improved, but the tingling had recently returned when he was in colder temperatures around July 16. Dr. M. Hamming diagnosed Petitioner with left carpal tunnel syndrome symptoms and left shoulder pain with a possible SLAP tear. He then administered a left shoulder injection and kept Petitioner on light duty.

When Petitioner next saw Dr. Bansal on July 25, 2017, he reported trouble sleeping and a decreased appetite. Petitioner stated that he had multiple stressors, including his health problems and recent incidents where other people had threatened him. Petitioner also indicated that his speech, concentration, memory, and ability to multi-task were better before his accident. Dr. Bansal diagnoses were anxiety, a traumatic brain injury, and ulnar neuropathy. She recommended Petitioner get rest and pursue therapy for his stress and anxiety.

When Petitioner again followed up with Dr. DeLeon on August 11, 2017, he complained of continued left wrist pain. Dr. DeLeon administered a left wrist corticosteroid injection, provided a five-pound lifting restriction for the left hand, and ordered physical therapy for the left wrist.

On August 25, 2017, Petitioner also reported noticing a new radicular pain that went down the back of his legs. He complained of ongoing bilateral hip, left ankle, and left shoulder pain. Physician Assistant Haley Walton of Illinois Bone & Joint administered a left hip cortisone injection, kept Petitioner on light duty, and recommended he see a podiatrist for his left ankle and Dr. Parikh for his radiculopathy. When Petitioner returned to Dr. Parikh on September 5, 2017, he was diagnosed with persistent cervicalgia with underlying C4-C5 and C5-C6 disc protrusions. Dr. Parikh referred Petitioner for chiropractic care and ordered upper extremity EMGs.

Thereafter, on September 12, 2017, Dr. DeLeon diagnosed Petitioner with a left wrist STT chronic sprain. He stated Petitioner had hurt his STT joint during his injury, but it was initially not as painful compared to the ganglion cyst. Dr. DeLeon administered a left wrist injection and allowed Petitioner to work without restrictions as to the left wrist.

On September 21, 2017, Petitioner presented to separate visits with Dr. Shah, Dr. Parikh, and Dr. Bansal. Dr. Shah recommended a left upper extremity EMG after Petitioner presented with left arm tingling and numbness. Dr. Parikh then obtained lumbar X-rays, which found moderate L3-L4 and L5-S1 degenerative disc disease with Grade I L3-L4 spondylolisthesis and associated bilateral L3 spondylolysis. In addition to these findings, Dr. Parikh's diagnoses included bilateral lumbosacral radiculopathy with radicular symptoms involving the L5-S1 nerve root distribution. Then, still on the same day, Dr. Bansal opined that Petitioner's residual cognitive complaints now had more to do with anxiety than traumatic brain injury symptoms, since such symptoms would not have such long-term effects. Petitioner was unwilling to take medication for these symptoms, so Dr. Bansal recommended a therapist. She further indicated that Petitioner could go back to work if he was comfortable on a light duty part-time basis.

On the next day, September 22, 2017, Dr. M. Hamming administered left hip and left shoulder steroid injections. When he returned on October 27, 2017, Petitioner reported the hip injection did not give him significant benefit, but the shoulder injection did, although the pain had returned. Dr. M. Hamming recommended a shoulder arthroscopy and kept Petitioner on light duty.

Also on October 27, 2017, Petitioner underwent an unremarkable lumbar MRI. On November 9, 2017, Dr. Parikh stated that the MRI was negative for disc protrusions or stenosis and that the etiology of Petitioner's bilateral lower extremity paresthesia was unclear. Dr. Parikh noted that Petitioner continued to have intermittent low back pain and underlying mild L3-L4 degenerative disc disease, but otherwise, his lumbar spine was stable. On November 16, 2017, Dr. Shah also opined that the MRI was normal. When Petitioner returned on December 6, 2017, Dr. Shah reported that Petitioner wanted a second opinion with a neurosurgeon for his back pain.

On December 8, 2017, Petitioner told Dr. M. Hamming that both of his knees were now painful in addition to his ongoing left hip, ankle, and shoulder pain. Petitioner denied any acute inciting event, and Dr. M. Hamming stated that Petitioner's knees were not being treated under workers' compensation. Dr. M. Hamming then put further intervention of Petitioner's left shoulder on hold until they first tried to improve his left hip. He stated that none of Petitioner's multiple ongoing musculoskeletal issues had improved despite conservative measures.

Thereafter, on December 11, 2017, a left upper extremity EMG/NCS found no evidence of neuropathy or radiculopathy. Also on December 11, 2017, Dr. Patricia Ryan, a psychologist, wrote a letter to Dr. Shah thanking him for his referral and documenting that she saw Petitioner on October 17, 2017 and four times thereafter. Dr. Ryan indicated that Petitioner had anxiety and mild depression secondary to his medical condition. She opined that Petitioner's pain compounded with his extreme lifestyle change was most likely the root of his anxiety and depression.

On December 28, 2017, Dr. Bansal reviewed Petitioner's lumbar MRI and found that it showed L3-L4 spondylosis. Dr. Bansal's diagnoses included a traumatic brain injury, a resultant whiplash neck injury, and low back pain radiating down the left leg. She recommended a lumbar epidural steroid injection and took Petitioner off work until February 9, 2018.

On January 3, 2018, a left hip MRI then showed: a blunted and diminutive anterior

acetabular labrum suggestive of prior arthroscopic labral surgery; intermediate signal along the superior labrum suggestive of degeneration or postoperative change rather than a tear; no discrete labral tear; small focal areas of mild chondromalacia with no full-thickness chondral defect; focal osseous protuberance or bump at the femoral head and neck junction that can be associated with cam impingement; and a questionable signal abnormality in the peripheral acetabulum or labrum.

Petitioner received another left hip steroid injection on January 19, 2018. Dr. M. Hamming indicated that Petitioner's hip was now the main issue and Petitioner might want to consider a hip arthroscopy.

Petitioner then saw Dr. Gary Kaufman at NorthShore University HealthSystem for a routine general examination on February 27, 2018. Petitioner testified that he began seeing Dr. Kaufman, because his wife thought it would be a good idea for them to have the same primary care physician after he switched onto her insurance policy. Dr. Kaufman's assessment included a left acetabular labrum tear, sequela. Per Petitioner's request, Dr. Kaufman provided an orthopedic referral and recommended Dr. Jason Koh, Dr. Bradley Dunlap, or Dr. Anand Srinivasan.

On April 4, 2018, Dr. Bansal noted that Petitioner's low back pain was much better except for some minor muscle spasms. She recommended physical therapy for Petitioner's cervical spondylosis but stated that Petitioner had no neurological limitations on his work at that time and was primarily limited for his hip. On April 10, 2018, a left hip X-ray further revealed mild degenerative changes, bony irregularity along the left acetabulum, and a calcific, ossific density lateral to the hip joint that possibly represented calcific tendinitis or sequela from a prior injury. No definitive acute fracture or dislocation was noted.

Also on April 10, 2018, Petitioner presented to Dr. Koh complaining of left hip, neck, low back, and shoulder pain, which Dr. Koh noted had all stemmed from the November 2016 accident. Dr. Koh diagnosed Petitioner with left hip and left shoulder impingement syndrome as well as chronic left hip pain with a residual femoral cam lesion on MRI. He recommended a left hip arthroscopy and femoroplasty and ordered a left shoulder MRI, which was obtained on April 19, 2018. The MRI found no fracture, rotator cuff tear, or discrete labral tear.

Petitioner then saw Dr. Steven Kodros of NorthShore Orthopaedic Institute on April 26, 2018. Petitioner testified that Dr. Kaufman had referred him to some in-network orthopedic specialists, including Dr. Kodros. Petitioner reported to Dr. Kodros a prior history of a severe ankle sprain in 2012 with intermittent ankle pain and symptoms since then. Dr. Kodros diagnosed Petitioner with chronic left ankle pain post-injury with a differential diagnosis of underlying mild Achilles tendinosis. Dr. Kodros also considered the possibility of mild soft tissue impingement anterolaterally and underlying occult internal derangement. He noted that Petitioner's physical examination and left ankle X-rays were unremarkable for significant abnormalities at that time.

Petitioner testified that he did not get a good feeling from Dr. Kodros in terms of his bedside manner and treatment plan, which included a left ankle MRI. Therefore, Petitioner testified that he stopped treating with Dr. Kodros and pursued a second opinion with Dr. Anish Kadakia. The deposition transcript of Dr. Kadakia was rejected as an exhibit by the Arbitrator and not admitted into the record.

Petitioner then underwent a left hip femoroplasty on June 15, 2018. When he followed up at Dr. Koh's office on June 25, 2018, Petitioner reported doing well post-surgery and taking Norco for nightly pain. Physician Assistant Isaac Jones recommended physical therapy and continued restrictions. PA Jones again continued his physical therapy recommendation on July 30, 2018 after Petitioner reported ongoing popping and apprehension with activities.

Petitioner last treated with Physician Assistant Ronisha Carpenter at Dr. Bansal's office on September 18, 2018. Petitioner continued to complain of numerous ongoing issues, including neck spasms, low back pain, sciatic nerve pain down his left leg, anxiety with work-related stress, difficulty answering questions, cloudiness, and head pressure. Dr. Bansal recommended Petitioner consider a referral to neuropsychological testing due to his traumatic brain injury, problems concentrating, and difficulty answering questions. Continued physical therapy was also recommended.

b. Depositions of Treating Doctors

On October 31, 2018, Dr. M. Hamming was deposed regarding Petitioner's left hip and testified consistently with his treatment notes. He further testified that it was difficult to say the exact origin of Petitioner's labral tear. Dr. M. Hamming explained that Petitioner had a bony morphology since skeletal maturity that predisposed him to labral tears, but Petitioner nevertheless first noted subjective pain symptoms after the accident. He opined that the accident was when Petitioner's hip first became symptomatic, although he could not say whether the labral tear was already there or not. Dr. M. Hamming further testified that the onset of symptomatology and Petitioner's pain complaints were the driving force for his need for care. However, Dr. M. Hamming testified that when he last saw Petitioner on January 19, 2018 after his hip surgery, he did not objectively know why Petitioner continued to have subjective left hip symptoms.

The parties also deposed Dr. Koh on September 24, 2018. Dr. Koh testified that he had recommended arthroscopic left hip surgery for Petitioner, because he was concerned there was residual impingement or pinching around Petitioner's hip related to his injury and subsequent surgeries. Dr. Koh opined that Petitioner's symptoms were related to his work accident. He testified that when he performed the left hip surgery on June 15, 2018, he saw scar tissue and a loose piece of suture material that he believed was from Petitioner's prior surgery with Dr. Hamming. He opined that the material that needed debrided had formed as a result of the prior surgery. Dr. Koh testified that Petitioner's second hip surgery was necessary because his pain was related to the newly formed scar tissue, loose material inside the hip joint, and some residual bone spurring. He estimated that it would typically take a patient 12 months to reach MMI after this operation, but Petitioner's recovery period could be longer given that this was a revision surgery.

The parties thereafter deposed Dr. Bansal on January 11, 2019. Dr. Bansal testified consistently with her treatment notes and clarified that she did not treat Petitioner orthopedically, as she was a neurologist. She further testified that Petitioner had reported having a prior concussion or mild traumatic brain injury in 2009, but it had resolved by the time of his work accident. Dr. Bansal found that Petitioner had a mild traumatic brain injury and resultant neck whiplash injury secondary to the work accident.

Dr. Bansal further testified that when she saw Petitioner on September 21, 2017, Petitioner's cognition was doing better, but he had some residual symptoms that she attributed more to anxiety rather than the traumatic brain injury. When she thereafter saw him on April 4, 2018, Dr. Bansal opined that Petitioner could go back to work from a neurological standpoint but deferred to orthopedics from that point on.

Lastly, Dr. Bansal testified that on September 18, 2018, she recommended neuropsych testing to figure out if Petitioner's ongoing attention and concentration difficulties were coming from his anxiety at work or the traumatic brain injury. Dr. Bansal testified that she did not intend for this to be her last visit with Petitioner, as Petitioner continued to need her care.

c. *§12 Reports and Deposition of Dr. John Koehler*

In a September 12, 2017 report, Dr. Koehler detailed his findings from his §12 examination performed on September 5, 2017. Dr. Koehler found that Petitioner had sustained the following work-related injuries as a result of his accident: a left elbow contusion, a left hip labral tear, a left shoulder strain, a cervical sprain, a left wrist contusion, and a right ankle injury. Dr. Koehler opined that Petitioner was now at MMI for all these work-related injuries and capable of full duty work. He further clarified that he did not find Petitioner's bilateral hip cam lesions, left wrist ganglion cyst, left ankle pain, left ulnar nerve neuropraxia, and sciatica to be causally related. Dr. Koehler also stated that the vast majority of Petitioner's complaints were subjective and not supported by objective findings with respect to the cervical spine, left ankle, left shoulder, and hips. He noted that Petitioner had displayed one positive Waddell's sign.

Dr. Koehler performed a second §12 examination on February 22, 2019. In the report dated March 4, 2019, Dr. Koehler stated that his diagnoses were the same as his prior §12 examination. Additionally, Dr. Koehler opined that Petitioner's second hip surgery was related to his first surgery having left a suture in the joint. As such, he opined that the need for the second left hip surgery was related to the work accident. Nevertheless, he opined that Petitioner had reached MMI for his left hip as of the second surgery date and was functionally normal except for his unrelated cam lesions. Consistent with his first §12 examination, Dr. Koehler stated that Petitioner also remained at MMI for all of his other work-related injuries. He opined that Petitioner was able to perform full duty employment in any job classification.

Dr. Koehler also noted that Petitioner now had lumbar complaints that came much later and were therefore not addressed in his first §12 report. As such, he found Petitioner's lumbar pain to not be related to the accident. Additionally, on examination, Dr. Koehler found that Petitioner had fully functional lumbar muscles and a negative straight leg raise.

Dr. Koehler's records review also referenced two additional surgeries that were not detailed within the medical records admitted into evidence at trial. Specifically, Dr. Koehler reported that Petitioner had a left ankle Brostrom ORIF surgery on October 1, 2018 and a left shoulder arthroscopy, bursectomy, debridement, and subacromial decompression on October 19, 2018.

When the parties deposed Dr. Koehler on April 17, 2019, he testified consistently with his

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§12 reports. Dr. Koehler further testified that both Petitioner's first and second hip surgeries were causally related to the work accident. However, he opined that the ankle and shoulder surgeries that Petitioner underwent in between his two §12 examinations were not related to the accident. He testified that Petitioner had a process of arthritic degenerative changes in his shoulder that pre-dated the crash. Nevertheless, Dr. Koehler conceded that Petitioner's symptomatic shoulder complaints started after the crash.

Dr. Koehler further testified that he did not think Petitioner had a traumatic brain injury or a lumbar spine injury from the crash. He also opined that Petitioner's left ankle complaints had no relationship to the accident.

d. Evidence Regarding Nature and Extent

Petitioner testified that prior to the accident, he never had any left wrist problems nor sought care for his left shoulder, left knee, or left hip. Nevertheless, Petitioner testified that he had sprained his left ankle approximately twice before by playing basketball. He explained that he had sprained his left ankle in 2012 and was on crutches for six to seven days, but no doctor had prescribed surgery at that time. Petitioner testified that also around 2011 to 2012, he had stepped on a shoe, causing a residual effect on his ankle. He was out of work more than three days after this incident. Petitioner testified that although he had a number of left ankle sprains over the years playing basketball, they had all resolved with no linger effects, fractures, or significant damage.

After the accident, Petitioner testified to undergoing a total of five surgeries, including left hip surgery on March 16, 2017, left wrist surgery on July 6, 2017, another hip surgery with Dr. Koh, left ankle surgery with Dr. Kadakia, and left shoulder surgery with Dr. Koh. Not all of these surgeries were included in the treatment records submitted into evidence at the hearing.

Regarding the current condition of his left ankle, Petitioner complained of ongoing pain. He testified that it was still very weak, and there were only limited things he could do to strengthen it, since he did not have the equipment or ability to do so.

Regarding his left hip condition, Petitioner testified that he still had pain and weakness, but physical therapy was being considered to resolve it. He testified that he could not do anything involving excessive hip exertion. Petitioner further testified that pretty much everything he could not do now involved his left hip, because everything else was going to get better with physical therapy. As to the right hip, Petitioner testified that he still had pain that he attributed to the crash, because he never had right hip pain before the accident.

Regarding his left wrist condition, Petitioner testified that he had pain on its underside, but his motion was fine. Petitioner testified that his wrist affected him, and he noticed more pain when he had to grip something heavier.

Regarding his left shoulder condition, Petitioner testified that it was "getting there." He indicated that he thought he could work with regard to his left shoulder.

Regarding his cervical spine condition, Petitioner testified that he still had muscle spasms,

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but Dr. Bansal believed physical therapy could help resolve it.

Regarding his anxiety condition, Petitioner indicated that it was there, but okay. When asked what he experienced on a daily basis concerning his anxiety, Petitioner responded that there had been a lot of stressful things going on and it affected him. Petitioner did not elaborate further.

Regarding his left knee condition, Petitioner testified that it was "okay," but did not elaborate further. He also testified that his lumbar spine was now asymptomatic and his right ankle had resolved.

Lastly, Petitioner testified that he did not receive TTD benefits after September 19, 2017. Thereafter, on January 10, 2018, Respondent sent Petitioner a Notice of Termination letter ending his employment as of January 16, 2018, because Petitioner had been unable to perform his essential job functions and had no anticipated date for a return to full duty work. In the letter, Respondent documented that Petitioner had been on light duty from November 7, 2016 to March 16, 2017, medical leave from March 17, 2017 to September 22, 2017, and light duty again from September 22, 2017 to November 7, 2017. Petitioner testified that he was told on November 7, 2017 to go home, and he did not return to work after that date. Petitioner testified that after the accident, he never looked for another job besides with Respondent. Petitioner indicated that he was still seeking employment back with Respondent.

II. CONCLUSIONS OF LAW

a. Causation and MMI Dates

Following a careful review of the entire record, the Commission affirms the Arbitrator's findings as to which body parts are causally related to the November 7, 2016 accident and which body parts are not. Specifically, the Commission affirms the Arbitrator's finding that no causal relationship existed between the work accident and Petitioner's alleged left ankle, left elbow, and lumbar spine injuries, as well as the alleged traumatic brain injury. The record thus supports the Arbitrator's denial of benefits for each of these body parts. The Commission further affirms the Arbitrator's findings that Petitioner's left hip, left wrist, left shoulder, right ankle, anxiety, and cervical spine conditions were causally related to his work accident. However, for some of these causally related conditions, the Commission modifies the MMI date to extend to the hearing date of May 16, 2019 for the reasons detailed below.

For the left hip labral tear, the Arbitrator found causation through September 24, 2018, because that was the date Dr. Koh was deposed and testified that Petitioner was progressing well following his second hip surgery. However, at this deposition, Dr. Koh also testified that it would typically take a patient 12 months after this operation to reach MMI and Petitioner's recovery could take longer given that he had a prior surgery and revision. Moreover, the treatment records do not show that Petitioner was ever expressly placed at MMI by his treating doctors. The §12 doctor, Dr. Koehler, did opine that Petitioner had reached MMI for his causally related left hip condition as of his second surgery date. However, abruptly cutting off the MMI date as of the surgery date does not reasonably account for any postoperative care or a reasonable recovery period. Instead, given that Petitioner testified to ongoing left hip complaints when this matter

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proceeded to a permanency hearing and Petitioner had not been placed at MMI by his treating doctors, the Commission finds the record supports modifying the MMI date to the hearing date.

For Petitioner's left shoulder, the Arbitrator found that Petitioner's condition was causally related to the accident only through September 12, 2017; however, the Commission again finds that the record supports extending the MMI date to May 16, 2019. The treatment records indicate that Petitioner's left shoulder only became symptomatic after the accident. Despite opining that Petitioner had reached MMI and had chronic arthritic changes predating the crash, Dr. Koehler nevertheless conceded that Petitioner's symptomatic complaints started only after the crash. Given that Petitioner's shoulder became symptomatic to the point of necessitating surgery post-accident and the treating doctors did not place Petitioner at MMI, the record supports modifying this MMI date to also reflect the May 16, 2019 hearing date.

For the anxiety condition, the Arbitrator found that Petitioner had reached MMI as of September 12, 2017. However, the Commission again finds that the record supports extending the MMI date to the hearing date. In his §12 report from September 12, 2017, Dr. Koehler did not provide a clear causal opinion as to Petitioner's anxiety condition. Petitioner thereafter continued to treat for his anxiety after September 12, 2017, and on December 11, 2017, Dr. Ryan opined that Petitioner's anxiety was secondary to his medical condition, which ultimately stemmed from the accident. Dr. Ryan stated that Petitioner's considerable pain compounded with his extreme lifestyle change was most likely the root of his anxiety. None of Petitioner's treating doctors, nor the §12 examiner, placed Petitioner at MMI for his anxiety condition before the parties proceeded to the hearing on permanency. For this reason, the Commission modifies the MMI date to reflect the hearing date of May 16, 2019 for the anxiety condition.

For the cervical condition, the Arbitrator set the MMI date at September 12, 2017; however, the Commission again finds that the record supports modifying the MMI date to May 16, 2019. In his §12 report from September 12, 2017, Dr. Koehler opined that Petitioner had suffered a work-related cervical strain, but it had resolved at MMI. Nevertheless, Petitioner continued to complain of neck spasms and symptoms through his last treatment visit with Dr. Bansal's office on September 18, 2018. The treatment records do not indicate that Petitioner had any pre-accident cervical problems; however, after the accident, Petitioner continued to express neck complaints and was not placed at MMI by his treating doctor by the time this matter proceeded to a permanency hearing. Additionally, Dr. Parikh found that Petitioner's MRI showed objective evidence of C4-C5 and C5-C6 disc protrusions. For these reasons, the Commission finds that the record supports modifying the MMI date for the cervical condition to the hearing date.

The Commission modifies the MMI dates as specified above and otherwise affirms and adopts the Arbitrator's causal findings.

b. Medical Expenses and TTD Benefits

After modifying the MMI dates for Petitioner's left hip, left shoulder, anxiety, and cervical conditions as stated above, the Commission further modifies the Arbitrator's award of medical expenses for these causally related conditions to extend to the new MMI date of May 16, 2019. The Commission thus finds that Respondent is liable for all reasonable and necessary medical

expenses related to Petitioner's left hip, left shoulder, anxiety, and cervical conditions through the hearing date of May 16, 2019 pursuant to §8(a) and §8.2 of the Illinois Workers' Compensation Act. The Commission otherwise affirms the Arbitrator's awards and denials of medical expenses for Petitioner's other claimed body parts as specified. The Commission further affirms the Arbitrator's denial of Petitioner's post-hearing motion to amend PX 14 to include bills from Dr. DeLeon, Dr. Koch, and Dr. Kadakia that were not admitted into evidence at the time of the hearing.

Regarding TTD benefits, the record indicates that Respondent stopped accommodating Petitioner's light duty as of November 7, 2017. Right before that date, Dr. M. Hamming put Petitioner on light duty restrictions as of October 27, 2017 for his left shoulder condition, which the Commission has found did not reach MMI until the hearing date. Although the treatment notes address ongoing work restrictions sporadically after this time, Petitioner was never explicitly returned to full duty work by his treating doctors for all of his work-related conditions. He was eventually terminated from his employment with Respondent as of January 16, 2018 due to his ongoing inability to perform his full duty job and the lack of an anticipated return to work date. Although Petitioner never looked for another job within his restrictions, he was never actually placed at MMI with permanent restrictions to use on a job search for maintenance purposes. Given that the treating doctors did not find that Petitioner's work-related conditions had stabilized to the point of returning him to full duty work, the Commission finds that Petitioner is entitled to TTD benefits from November 8, 2017 through the May 16, 2019 hearing date.

c. Nature and Extent

Pursuant to §8.1b, for accidents occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria with no single factor being the sole determinant of disability. The criteria to be considered includes: (i) the reported level of impairment pursuant to (a) [AMA "Guides to Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b).

Regarding criterion (i), no AMA impairment was provided in this case. As such, the Commission assigns no weight to this factor.

Regarding criterion (ii), Petitioner was an officer with the warrants division on the accident date. However, Respondent terminated Petitioner's employment effective on January 16, 2018, because he remained unable to perform his essential job functions. Petitioner testified he did not thereafter look for another job, but he continued to seek employment back with Respondent. The Commission assigns significant weight to this factor.

Regarding criterion (iii), Petitioner was 31 years old on the accident date. Although there was no direct testimony as to how Petitioner's age affected his disability, the Commission presumes that Petitioner has a substantial number of years left in the workforce due to his young age. The Commission assigns moderate weight to this factor.

Regarding criterion (iv), Petitioner was no longer employed by Respondent, but had not

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looked for other employment nor obtained a labor market study. There was no other testimony or evidence specifically speaking to Petitioner's future earning capacity. The Commission assigns some weight to this factor.

Regarding criterion (v), the Commission incorporates by reference the summary provided in this Decision's Findings of Fact section as to the treatment records for each affected body part and Petitioner's testimony as to the nature and extent of each of his causally related conditions. The Commission assigns significant weight to this factor.

Upon consideration of these factors, the Commission affirms the Arbitrator's award of 5% loss of use of the left hand for Petitioner's left wrist injuries, but otherwise modifies the Arbitrator's permanency awards as follows.

For Petitioner's cervical strain, anxiety, and left shoulder injuries, the Commission modifies the permanency award to 22.5% MAW. The increased award is warranted given that Petitioner's left shoulder injury necessitated surgery and two injections, and Petitioner was never placed at MMI by his treating doctors for his cervical condition or anxiety. Petitioner testified that he still experienced muscle spasms in his neck and continued to be affected by his anxiety.

The Commission also modifies the permanency award for Petitioner's left hip injury to 35% loss of use of the left leg. Petitioner's treatment for his left hip required two surgeries, three injections, physical therapy, work restrictions, and prescription medication. Petitioner testified to ongoing pain and weakness in his left hip today. He testified that he cannot do anything involving excessive hip exertion. The Commission finds that the increased award is warranted especially given that Petitioner underwent two surgeries and lost his employment with Respondent in part due to his ongoing left hip limitations, amongst his other conditions.

The Commission thus modifies the Decision of the Arbitrator accordingly as stated herein. 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 June 24, 2019, is modified as stated herein.

IT IS FURTHER FOUND BY THE COMMISSION that the MMI date for Petitioner's left hip, left shoulder, anxiety, and cervical conditions is May 16, 2019. The Commission modifies the Decision of the Arbitrator to find that a causal relationship existed between these conditions and Petitioner's work accident through the hearing date of May 16, 2019. The Commission otherwise affirms the Arbitrator's findings as to which body parts are causally related to the November 7, 2016 accident and which body parts are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for all reasonable and necessary medical expenses related to Petitioner's left hip, left shoulder, anxiety, and cervical conditions through the hearing date of May 16, 2019 pursuant to §8(a) and §8.2 of the Act. The Commission otherwise affirms the Arbitrator's awards and denials of medical expenses for Petitioner's other claimed body parts.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $1,154.40 per week from November 8, 2017 through May 16, 2019, which represents a period of 79 1/7 weeks, in accordance with §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $775.18 per week for a period of 10.25 weeks as Petitioner sustained a 5% loss of use of the left hand/wrist pursuant to §8(e) of the Act. The Commission further orders that Respondent pay to Petitioner $775.18 per week for a period of 112.5 weeks as Petitioner sustained a 22.5% loss of use of MAW for his left shoulder, cervical, and anxiety conditions pursuant to §8(d)(2) of the Act. The Commission further orders that Respondent pay to Petitioner $775.18 per week for a period of 75.25 weeks as Petitioner sustained a 35% loss of use of the left leg pursuant to §8(e) of the Act.

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

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

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 7 - 2020

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/met
O: 10/22/20
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0717

NELSON, MICHAEL
Employee/Petitioner

Case# **17WC001967**

COUNTY OF LAKE
Employer/Respondent

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:

5551 MENDOZA LAW PC
GEORGE MENDOZA
120 S STATE ST SUITE 400
CHICAGO, IL 60603

1295 SMITH AMUNDSEN LLC
LESLIE T JOHNSON
150 N MICHIGAN AVE SUITE 3300
CHICAGO, IL 60601

20IWCC0717

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

Michael Nelson
Employee/Petitioner

v.

County of Lake
Employer/Respondent

Case # 17 WC 001967

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 Carolyn Doherty, Arbitrator of the Commission, in the city of Rockford, on May 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. ☒ 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. xx Other - Petitioner's request for fees and penalties

FINDINGS

On November 7, 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 condition of ill-being through 9/12/17 is causally related to the accident. SEE DECISION

In the year preceding the injury, Petitioner earned $90,043.20; the average weekly wage was $1,731.60

On the date of accident, Petitioner was 31 years of age, single, with **0** dependent children.

Petitioner received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $5,869.22 for advanced PPD, for a total credit of $5,869.22.

Respondent is entitled to a credit of $0 under Section 8(j) of the Act. ARB EX 1. SEE DECISION

ORDER

Respondent paid Petitioner full salary during period of temporary total disability through 11/7/17. The Arbitrator found no additional TTD was owed to Petitioner through 9/12/17 and no TTD is awarded. SEE DECISION .

Respondent shall pay Petitioner $775.18 per week for a period of 25 weeks as Petitioner sustained 5% loss of use of the person as a whole for his injuries to the cervical/anxiety/left shoulder pursuant to Section 8(d)(2) of the Act.

Respondent shall pay Petitioner $775.18 per week for a period of 64.5 weeks as Petitioner sustained 30% loss of use of the left leg (left hip injury) pursuant to Section 8(e) of the Act.

Respondent shall pay Petitioner $775.18 per week for a period of 10.25 weeks as Petitioner sustained 5% loss of use of the left hand/wrist or pursuant to Section 8(e) of the Act.

Respondent shall be given a credit of $5,869.22 for an advance PPD payment.

Respondent has paid some medical bills and group insurance has paid some, none of which is reflected in the bills submitted by Petitioner as trial exhibit #14. The outstanding bills in PX 14 (except DeLeon, Koh, Kadakia rejected bills) incurred through 9/12/17 shall be paid by Respondent directly to the providers to the lesser amount of the fee schedule or the negotiated rate.

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

6/21/19

Date

JUN 24 2019

FINDINGS OF FACT

At trial, the parties stipulated to the issues of accident and notice. ARB EX 1. The 31 year old Petitioner testified that his first job in law enforcement was with Respondent, Lake County Sheriff's office. (T. 9). He was hired on March 26, 2008 (T. 10). Petitioner obtained a college degree in Law Enforcement and Justice Administration in 2008 and was in the US Army Reserves from 2004 to 2013.

Petitioner testified that on November 7, 2016 Petitioner was assigned to the Warrants Division, apprehending subjects. His physical duties included running, tackling, cuffing, and basically controlling another person while apprehending. (T. 11). He was assigned to the six a.m. to two p.m. shift. He takes his police car home at the end of his shift and fuels his vehicle at the Sheriff-designated location in Libertyville on his way home to Volo so that his vehicle is ready for the next shift. His shift can start from home or at the police station if a pre-shift meeting is needed (T. 12-16).

On November 7, 2016 while on duty Petitioner drove west on Belvidere Rd. approaching the intersection of Soranto Ct. (T. 17) (Pet.'s. Ex. 1, Amb. Rpt.). At the intersection, a van turned left and collided into the driver's side front of Petitioner's vehicle, changing the direction/path of Petitioner's vehicle into a brick building (T. 17-18). Petitioner tried to avoid the collision by breaking and turning (T. 17).

Petitioner reports the severity of the first impact as 8 out of 10 (T. 18). The second impact occurred when Petitioner's airbag inflated and hit his face (T. 19). At the first impact his body went left, striking the entire left side of his body on the window and door (T. 19). At the third impact when his vehicle hit and went into the brick building, his body went forward into the seat belt and he jammed/over-flexed his left wrist gripping the steering wheel (T. 21).

Once his vehicle came to rest at the brick building, he experienced pain in both his ankles (T. 22). He had to crawl out of his vehicle and was able to stand up. (T. 23). A Waukegan Fire Department ambulance arrived and transported him to Advocate Condell Medical Center Emergency Department (T. 24) (Pet.'s Ex. 1). Petitioner told the EMT's that his wrist and ankle hurt, but he cannot recall all that he said to them (T. 26). The ambulance report reflects he reported left wrist and right ankle pain. PX 1.

At the emergency facility, Petitioner recalls telling the care givers that his ankles, wrist and neck were painful and stiff (T. 27). The emergency department records report that he complained of left wrist and right ankle pain, worse with weight bearing and walking, and, neck pain, worse with neck rotation (Pet's Ex. 2). The left wrist pain was located between the thumb MCP and snuff-box. Petitioner refused an x-ray to the ankle. The left wrist x-ray showed no acute fracture or dislocation. PX 2. Petitioner followed up with his primary care physician, Dr. D. Shah (T. 28) on November 9, 2016 (T. 29).

Petitioner testified that in the time between leaving the emergency facility and following up with Dr. Shah, Petitioner began feeling more pain. The entire left side of his body was aching in pain (T. 30). Petitioner did not return to the ER. T. 30.

On November 9, 2016 Petitioner told Dr. Shah his "whole skeletal structure on his left side was in pain and that his neck was in pain". Petitioner also reported pain in the left shoulder, thoracic area and neck area as well as headaches and some left knee pain. PX 3. Petitioner was prescribed medication and told to follow up at Illinois Bone and Joint. PX 3. Dr. Shah's records reflect that Petitioner treated with him from November 9, 2016 to February 1, 2018 (Pet.'s Ex. 3). Over the course of this extended treatment period, Dr. Shah referred Petitioner to Illinois Bone and Joint to see Dr. David Hamming. Dr. Shah ordered MRI exams of Petitioner's left hip, lumbar spine, and left shoulder during this treatment period. Dr. Shah also referred Petitioner to Dr. Bansal, a

neurologist for headaches and vision changes. (Pet.'s Ex. 3). Dr. Shah also referred Petitioner to Dr. Parikh for cervical spine/neck pain; and to Dr. DeLeon for left wrist issues. On July 18, 2018 Petitioner reported pain in his left ankle/Achilles tendon since the crash, and numbness in his left fourth and fifth fingers (Pet.'s Ex. 3). On November 16, 2017, one year after the accident, Dr. Shah's records reflect that Petitioner "started PT for left ankle going 3 x's per week" (Pet's Ex. 3), but it was stopped by the therapist due to increased pain (T. 32-34).

Petitioner received medical care at Illinois Bone and Joint starting on 11/14/16 for conditions in his left hip, left wrist and his neck and cervical spine. PX 4, 5 and 6. Specifically, Petitioner was diagnosed with a left hip labral tear per MRI left hip arthrogram on 12/30/16. PX 4. Dr. Hamming gave Petitioner an injection in his left hip on December 30, 2016 (T. 37), and ordered physical therapy for the left shoulder (T. 37). Left wrist MRI showed a ganglion cyst as of 12/30/16. PX 4. A left shoulder MRI arthrogram taken on 1/12/17 was reviewed by Dr. Hamming who thereafter ruled out labral or rotator cuff tear based on the MRI. PX 4. Petitioner was given no restrictions for his shoulder but was restricted for his hip labral tear. Petitioner continued to complain of left shoulder pain and lifting limitations to Dr. Hamming on 2/16/17 and was offered an injection but refused and continued rehab exercises as previously ordered for the left shoulder. PX 4.

Dr. Hamming performed surgery on Petitioner's left hip on March 16, 2017 that included arthroscopy labral repair; left hip arthroscopic acetabuloplasty repair and resection; microfracture of the acetabulum, labral tear repair, osteochondroplasty, resection, and synovectomy. PX 5. Petitioner followed up with Dr. Mark Hamming after left hip surgery. PX 4. He also attended PT for the left hip. On 7/14/17, Petitioner complained of continued hip pain, left shoulder pain and left ankle pain. Petitioner was ordered continued PT for all complaints. Hip injections were offered but again deferred by Petitioner. Left shoulder injections were also offered and Petitioner received an injection on 7/18/17 with no improvement. However, based on continued complaints of left hip pain, Petitioner and had another hip injection on August 25, 2017 per continued complaints.

Petitioner saw Dr. Parikh for his neck/cervical spine on 4/13/17 per referral from Dr. Hamming. PX 4. Dr. Parikh initially ordered PT for a cervical strain with no evidence of radiculopathy. Dr. Parikh ordered an MRI done on 6/5/17 and it revealed minimal degenerative changes at C5-6 without spinal canal or neural foraminal stenosis at any level. PX 4. On June 8, 2017, Petitioner reported that his cervical was 75% improved with only intermittent stiffness and soreness and no radiating pain or numbness, tingling or weakness in the arms. PX 4. Following the negative MRI, Petitioner was told to continue home exercise for the shoulder and to follow up as necessary. Nevertheless, in September 2017 referred him to a chiropractor for neck issues (T. 48-49).

Petitioner saw Dr. DeLeon for his left wrist beginning on June 6, 2017, per the referral of Dr. Hamming on 6/2/17. Dr. DeLeon noted that Petitioner's left wrist was hyperflexed in the car accident and diagnosed a left dorsal ganglion cyst. He recommended an excision which he performed on July 6, 2017 at Hawthorn Surgery Center. PX 4; PX 6. Petitioner had a post surgical injection on 8/11/17 and again on 9/12/17 from Dr. DeLeon. PX 4.

On 8/25/17, Dr. Hamming referred Petitioner to a podiatrist for his continued left ankle complaints. He injected Petitioner's left hip (greater trochanteric bursal steroid injection) to relieve pain complaints. Petitioner reported that he was seeking an EMG for his continued left shoulder complaints. On 9/5/17, Dr. Parikh agreed with the need for a cervical EMG and sent Petitioner to a chiropractor for cervical spine complaints. PX 4.

Petitioner, on September 22, 2017, was given a left shoulder injection by Dr. M. Hamming which Dr. Hamming indicated provided "excellent improvement in his left shoulder symptoms" on post injection exam. PX 4. Dr. Hamming also provided a left intraarticular hip injection on 9/22/17 which revealed some improvement in Petitioner's symptoms post injection. Petitioner was to continue PT for the left hip, shoulder and foot. He

asked if it were "okay for him to coach basketball" and he was told he could do so but without running or jumping. He was told to continue taking a daily anti inflammatory for control. PX 4.

On September 21, 2017, Petitioner saw Dr. Parikh and complained of lumbar pain and left radiculopathy which Petitioner related to his hip therapy. On 11/9/17, Dr. Parikh noted that the lumbar MRI done on 10/27/17 was negative and without evidence of stenosis. He indicated that the etiology of the persistent lower extremity complaints was unclear based on the negative MRI. He recommended a lower extremity EMG. PX 4.

On 12/8/17, Dr. Hamming ordered a left hip MRI and left ankle MRI. He also noted the potential need for potential rhueumatologic treatment due to continued pain in multiple joints throughout his body. PX 4.

On 1/19/18, Dr. Hamming again injected the left hip. PX 4. 1/19/18 was the last visit date. Dr. Hamming testified that Petitioner's left hip "issues" were the result of the car accident. PX 9, p. 10. He opined that Petitioner's left hip became symptomatic after the accident. PX 9, p. 11. The diagnosis for which Petitioner underwent surgery was left hip femoral acetabular impingement with labral tearing and chondromalacia of the superolateral acetabulum. PX 9, p. 11. He is not aware of any additional surgeries had by Petitioner since the last visit on 1/19/18. P, 48.

Petitioner testified that he first saw Dr. Bansal on May 25, 2017 and continues to treat with her, when he has insurance and is able to pay (T. 42). PX 8. Dr. Shah referred Petitioner to Dr. Bansal. He complained to Dr. Bansal of headaches, irritableness, and concentration trouble (T. 43). He saw Dr. Bansal on August 2, 2017 where he complained of trouble sleeping, no appetite, and stress over health issues, stuttering, and trouble multitasking and concentrating (T. 48). Petitioner testified that Dr. Bansal prescribed medication for anxiety but Petitioner would not take the medication. Dr. Bansal sent Petitioner to Dr. Ryan, a psychologist, for therapy as of 12/11/17.

Subsequent to Petitioner's treatment with Drs. Hamming, DeLeon, Bansal, and Parikh, Petitioner received additional treatment from Dr. Koh for his left hip and left shoulder at Northshore, and Dr. Kadakia at Northwestern for his left ankle. Petitioner testified that his benefits were terminated by Respondent in January 2018 and he was under his wife's group insurance around March 2018. Petitioner resumed treatment at that time.

The records from Northshore University Health System dated 2/27/18 indicate that Petitioner's primary care provider Dr. Kaufman referred Petitioner to an orthopedic, Dr. Koh, per Petitioner's request with regard to his left hip. PX 10. Dr. Koh began treating Petitioner's left hip and left shoulder on April 10, 2018. PX 10, p. 5. Petitioner complained of persistent pain and discomfort. On exam, he noted left shoulder tenderness over the biceps tendon, weakness, positive Hawkins test for impingement and positive Speed's and O'Brien's test. The left hip exam revealed good range of motion, pain with flexion, adduction, internal rotation and weak external rotation strength. P. 8. Dr. Koh recommended arthroscopic surgery for the left hip to address the residual impingement around the edge of the hip. He causally related the need for this surgery to the accident. P. 10. On June 5, 2018, Dr. Koh examined Petitioner's left shoulder. P. 12. He provides no further testimony regarding the left shoulder.

On June 15, 2018, Dr. Koh performed a femoroplasty, with extensive repair, revision and excision of scar tissue from the previous surgery. P. 14-18. In his opinion, the second surgery was necessary because of Petitioner's continued pain and discomfort caused by the scar tissue and loose material inside the hip joint and residual bone spurring at the edge of the femur contributing to the pain. P. 18. At the time of his deposition on 9/24/18, he felt Petitioner was progressing well. On cross-exam, Dr. Koh does not recall a physician referral for Petitioner. P. 23.

Beginning on the accident date November 7, 2016, until the hearing date, May 16, 2019, Petitioner was either off work recovering from surgeries, on restricted duty work or released from treatment and released for work. Petitioner's benefits were terminated as of September 17, 2017, following the date of his Section 12 exam with Dr. Koehler on 9/12/17. PX 16. Petitioner's employment with Respondent was terminated as of January 16, 2018. PX 17. Petitioner has not applied for work anywhere other than with Respondent (T. 82). He is seeking a return to work with Respondent (T. 83).

Dr. Koehler testified via evidence deposition dated April 17, 2019. RX 1. Dr. Koehler is Respondent's Section 12 examining physician. He testified that he examined Petitioner on two occasions- 9/12/17 and 3/4/19. Dr. Koehler examined Petitioner's left ankle on 9/12/17. He also reviewed the prior medical records from Illinois Bone and Joint dated August 25, 2017 wherein the doctor noted Petitioner was walking without antalgia, and the left ankle had no swelling, bruising or redness or skin changes. Dr. Koehler examined the left ankle and foot on 9/12/17 and noted no swelling or enlargement, normal flexion, excellent muscle tone, reflexes were one plus bilateral and symmetric at the knees and ankle, good calf muscle bulk, excellent muscle tone and normal range of motion of the ankles and knees. P. 13. Dr. Koehler's exam preceded Petitioner's left ankle surgery. Dr. Koehler opined that Petitioner's left ankle condition and surgery was not causally related to the car accident of 11/7/16 as Petitioner did not have any left ankle complaints in the emergency room and the investigative studies were negative. He did not know what if anything occurred between his normal exam of Petitioner in September 2017 and the MRI of the left ankle showing chronic changes and prompting surgery. P. 14-15. Dr. Koehler reviewed the testing performed by Dr. Kadakia as well as the medical records indicating Dr. Kadakia's belief that left ankle surgery was necessary and Dr. Koehler disagreed with those findings and opinions. RX 1, report dated 3/4/19.

Following the Section 12 exam in September 2017, Dr. Koehler agreed that Petitioner sustained a left elbow contusion, left hip labral tear, left shoulder strain without radiographic evidence of a SLAP tear, left sided cervical spine strain, left wrist contusion with no causal connection for the cyst, and right ankle pain. He opined that all of these causally related conditions had resolved as of his exam on 9/12/17 and that Petitioner had reached MMI for those conditions. In his subsequent report issued in March 2019, Dr. Koehler opined that the second surgery for the left hip performed by Dr. Koh on June 15, 2018 was also causally related to the accident of 11/7/16. However, his opinion on the other conditions remained unchanged. RX 1.

At trial, Petitioner testified that his left ankle is weak and he thinks PT would help. T. 68. His left knee is "okay." T. 69. He still has pain in his left hip and thinks PT would help. T. 69. His left shoulder is "getting there" and he thinks he can work with his left shoulder. T. 69-70. His lumbar spine is "asymptomatic right now." T. 70. He still gets muscle spasms in his cervical spine but he thinks PT would help. T. 70. His anxiety is "okay" and he is "coping." He has pain on the underside of the left wrist and he has some strength issues gripping heavier objects but the motion is "fine." T. 71. His right ankle has "resolved." T. 71. He also testified that he has right hip pain which he attributes to the accident but has not been treated for the right hip. T. 72. Petitioner testified he can no longer play basketball. His main limitations on a daily basis come from the left hip condition. T. 81.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

The Arbitrator notes that penalties and attorney fees were placed at issue on the request for hearing form and a formal motion was filed at the time Petitioner's Proposed Decision was submitted per leave of the Arbitrator

and without objection from Respondent to the timing of the presentation of the Petition. Petitioner's penalty motion is addressed in the Decision below.

Additionally, Petitioner submitted a post trial motion to admit medical bills from doctors DeLeon, Koh, and Kadakia because the Petitioner did not possess them at the time of trial. The bills were obtained after the trial. In addition, the Arbitrator addresses evidentiary objections to Dr. Koh's narrative opinion dated January 3, 2019 (Px-13). Lastly, the Arbitrator addresses Respondent's objections to Dr. Kadakia's deposition. PX 11.

1. The Arbitrator rejects PX-11, the Kadakia deposition transcript (with treating records as exhibits therein) sustaining Respondent's objections. Petitioner's attorney admits to taking this deposition without first providing any treatment records of Dr. Kadakia to Respondent attorney, and without the agreement or presence of Respondent attorney. (See also, Rx-2 emails regarding the issue between the attorneys). Taking the deposition in this manner resulted in undue prejudice to Respondent's defense of the case and violates rules of the IWCC. Respondent's objections are sustained and PX 11 is rejected as is the testimony and opinion of Dr. Kadakia. The deposition transcript at PX 11 is marked rejected by the Arbitrator and is not admitted into evidence and has not been considered by the Arbitrator.

2. The Arbitrator sustains the Respondent's objection to the hearsay narrative by Dr. Koh prepared for the purposes of litigation, addressed to Petitioner's attorney, directed "to whom I may concern" and, as conceded by the Petitioner attorney, drafted to avoid costs of another deposition of Koh. PX 13. It is admittedly hearsay and Petitioner offers no hearsay exception as a basis is to overrule Respondent's objection. PX 13 is rejected and so marked by the Arbitrator. To the extent the letter which is the rejected PX 13 is contained in any other records submitted by Petitioner, the letter is rejected and has not been considered by the Arbitrator.

3. The motion to admit bills from DeLeon, Kho, and Kadakia, amending them to the already admitted PX-14, is denied. Those bills were not presented at the time of trial. The Arbitrator finds that the admission of those bills post trial results in undue prejudice to Respondent. T. 107-108.

ON THE ISSUE OF (G), EARNINGS, THE ARBITRATOR CONCLUDES:

At trial, Petitioner alleged earnings of $90,043.20 and an average weekly wage of $1,731.60. Petitioner's alleged wage was based on Petitioner earning $43.29 per hour and a 40 hour work week. T. 87. The Arbitrator finds Petitioner's average weekly wage was $1,731.60. T. 12-13. The Arbitrator is not persuaded otherwise by Petitioner's testimony on cross-exam. T. 86-90.

ON THE ISSUE OF (F), WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY THE ARBITRATOR CONCLUDES:

Based on the record in its entirety, and on the medical records and opinions summarized above, the Arbitrator finds causal connection for Petitioner's left hip labral tear through the date of 9/24/18 when Dr. Koh testified that Petitioner was progressing well following the second surgery performed on the left hip by Dr. Koh in June 2018. Further, the Arbitrator notes that Dr. Koehler opined that the left hip condition including the second surgery performed by Dr. Koh was causally related to the car accident.

The Arbitrator finds causal connection for Petitioner's left shoulder strain through 9/12/17 only. Petitioner's objective left shoulder testing was negative for any tears and Petitioner received conservative treatment. Petitioner, on September 22, 2017, was given a left shoulder injection by Dr. M. Hamming which Dr. Hamming

indicated provided "excellent improvement in his left shoulder symptoms" on post injection exam. PX 4. Dr. Koh does not establish a causal connection between the shoulder surgery he performed and the work accident. The October 2018 surgery occurred after Koh testified in his deposition about the hip treatment. Respondent's objection to the January 2019 letter drafted by Kho at the request of the attorney in preparation for litigation which addresses causation for the left shoulder was sustained and the letter is not admissible. Therefore, the Arbitrator finds causal connection for Petitioner's left shoulder strain through 9/12/17.

The Arbitrator finds causal connection for the left wrist and for the surgery and treatment provided by Dr. DeLeon through 9/12/17. Petitioner was referred to Dr. DeLeon by Dr. Hamming for his left wrist treatment. Dr. DeLeon noted that Petitioner's left wrist was hyperflexed in the car accident and he diagnosed a left dorsal ganglion cyst. He recommended an excision which he performed on July 6, 2017 at Hawthorn Surgery Center. PX 4; PX 6. Petitioner had a post surgical injection on 8/11/17 and again on 9/12/17 from Dr. DeLeon. Based on the contemporaneous complaints of left wrist symptoms and on the opinion of Dr. DeLeon, the Arbitrator finds causal connection for the left wrist condition through 9/12/17.

The Arbitrator finds causal connection for Petitioner's anxiety condition through 9/12/17. Petitioner was treated for a possible traumatic brain injury. However, after the current accident, there were no objective test results to support a TBI. Petitioner was treated for increased anxiety and the Arbitrator places the finding of causal connection on the supporting treating records. The Arbitrator further finds causal connection for Petitioner's cervical strain as reflected in the medical records and for which he received minimal conservative treatment.

The Arbitrator finds causal connection for the immediate right ankle complaints of pain/sprain which resolved quickly per the medical records.

Based on the credible evidence at trial, the Arbitrator finds no causal connection for Petitioner's left ankle complaints or treatment. The contemporaneous histories from medical providers including the ambulance and ER reports do not reference any complaints to the left ankle but rather only the right ankle. Petitioner's left ankle complaints began much later as referenced in the medical records. The Arbitrator finds no causal connection for the left ankle complaints given the delay in report and treatment and based on the record in its entirety. Dr. Kadakia's evidence deposition and his opinions relating to the left ankle treatment were barred for reasons as stated above.

There is no causal connection to any current alleged disability to the left elbow and the accident. Dr. Koehler addresses the issue and opined without rebuttal that there was no condition related to the accident. There is no treating physician testifying otherwise. The Arbitrator further finds no causal connection for any lumbar condition. The finding is based on the lack of initial lumbar complaints after the accident and on the opinion of Dr. Koehler.

ON THE ISSUE OF (K), TO WHAT EXTENT WAS THE PETITIONER TEMPORARILY AND TOTALLY DISABLED, THE ARBITRATOR CONCLUDES:

The parties agreed that Petitioner was paid full salary from the date of the accident through November 7, 2017. At trial, Petitioner requested TTD for the periods of 9/19/17 through 9/22/17. Petitioner received full salary during that period. Petitioner requested TTD again from 11/7/17 through the date of trial. ARB EX 1. Based on the Arbitrator's findings on the issue of causal connection through 9/12/17 for Petitioner's conditions of ill-being, combined with the January 2018 employment termination thereafter, the Arbitrator further finds that no period of TTD is owed to Petitioner and no TTD is awarded. ARB EX 1.

ON THE ISSUE OF (J), WHAT MEDICAL SERVICES RENDERED TO PETITIONER WERE REASONABLE AND NECESSARY AND WHETHER RESPONDENT HAS PAID ALL APPROPRIATE CHARGES THE ARBITRATOR FINDS CONCLUDES:

Based on the Arbitrator's findings on the issue of causal connection through 9/12/17 for Petitioner's conditions of ill-being, the Arbitrator finds that Respondent shall pay Petitioner the reasonable, necessary and causally related medical expenses incurred by Petitioner for those conditions found causally related (see above) through 9/12/17. Respondent shall pay these bills pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any, and shall hold Petitioner harmless for applicable payments made, if any, to which Section 8(j) applies. The Arbitrator rejected Petitioner's submission of medical bills from Drs. DeLeon, Koh and Kadakia as stated above and those bills are not included in the Arbitrator's award of medical expenses to Petitioner regardless of the date and condition for which those services were received.

ON THE ISSUE OF (L), THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR CONCLUDES:

Petitioner clearly placed nature and extent at issue at trial. ARB EX 1. At trial, Petitioner testified he still has pain in his left hip and thinks PT would help. T. 69. His left shoulder is "getting there" and he thinks he can work with his left shoulder. T. 69-70. His lumbar spine is "asymptomatic right now." T. 70. He still gets muscle spasms in his cervical spine but he thinks PT would help. T. 70. His anxiety is "okay" and he is "coping." He has pain on the underside of the left wrist and he has some strength issues gripping heavier objects but the motion is "fine." T. 71. His right ankle has "resolved." T. 71. Petitioner testified he can no longer play basketball. His main limitations on a daily basis come from the left hip condition. T. 81.

Pursuant to Section 8.1(b) of the Act, the Arbitrator notes that no AMA rating was submitted by either party and no weight is given to that factor. Petitioner failed to present any credible or developed evidence or testimony on the issue of future economic impairment so no weight is given to that factor. Petitioner is 31 years old and will have many years in the work force. Given his young age, some weight is given to this factor. With regard to occupation, the Arbitrator notes that Petitioner is willing to return to work with Respondent or in the line of law enforcement. He testified that he does not feel restricted by any of his injuries. Great weight is given to his factor.

Petitioner's testimony with regard to his continued disability is referenced above. After weighing and considering all five factors, the Arbitrator concludes:

Left Hip- Petitioner sustained a labral tear requiring two surgeries. Petitioner's main limitations are caused by the left hip. Accordingly, the Arbitrator finds Petitioner sustained 30% loss of use of leg pursuant to Section 8(e) of the Act.

Cervical strain/left shoulder strain/anxiety – Based on the record as a whole, the Arbitrator finds that Petitioner sustained 5% loss of use of the person as a whole under Section 8(d)(2) of the Act.

Left wrist – Based on the record as a whole, the Arbitrator finds that Petitioner sustained 5% loss of use of the left hand.

No ppd award is made for the right ankle as there was no treatment rendered and no residual effect testified to by Petitioner. Based on the findings on the issue of causal connection as stated above, no further PPD is awarded for any other condition. Respondent shall receive a credit for PPD advanced to Petitioner. ARB EX 1.

ON THE ISSUE OF (M), WHETHER PENALTIES AND FEES SHOULD BE IMPOSED ON RESPONDENT, THE ARBITRATOR CONCLUDES:

Based on the record in its entirety, and on the Arbitrator's findings of the issues of causal connection and TTD, the Arbitrator further finds that Respondent's conduct was neither so unreasonable nor vexatious so as to justify the imposition of penalties or fees under Sections 19(k). (l) or 16 of the Act. Petitioner's request 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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Barhoumeh,

Petitioner,

20IWCC0718

vs.

NO: 17 WC 32358

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §§19(b) ad 8(a) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of fees and penalties and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 March 16, 2020, is hereby affirmed and adopted.

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

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

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

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 7 - 2020
o11/19/20
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

20IWCC0718

BARHOUMEH, WILLIAM
Employee/Petitioner

Case# **17WC032358**

19WC036380

CITY OF CHICAGO
Employer/Respondent

On 3/16/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% 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
KEVIN T VEUGELER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0010 CITY OF CHICAGO
MATTHEW LOCKE
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

20IWCC0718

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 X

ILLINOIS WORKERS' COMPENSATION COMMISSION
19(B)/8(A) ARBITRATION DECISION

William Barhoumeh
Employee/Petitioner
v.
City of Chicago
Employer/Respondent

Case # 17 WC 032358
19 WC 036380

Setting **Chicago**

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **February 21, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 1, 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 **$48,199.82**; the average weekly wage was **$926.91.**

On the date of accident, Petitioner was **50** years of age, married, with 3 dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

The parties agree Petitioner was temporarily totally disabled from December 1, 2016 through April 4, 2019, a period of 122 1/7 weeks. Arb Exh 1.

Respondent shall be given a credit of **$69,997.50** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$69,997.50**.

ORDER

Medical Benefits
The Arbitrator awards the claimed medical expenses (PX 4-9), subject to the fee schedule and with Respondent receiving credit for any payments it has made. RX 1.

Prospective Care
Respondent shall authorize and pay for prospective care in the form of the left knee revision surgery recommended by Dr. Giannoulias.

Penalties/Fees
For the reasons set forth in the attached decision, the Arbitrator declines to find Respondent liable for penalties and fees.

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

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

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

Molly C Mason

Signature of Arbitrator

20IWCC0718

Date: March 16, 2020

MAR 16 2020

20IWCC0718

Procedural Note/Summary of Disputed Issues

Two Applications are on file but, at the hearing, Petitioner's attorney clarified that only one accident occurred. The parties agree that Petitioner, a longtime Respondent employee, was injured on December 1, 2016 while working as a watchman for Respondent. Petitioner claims he injured his lower back and left knee on that date. He underwent treatment at Metro South Emergency Room on the date of the accident. The Emergency Room records are not in evidence. On December 2, 2016, he began a course of care at U.S. Healthworks, an occupational medicine facility of Respondent's selection. U.S. Healthworks subsequently referred him to Dr. Tu, an orthopedic surgeon. Dr. Tu referred him to Dr. Sharma, a pain physician, who referred him to Drs. Sompalli and Templin. Dr. Sompalli operated on Petitioner's left knee on August 1, 2017, performing an arthroscopy, microfracture and chondroplasty. Petitioner remained symptomatic postoperatively. Eventually, Dr. Sompalli referred Petitioner to Dr. Giannoulias. Following repeat MRIs, Dr. Giannoulias recommended a left knee revision arthroscopy and imposed permanent restrictions.

The parties agree that Petitioner was temporarily totally disabled from December 1, 2016 through April 4, 2019. Arb Exh 1. Petitioner resumed working as a watchman on April 4, 2019. He testified that some of his watchman duties exceed his restrictions.

At Respondent's request, Dr. Forsythe conducted a Section 12 examination on September 5, 2019. He noted symptom magnification and inconsistencies. He opined that the work accident permanently aggravated an underlying left knee condition. He concluded that Petitioner needed no further left knee treatment. He found Petitioner capable of continuing his watchman job but indicated that, if Petitioner declined to do this, he could undergo a functional capacity evaluation with validity profiling.

The disputed issues include causal connection, medical expenses, penalties/fees and prospective care.

Arbitrator's Findings of Fact

Petitioner testified he has worked for Respondent for 22 years. He works as a watchman. His duties are security-related. He is dispatched to various Respondent facilities and salt piles, where he makes rounds and checks doors and gates. He works alone.

Petitioner denied having any low back or left knee problems before December 1, 2016. On that date, he was working inside a mobile trailer, securing a salt dome. He stepped onto a vent that was rusty. He thought the vent was secure but it gave way. He injured his left knee and low back. He called his office and then called 911. Paramedics arrived and transported him to Metro South Hospital, where he underwent X-rays.

No paramedic records are in evidence but Dr. Forsythe, Respondent's examiner, referenced a "City of Chicago EMS report" in his report. He noted that Petitioner reported injuring his left knee after "his foot became caught on a vent cover and he fell forward onto his hands." RX 4.

No records from Metro South Hospital are in evidence. Dr. Forsythe testified he was not provided with any records from Metro South. RX 2, pp. 20-21.

Petitioner testified he underwent treatment at U.S. HealthWorks on December 2, 2016. The records from U.S. HealthWorks include a document reflecting that Pat Tomey authorized Petitioner's visit of December 2, 2016. The initial history reads as follows:

> "Yesterday walking & his lt foot went through a rusted top of a damaged floor vent. His feet went through but body went forward and 'twisted.' Pain lt knee and lt lower back. Back pain radiates to left foot. No numbness or tingling. Went to ER, had X-rays, no meds, reports 'they did nothing.'"

The examining provider, Sarah Purdy, PA-C, described Petitioner's gait as abnormal. She noted left-sided lumbar tenderness on examination and indicated Petitioner was unable to lie down due to knee pain. She assessed Petitioner as having a lumbar strain and a possible anterior cruciate ligament tear. She provided Petitioner with an Ace wrap and crutches. She prescribed a left knee MRI and medication. She released Petitioner to seated work with crutch usage, indicating Petitioner should elevate his leg when at home. PX 1.

Petitioner testified he did not return to work at this point because Respondent could not accommodate his restrictions.

Petitioner returned to U.S. HealthWorks on December 5, 2016 and saw Dr. Sisson. The doctor noted ongoing complaints of left knee and lower back pain and difficulty walking. He dispensed a knee sleeve and prescribed a tapering dose of Prednisone. He also prescribed physical therapy. PX 1.

Petitioner underwent an initial physical therapy evaluation at U.S. Healthworks on December 7, 2016. The evaluating therapist noted that Petitioner reported falling into a two-foot hole and experiencing left knee pain. She also noted that Petitioner initially went to an Emergency Room. She described Petitioner as having a left knee sprain and compensatory low back pain.

The left knee MRI, performed without contrast on December 8, 2016, showed a small to moderate amount of fluid within the suprapatellar bursa and chondromalacia. The radiologist described the ligaments and menisci as intact. PX 2.

At the referral of Dr. Sisson, Petitioner saw Dr. Tu, an orthopedic surgeon, on December 29, 2016. In his note of that date, the doctor noted that, on December 1, 2016, Petitioner was walking when he got his left foot caught in a vent that was missing its cover and fell forward. He also noted that Petitioner was experiencing left knee pain, swelling and periodic "giving way" and low back pain radiating down his left leg. He indicated that a left knee MRI "demonstrated chondromalacia of the patella with an effusion present." On left knee examination, he noted some tenderness over the joint line and no effusion. He diagnosed a left knee strain and lower back pain. He prescribed therapy for the left knee and spine and directed Petitioner to return in five weeks. PX 1.

Petitioner underwent an initial physical therapy evaluation at ATI on January 2, 2017. The evaluating therapist recorded a history of the work accident and subsequent care. She noted that Petitioner rated his pain at 8/10 with activity and reported difficulty with stairs. She noted mild swelling of the popliteal fossa.

Petitioner continued attending therapy thereafter. A progress note dated January 30, 2017 reflects that Petitioner was still reporting high levels of pain in his left knee and the left side of his back. PX

Petitioner returned to Dr. Tu on February 2, 2017. The doctor noted "really minimal improvement" following the therapy. He indicated that Petitioner was still experiencing 8/10 pain and difficulty with walking, bending and lifting. On lumbar spine examination, he noted some improvement of range of motion and positive straight leg raising. On left knee examination, he noted tenderness over the joint line and no effusion. He diagnosed a left knee strain and aggravation of patellofemoral chondromalacia and lower back pain. He administered a cortisone injection into the left knee and prescribed a lumbar spine MRI.

A therapy progress note dated February 6, 2017 reflects that Petitioner was still having difficulty with stairs and could not tell whether the injection had helped. PX 3.

The lumbar spine MRI, performed without contrast on February 14, 2017, showed a 2 millimeter posterior central protrusion at L5-S1, annular bulging from L3-L5 in conjunction with posterior element hypertrophy causing significant central canal stenosis at those levels and Grade 1 anterolisthesis of L4 on L5.

A therapy progress note dated February 23, 2017 reflects that Petitioner felt about the same and was experiencing left leg weakness as well as left knee and lower back pain. PX 3.

Petitioner returned to Dr. Tu on March 2, 2017 and reported minimal improvement. He complained of pain starting from his lumbar spine and radiating down his left leg. On lumbar spine examination, the doctor noted a limited range of motion, tenderness over the paraspinal muscles and positive straight leg raising on the left. On left knee examination, he noted no joint line tenderness, no laxity and no effusion. He interpreted the MRI as showing "some

changes with stenosis present." He continued the work restrictions and referred Petitioner to a pain specialist for possible injections. PX 2.

Petitioner saw Dr. Sharma, a pain physician, on March 10, 2017. The note of that date describes Dr. Tu as the referring physician. Dr. Sharma recorded a consistent history of the work accident and subsequent care. He noted a complaint of 8/10 low back pain radiating down the back of the left leg. He also noted that Petitioner denied any right lower extremity involvement and reported no improvement following therapy and a left knee injection.

Dr. Sharma described Petitioner's gait as antalgic. On lumbar spine examination, he noted positive seated straight leg raising on the left at 90 degrees and a diminished left ankle reflex compared to the right. He interpreted the MRI images as showing a Grade 1 spondylolisthesis, L4 over L5, with advanced central canal stenosis at L5-S1, most significant at L4-L5. Dr. Sharma assessed Petitioner as having acute low back pain and left lumbar radiculopathy "from a work-related injury, 12/1/16." He ordered flexion-extension X-rays. He maintained the 10-pound restriction and directed Petitioner to avoid repetitive bending, twisting, lifting, kneeling and crawling. He also recommended that Petitioner see an orthopedic surgeon for his left knee. PX 2.

Petitioner underwent lumbar spine X-rays on March 15, 2017. The flexion-extension views showed a mild decrease in range of motion without evidence for any significant subluxations. PX 2.

At Dr. Sharma's referral, Petitioner saw Dr. Sompalli, an orthopedic surgeon, on May 20, 2017. The doctor described the mechanism of injury as follows:

> "He states he is a security guard. He was walking. There was a flimsy cover on a hole, I believe, and his left leg stepped on the cover and fell into the hole which was 2-3 feet deep. This injury happened on 12/01/2016."

The doctor noted that Petitioner had seen Dr. Tu and denied left knee improvement following therapy and an injection. He noted no abnormalities on right knee examination. On left knee examination, he noted patellofemoral grind, medial and lateral patellar tenderness and joint line tenderness, negative McMurray's, negative anterior drawer and intact sensation.

Dr. Sompalli indicated he reviewed the left knee MRI. He found it "curious" that Petitioner was still experiencing so much pain following therapy and an injection. He prescribed a repeat left knee MRI and left knee X-rays. He continued the restrictions of no lifting, carrying, pushing or pulling over 10 pounds. He directed Petitioner to return in three weeks. PX 2.

The repeat left knee MRI, performed without contrast on May 26, 2017, showed a small joint effusion, degeneration and low-grade partial thickness tearing of the posterior root

ligament of the medial meniscus, with mild extrusion, mild proximal patellar tendinopathy, patchy Grade 2-3 patellofemoral chondromalacia, worst involving the central femoral trochlea and mild medial compartment osteoarthritis. The radiologist indicated he had access to the December 8, 2016 MRI report and a "single selected image." PX 2.

At Dr. Sharma's referral, Petitioner saw Dr. Templin, a spine surgeon, on June 2, 2017, for an evaluation of his left leg and back pain. Dr. Templin recorded a history of the work accident and subsequent care. He noted that Petitioner rated his pain at 8/10 and described his symptoms as aggravated by standing and walking. He described Petitioner's gait as antalgic. With straight leg raising, he noted mild buttock pain on the left at about 50 degrees. He reviewed the report concerning the February 14, 2017 lumbar spine MRI.

Dr. Templin described Petitioner as "status post a fall with an L4-L5 spondylolisthesis and stenosis aggravated by the fall, with continued low back pain and radicular pain extending into the left leg." He recommended one more epidural injection on the left at L5. He indicated Petitioner would have the option of undergoing an L4-L5 fusion if he remained symptomatic after the injection. He recommended that Petitioner continue seeing an orthopedic surgeon for his left knee. He continued the 10-pound restriction and asked Petitioner to bring in the MRI images. PX 2.

On June 10, 2017, Dr. Sompalli noted that Petitioner was still experiencing 6/10 left knee pain along with swelling and some giving way. After reviewing the repeat MRI, he concluded that the posterior root medial meniscus tear was likely causing the effusion and pain. He told Petitioner he wanted to perform a chondroplasty as well as a root tear repair. On re-examination, he noted flexion to 100 with moderate effusion, medial joint line tenderness and positive McMurray's testing. He prescribed a hinged brace to provide stability. He continued the previous restrictions and added restrictions of no squatting, ladder usage or climbing. PX 2.

Dr. Sharma administered a left L4-L5 transforaminal epidural steroid injection on July 14, 2017. PX 2.

Dr. Sompalli operated on Petitioner's left knee on August 1, 2017, performing an arthroscopy and medial meniscus repair, using an Arthrex cinch, and a microfracture of the medial femoral condyle using chondral picks and a chondroplasty of the medial femoral condyle. In his operative report, Dr. Sompalli documented an OCD lesion of the weightbearing surface of the medial femoral condyle and Grade 4 chondromalacia. He directed Petitioner to stay off work. PX 2, 3.

At the first post-operative visit, on August 8, 2017, Dr. Sompalli directed Petitioner to gradually begin weightbearing and start therapy. He kept Petitioner off work. PX 3.

On August 11, 2017, Dr. Sharma noted that Petitioner reported improvement following the injection but was using crutches postoperatively. Dr. Sharma recommended that Petitioner return to him once he had been cleared by his orthopedic surgeon. PX 2.

Petitioner underwent an initial physical therapy evaluation at ATI on August 14, 2017. PX 3.

A therapy progress note dated September 6, 2017 reflects that Petitioner was still using crutches and experiencing knee pain when bending or straightening his leg. PX 3.

A therapy progress note dated September 21, 2017 reflects that Petitioner complained of left knee pain and swelling as well as buckling and an inability to straighten his leg all the way. PX 3.

On September 23, 2017, Dr. Sompalli progressed Petitioner to full weightbearing and directed him to continue therapy. He continued to keep Petitioner off work. PX 2.

A therapy progress note dated October 5, 2017 reflects that Petitioner was still complaining of left knee pain, swelling and buckling, as well as difficulty climbing stairs leading with his left foot. The therapist noted moderate swelling proximate to and at the knee. The therapist indicated Petitioner remained at a sedentary level and needed to be capable of light physical demand work in order to resume his security guard job. PX 3.

On October 11, 2017, Dr. Sompalli recommended four more weeks of therapy.

A physical therapy discharge note of October 13, 2017 reflects that Petitioner was being discharged "due to authorization limits." The therapist noted that Petitioner remained at a sedentary physical demand level and was unable to ascend stairs without bilateral upper extremity support. The therapist also noted significant atrophy of the left quadriceps. PX 3.

On October 17, 2017, Coventry issued a letter to Dr. Sompalli non-certifying the additional therapy in reliance on an opinion provided by Dr. Antonelli, an occupational medicine physician.

Petitioner returned to Dr. Sompalli on November 18, 2017. The doctor noted that Petitioner described his left leg as "completely weak" and unable to support him. He also noted that only three weeks of therapy had been approved. He described this as "completely unacceptable." On right leg examination, he noted no abnormalities. On left leg examination, he noted extension to only -20, flexion to 100, 3/5 quadriceps and hamstring strength and "significant atrophy of the quadriceps."

Dr. Sompalli attributed Petitioner's weakness to the lack of therapy. He indicated Petitioner "will never recover with this kind of leg." He prescribed eight weeks of therapy along with a repeat left knee MRI. He continued to keep Petitioner off work. PX 2.

The repeat left knee MRI, performed without contrast on November 21, 2017, showed a horizontal posterior root tear of the medial meniscus and mild diffuse chondromalacia. PX 2.

Petitioner underwent a functional capacity evaluation at ATI on January 23, 2018. The evaluating therapist rated the evaluation as valid. He found Petitioner to be functioning at a light physical demand level, the level required for the watchman job. He noted, however, that the job description provided by Respondent indicated a watchman has to be able to stand and walk for extended or continuous periods and able to climb stairs as required, and that he was recommending that Petitioner climb stairs only occasionally due to balance issues. He further recommended that Petitioner knee on a "minimal-occasional basis only," noting that Petitioner "demonstrated significant functional difficulty with kneeling." PX 2.

On February 3, 2018, Dr. Sompalli noted that the evaluation showed that Petitioner was at a light physical demand level but that Petitioner indicated he could not work because he could not climb stairs and also had difficulty kneeling and squatting. On left knee re-examination, Dr. Sompalli noted a range of motion from 0 to 100 degrees, positive McMurray's testing, medial joint line tenderness, quadriceps and hamstring strength of 4/5 and intact sensation. Dr. Sompalli prescribed a Cybex test to determine the origin of Petitioner's left leg weakness, noting that the recent MRI, which showed a repair that did not heal, would explain Petitioner's pain but not the weakness. He directed Petitioner to remain off work. PX 2.

Petitioner testified that Respondent did not authorize the Cybex test.

On March 31, 2018, Dr. Sompalli noted that the Cybex test had not been done and that Petitioner was still experiencing left knee pain and weakness. He recommended that Petitioner stay off work and see Dr. Giannoulias for a second opinion. PX 2.

Petitioner first saw Dr. Giannoulias on April 25, 2018. The doctor noted a history of the work accident and subsequent surgery. He also noted complaints of persistent left knee pain and weakness. On examination, he noted "marked atrophy of the left quadriceps" a range of motion from 0 to 120 degrees with pain over the medial joint line, positive McMurray's and weakness of 4-/5. He opined that Petitioner "does still have a meniscus tear" but that "the main issue is the significant quadriceps atrophy that is still present at eight months out from surgery." He prescribed an EMG to check for neural compressive lesions. PX 2.

Petitioner underwent the EMG on June 7, 2018

Petitioner returned to Dr. Giannoulias on June 13, 2018. The doctor noted that the EMG demonstrated L3-L4 radiculopathy. He referred Petitioner back to Dr. Sharma for additional injections. He indicated Petitioner might require another left knee arthroscopy. He directed Petitioner to return to him after seeing Dr. Sharma.

Petitioner saw Dr. Sharma the same day and complained of gait-related back issues. Petitioner indicated that during the preceding one or two months he noted that his radicular left leg pain returned. On re-examination, the doctor noted positive straight leg raising on the left to 90 degrees and "notable swelling of the left knee." He diagnosed "acute on chronic

aggravation of left lower extremity radiculopathy stemming from a December 2016 injury." He recommended a repeat L4-L5 transforaminal injection and indicated that the orthopedic surgeon would determine work restrictions. PX 2.

Dr. Sharma administered a left L4-L5 transforaminal epidural steroid injection on July 6, 2018.

On August 8, 2018, Petitioner saw Kelly Diamond, PA, Dr. Sharma's assistant. Petitioner reported 40% improvement following the injection but persistent 8/10 low back pain. Diamond noted that Petitioner indicated he was not interested in surgery of any kind based on his lack of improvement following the left knee surgery. She prescribed Celebrex and Lidocaine patches. She recommended that Petitioner follow up with Dr. Sharma. PX 2.

On October 12, 2018, Dr. Sharma administered a left intra-articular knee joint injection. PX 2.

On November 14, 2018, Petitioner returned to Dr. Sharma and reported that the injection provided approximately 80% relief for two days. He also reported some improvement of his low back pain and gait. He denied any right lower extremity involvement. On re-examination, Dr. Sharma noted positive straight leg raising in the seated position to 90 degrees on the left, negative right straight leg raising, notable tenderness to palpation on the medial and lateral joint lines of the knee, negative drawer signs and patellar tendon tenderness to palpation. He informed Petitioner that "it appears that his left knee pain is contributing to his low back pain." However, given the lack of sustained response to the injection, he recommended repeat left knee and lumbar spine MRI scans. PX 2.

The repeat left knee MRI, performed without contrast on November 27, 2018, showed "chronic appearing complex tearing of the medial meniscus posterior horn with a low-grade radial component" and "moderate peripheral extrusion of the body" mild osteoarthritis of the medial compartment and moderate osteoarthritis of the patellofemoral compartment with areas of high grade cartilage loss. The repeat lumbar spine MRI, performed without contrast the same day, showed bulges with varying degrees of stenosis at L3-L4, L4-L5 and L5-S1 and "relatively stable Grade 2 anterolisthesis of L4 on L5." The radiologist indicated he compared the images with those obtained on February 14, 2017. PX 2.

On December 12, 2018, Dr. Sharma noted ongoing low back and left knee complaints. He described Petitioner's gait as antalgic. He discussed the MRI results with Petitioner. He recommended that Petitioner see "both orthopedics" since it appeared that his knee pain was aggravating his back. He recommended that Petitioner's knee be addressed before any further back intervention, based on the lumbar spine MRI, which he described as "stable" in comparison with the previous study. PX 2.

On January 10, 2019, Dr. Giannoulias noted a chief complaint of "left knee pain." On examination, he noted tenderness over the medial and lateral joint line. He administered an intra-articular injection. He kept Petitioner off work. PX 2.

On February 14, 2019, Dr. Giannoulias noted a chief complaint of "right knee pain" but went on to describe Petitioner as "having pain in his left knee." [The Arbitrator concludes that the reference to the right knee is erroneous.] He administered "another injection." He indicated he did not believe additional surgery would be "that fruitful" but that it remained an option if Petitioner could not live with his symptoms. He continued to keep Petitioner off work. PX 2.

On March 14, 2019, Dr. Giannoulias described Petitioner as returning for follow-up and "having a flare-up of pain in his left knee." He administered another injection and recommended that Petitioner "have permanent restrictions for his left knee." He released Petitioner to light duty as of April 1, 2019 subject to the following permanent restrictions: no climbing ladders, no kneeling or crawling and no stair usage. PX 2.

Petitioner testified he resumed working as a watchman for Respondent on April 4, 2019. His left knee is still swollen. He is not able to walk quickly and has difficulty using stairs and walking on uneven surfaces.

On May 16, 2019, Petitioner returned to Dr. Giannoulias. The doctor noted that Petitioner was "not doing very well" and wanted to proceed with another arthroscopy. On re-examination, the doctor noted tenderness to palpation in the medial joint line. He recommended the arthroscopy, noting Petitioner did not want to live with his symptoms. He imposed permanent restrictions of occasional walking, up to 3 hours per day, and no bending, squatting, climbing, ladder usage, kneeling, crawling or stair usage. PX 2.

On May 29, 2019, Dr. Sharma noted that Dr. Giannoulias had recommended another arthroscopy and that Petitioner was requesting "a possible injection for his low back and an off work status." He described Petitioner's gait as slightly antalgic. Straight leg raising on the left reproduced only knee pain. He reiterated to Petitioner that "his pain appears to be primarily left knee related" and that there was no evidence of radicular symptoms warranting spinal interventions. He attributed Petitioner's low back pain to his antalgic gait and recommended re-evaluation "if that pain continues after [the] knee is treated." He released Petitioner to regular duty, indicating that further restrictions would be coordinated through Petitioner's orthopedic surgeon. PX 2.

Documents in PX 5 include a prescription dated May 28, 2019 for a left knee patellar cut-out brace.

Petitioner testified that the recommended revision surgery was scheduled for August 15, 2019 but did not proceed because Respondent did not authorize it.

At Respondent's request, Dr. Forsythe conducted a Section 12 examination of Petitioner on September 5, 2019. See below for a summary of the doctor's testimony.

On December 18, 2019, Petitioner's counsel filed a Section 8(a) petition, citing Respondent's refusal to authorize the surgery recommended by Dr. Giannoulias, along with a petition for penalties and fees. Arb Exh 2.

Dr. Forsythe testified by way of evidence deposition on January 28, 2020. RX 2. Dr. Forsythe testified he is an orthopedic surgeon specializing in sports medicine and arthroscopic surgery. RX 2, p. 5. He is affiliated with Midwest Orthopaedics. RX 2, p. 5. Forsythe Dep Exh 1. He sees about 140 patients per week. RX 2, p. 5.

Dr. Forsythe testified he examined Petitioner on September 5, 2019. He recalls certain details of this examination. RX 2, p. 6. He reviewed a City of Chicago EMS report along with records from U.S. Healthworks and Drs. Tu, Sompalli, Giannoulias and Sharma. RX 2, p. 8. He obtained X-rays of Petitioner's left knee. The most pertinent finding on X-ray was narrowing of 2.5 millimeters on the left knee medial joint space versus the right knee. RX 2, pp. 9-10. This is consistent with wear and tear or chondrosis within the medial compartment, which is where Petitioner sustained an injury. RX 2, p. 10.

Dr. Forsythe testified he reviewed the note of May 16, 2019 and was aware that Dr. Giannoulias recommended a revision left knee arthroscopy. RX 2, p. 10.

Dr. Forsythe testified that Petitioner exhibited an "exaggerated antalgic gait, meaning that he walked with a severe limp which appeared to be exaggerated." Petitioner is slightly bowlegged. Dr. Forsythe testified there was no effusion of either knee. Both knees exhibited a range of motion from 0 to 135 degrees. Petitioner was able to keep his leg straight as he elevated the leg while lying down but, when he was seated, he claimed he could not straighten his knee. This was a "dramatic inconsistency." RX 2, pp. 11-12. Petitioner had 1+ posteromedial joint line tenderness of the left knee and no tenderness in the right knee. Petitioner could squat to 60 degrees. He was also able to walk on his heels and toes but had "exaggerated difficulty" in doing so. RX 2, pp. 12-13. He exhibited only 3/5 left quadriceps strength with cogwheel rigidity and "give away" effort.

Dr. Forsythe testified that, throughout the examination, Petitioner exhibited moderate to severe symptom magnification. RX 2, pp. 13-14.

Dr. Forsythe noted that Petitioner was performing full duty as of the examination. He saw no need for further treatment, in light of Petitioner's symptom magnification. RX 2, pp. 14-15. He disagreed with the recommendation of revision surgery. RX 2, p. 15. He indicated Petitioner could continue full duty or, if he declined to do so, he could undergo a functional capacity evaluation with biometric and validity testing at a non-treating facility "to determine the need for any permanent restrictions, if necessary." RX 2, p. 15.

Under cross-examination, Dr. Forsythe acknowledged that "the more relevant medical records [he has], the better." RX 2, p. 16. He received a letter setting forth various questions, but does not have that letter available. RX 2, p. 17. If his report does not mention certain records, it is likely he did not review those records. RX 2, pp. 18-19. He was directed to examine Petitioner's left knee. He was not given a specific job description but he knew Petitioner worked as a security guard for 22 years. RX 2, p. 20. He did not review the Metro South Emergency Room records. RX 2, p. 20. He reviewed two left knee MRIs but not the MRI taken on February 14, 2017. He did not review any lumbar spine MRIs. RX 2, p. 21. He is not a spine surgeon and was not asked to examine Petitioner's back. RX 2, pp. 21-22. He did not review Dr. Sharma's note of March 10, 2017 or any records from Dr. Templin. RX 2, p. 22. He reviewed the left knee MRI images of May 26, 2017. He agrees with the radiologist's interpretation of these images. RX 2, p. 23. He reviewed Dr. Sompalli's operative report but no intra-operative films. RX 2, p. 23. If Dr. Sompalli evaluated the meniscus appropriately, during the surgery, his finding of a medial meniscus root tear is an objective finding. RX 2, p. 24. The MRI, in contrast, was "most consistent with a partial injury to the meniscal root ligament attachment." RX 2, p. 25. The MRI also showed mild medial compartmental arthritis. The ligament injury and arthritis contributed to Petitioner's left knee symptoms. RX 2, pp. 26-27.

Dr. Forsythe testified he asked Petitioner whether he had left knee complaints before the work accident. Petitioner denied feeling discomfort and said he felt completely normal before the accident. Dr. Forsythe testified he did not review any pre-accident records. RX 2, p. 27. The MRI showed pre-existing mild medial compartment osteoarthritis but he has no evidence indicating this condition was symptomatic. RX 2, pp. 27-28.

Dr. Forsythe testified that McMurray's testing is objective "insofar as the forthrightness of the patient's symptoms" is concerned. RX 2, pp. 28, 35. He did not review Dr. Sompalli's note of November 18, 2017 but he did review the November 21, 2017 left knee MRI. He generally agreed with the radiologist's interpretation of this MRI, i.e., that it showed changes of the posterior roots of the medial meniscus attributable to the surgery. RX 2, pp. 30-31. He does not fully agree with Dr. Sompalli's finding of a horizontal tear of the posterior root versus normal post-operative changes. RX 2, pp. 30-33.

Dr. Forsythe agreed that the functional capacity evaluation of January 23, 2018 was found to be valid. Dr. Sompalli recommended Cybex testing on February 3, 2018 because he could not explain Petitioner's left knee weakness. RX 2, p. 34. The fact that Dr. Sompalli noted positive McMurray's testing on March 31, 2018 would be important if Petitioner was compliant and forthright. He did not give weight to Dr. Sharma's left knee findings of December 12, 2018 because Dr. Sharma is not a knee specialist. RX 2, p. 37. He did not review Dr. Giannoulias' notes of January or February 2019. Crepitation is an objective finding in the sense that the examiner notes crackling or popping. Petitioner's watchman job was classified as light physical demand level work. RX 2, p. 40. Some of Petitioner's subjective complaints are supported by the X-rays. RX 2, p. 41. He agrees with the radiologist that "there are findings which could be interpreted as recurrent tearing but, in his own opinion, the findings are not definitive and are secondary to objective clinical evaluation." RX 2, p. 43. Given the MRI findings, it is not

reasonable for Dr. Giannoulias to be recommending a repeat arthroscopy. Based on the MRIs, it is possible that Petitioner had meniscal fraying and/or tearing before the accident. At a minimum, Petitioner suffered a "permanent aggravation of this potentially pre-existing condition." RX 2, p. 45. If the radiologist's reading of the post-operative MRI is accurate, with the radiologist noting a horizontal posterior root tear, that tear could be contributing to Petitioner's pain. RX 2, p. 46.

Dr. Forsythe testified he is a fellow of the American Academy of Orthopaedic Surgeons, meaning he has passed his boards. He identified the Standards of Professionalism of that academy. He is familiar with these standards. They include standards of professionalism for physicians testifying as experts. RX 2, p. 47. They apply to his testimony. The standards require him to review all relevant records. Admittedly, he did not review the Emergency Room records. The standards place the onus for reviewing all of the records on the physician, not the person requesting the examination or records review. RX 2, pp. 48-49. He did not seek out the Emergency Room records in this case because the records from U.S. HealthWorks "provide a much higher level of specificity than an ER physician's report would entail." RX 2, p. 49. Based on the EMS report, there is no ambiguity about the temporal relationship of the alleged work injury. The Emergency Room records would not change his opinion. The MRI findings and higher-level tertiary examinations are the most relevant documents for him to review. RX 2, p. 51. X-rays would typically be taken in the Emergency Room, unless an injury was very minor. RX 2, p. 51. He has no doubt that Dr. Sompalli performed a meniscal root repair along with a microfracture procedure. RX 2, p. 52. He did not seek out the intra-operative photographs as "there was no value add." He did not seek out certain notes from Dr. Sompalli or Dr. Giannoulias because he was not aware of the existence of those notes. RX 2, pp. 53-55. He does not agree that all people who are over the age of 20 will exhibit some degenerative changes. Some growth plates do not close until age 25. RX 2, p. 56. Most 53-year-old men would have some degree of loss of water content but there are 53-year-old men who have essentially normal knees. RX 2, p. 57. Physicians do not treat asymptomatic degenerative changes. RX 2, p. 57. There are no records showing Petitioner had symptomatic degenerative left knee changes before the accident. RX 2, p. 58.

Dr. Forsythe testified he performs approximately 25 to 30 Section 12 examinations per month. He "would guess" that most of these are for insurers but he "pays no attention to whoever requests an independent medical examination." He has never looked at the data. RX 2, p. 59. He averages three to four depositions per month. RX 2, p. 59. He charges $1,200 to review records, examine an individual and generate a report. He might charge an additional amount if the records are voluminous. RX 2, p. 60. He does not know how much he charged Respondent. RX 2, p. 60. He typically bills $1,500 for one hour of deposition testimony. The term "restricted full duty" in his report is a typographical error. RX 2, p. 61.

On redirect, Dr. Forsythe testified he had no contact with the individual who requested that he examine Petitioner. His IME scheduler would have dealt with that person. RX 2, p. 63. He never personally schedules an IME. RX 2, p. 63. In this case, he had no direct contact with any Respondent representative. RX 2, p. 63. Since he was examining Petitioner to determine

whether he would benefit from revision surgery, it was most important that he review the post-operative X-rays and pre- and post-operative MRI scans. RX 2, p. 64. He reviewed about three years' worth of medical records. RX 2, p. 64.

Under re-cross, Dr. Forsythe testified he does not meet or talk with attorneys before he formulates his opinions. The questions he received in Petitioner's case were set forth in a letter from a Respondent representative. RX 2, p. 65. He did not speak with Petitioner's counsel before the deposition. RX 2, p. 66. Nor did Petitioner's counsel have the chance to send him records. RX 2, p. 67. He has performed "quite a few" examinations for Respondent. There are "lots of City employees." He has never performed examinations at the request of Petitioner's counsel. He has not been asked to do so. T. 68. In his estimation, he has performed more than a hundred examinations of City employees. RX 2, p. 69.

Petitioner testified he is continuing to work as a watchman. Respondent has not accommodated his restrictions. He is still being sent out to facilities where he must walk and climb stairs. His left knee is still bothering him. He has difficulty using stairs and walking on uneven surfaces. He is also experiencing left-sided low back pain. He takes Advil for his symptoms. Respondent has denied his medication.

Under cross-examination, Petitioner testified that, following the accident, he called 911 and was transported to a hospital on the south side. His attorney has the records from this hospital. He has health insurance with Respondent. He could have submitted his medical expenses to his group carrier. Respondent's examiner, Dr. Forsythe, has indicated he does not need the revision surgery Dr. Giannoulias has recommended. He has not lost time from work since he resumed working on April 4, 2019.

On redirect, Petitioner testified he would have to make co-payments and would incur out of pocket expenses if he used his group coverage. He would be required to make a payment before he could undergo the recommended surgery. He would not receive temporary total disability benefits following the surgery.

Arbitrator's Credibility Assessment

Petitioner's lengthy tenure with Respondent weighs in his favor, credibility-wise. Petitioner's testimony concerning the accident and his current symptoms was detailed and believable.

Petitioner did not offer his initial Emergency Room records into evidence but the EMS report, cited by Respondent's examiner, Dr. Forsythe, is consistent with Petitioner's account of the accident. Accident is not in dispute.

Dr. Forsythe described Petitioner as exhibiting symptom magnification, inconsistencies and an "exaggerated antalgic gait." None of the treating physicians described Petitioner as

inconsistent or exaggerating his symptoms. Petitioner did not select any of these physicians. The therapist who performed the functional capacity evaluation rated the evaluation as valid.

The Arbitrator finds Dr. Forsythe unpersuasive, particularly insofar as his opinions concerning causation and work status are concerned. Dr. Forsythe lacked a job description and certain records. He conceded he performs between 25 and 30 examinations per month. He "guessed" that most of these are for insurers. He saw Petitioner on one occasion while the treating physicians saw Petitioner a number of times. He acknowledged that the work accident caused a permanent aggravation and that Petitioner exhibited some objective examination and operative findings yet saw no need for additional care.

The Arbitrator elects to rely on the opinions and recommendations of Petitioner's treating physicians.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between the undisputed accident of December 1, 2016 and his current conditions of ill-being?

The Arbitrator finds that Petitioner established a causal connection between the undisputed work accident of December 1, 2016 and his current left knee and lumbar spine conditions of ill-being. In so finding, the Arbitrator relies on the following: 1) Petitioner's credible denial of any pre-accident left knee or low back problems; 2) the fact that none of the records in evidence document any such problems; 3) Petitioner's credible testimony concerning the mechanism of injury and abrupt onset of symptoms; 4) the initial history and complaints recorded at U.S. Healthworks on December 2, 2016; 5) Dr. Sharma's opinion [of March 10, 2017] that the work accident caused acute low back pain and left lumbar radiculopathy; 6) Dr. Templin's opinion [of June 2, 2017] that the work accident aggravated Petitioner's underlying L4-L5 condition; 7) Dr. Sompalli's various causation-related comments; and 8) Dr. Forsythe's concession that the work accident caused, at a minimum, a permanent aggravation of an underlying left knee condition.

The Arbitrator further finds that Petitioner established causation as to the need for the revision surgery recommended by Dr. Giannoulias. Petitioner continued voicing left knee complaints after the August 1, 2017 arthroscopy. There is no evidence indicating he reinjured his left knee during that time frame. Respondent's denial of therapy impeded his recovery and, according to Drs. Sompalli and Giannoulias, resulted in quadriceps atrophy which adversely affected his gait, contributing to his low back problems.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims unpaid medical and prescription bills from the six providers listed on the Request for Hearing form. PX 4-9. Respondent disputes this claim on the basis that the bills

have already been paid. Arb Exh 1. Respondent offered into evidence a print-out of the medical expenses and temporary total disability benefits it has paid. RX 1.

The itemized bill from Illinois Orthopedic Network (PX 4) reflects total charges of $67,803.37, insurance payments in the amount of $38,929.10, adjustments totaling $18,196.27 and a balance of $10,678.00. Respondent's print-out reflects multiple payments to Illinois Orthopedic Network. The Arbitrator finds the treatment rendered by the physicians at Illinois Orthopedic to be causally related to the accident as well as reasonable and necessary. The Arbitrator awards the claimed balance of $10,678.00, subject to the fee schedule.

The itemized bill from G & U Orthopedic (PX 5) is in the amount of $711.00. This bill relates to treatment rendered on May 28, 2019, the date on which Petitioner received a prescription for a left knee patellar cut-out brace. Respondent's print-out does not reflect any payments for services rendered on May 28, 2019. The Arbitrator finds it reasonable for Petitioner to have received a brace, given his ongoing left knee and quadriceps problem. The Arbitrator awards the claimed $711.00, subject to the fee schedule.

The itemized bill from Midwest Specialty Pharmacy, LLC (PX 6) reflects a balance of $2,878.80 for medication prescribed in 2017, 2018 and 2019. PX 6. Respondent's payment print-out reflects payments of $3,834.34 to Midwest Specialty Pharmacy. The Arbitrator finds the charges to be causally related to the accident as well as reasonable and necessary. Respondent's examiner, Dr. Forsythe, did not question the need for the prescribed medication. The Arbitrator awards the $2,878.80 balance, subject to the fee schedule.

The itemized QMed Assist bill (PX 7) reflects total charges of $19,930.97 for therapy-related equipment delivered to Petitioner on August 1, 2017, adjustments of $6,315.66, payments of $7,315.31 and a balance of $6,300.00. Respondent's payment print-out (RX 1) reflects payments of $9,264.06 and a balance of $10,666.91. The Arbitrator finds the charges and underlying care to be causally related to the accident as well as reasonable and necessary. Dr. Sompalli prescribed a home therapy unit for Petitioner to use following the August 1, 2017 surgery. Respondent's examiner did not question the need for the surgery or post-operative care. The Arbitrator awards the $6,300.00 balance, subject to the fee schedule.

The claimed charges of $3,900.00 from Berwyn Diagnostic Imaging (PX 8) relate to the repeat left knee and lumbar spine MRIs performed on November 27, 2018. PX 8. Petitioner underwent these repeat studies at Dr. Sompalli's direction, ten months before Dr. Forsythe conducted his Section 12 examination. Respondent's print-out (RX 1) does not reflect any payments to Berwyn Diagnostic Imaging. The Arbitrator has elected to rely on the treating physicians rather than Dr. Forsythe insofar as Petitioner's treatment needs are concerned. The Arbitrator awards the $3,900.00 bill, subject to the fee schedule.

Petitioner also claims a balance of $960.69 from ATI Physical Therapy. The itemized bill from this provider (PX 9) shows charges of $15,138.04 for therapy conducted in 2017 and the functional capacity evaluation of January 23, 2018. Respondent's print-out reflects payments in

the amount of $18,827.41 for physical therapy. RX 1. The dates of service in the print-out correlate, at least to an extent, with the dates of service on the itemized bill. The Arbitrator finds the treatment to be causally related to the work accident as well as reasonable and necessary. The Arbitrator awards the claimed balance of $960.69, subject to the fee schedule.

Is Petitioner entitled to prospective care?

The Arbitrator has previously found in Petitioner's favor on the issue of causation. The Arbitrator awards prospective care in the form of the revision left knee arthroscopy recommended by Dr. Giannoulias. In making this award, the Arbitrator relies in part on Petitioner's credible testimony concerning his ongoing left knee complaints. The Arbitrator also notes Dr. Forsythe's concession that the meniscal root tear demonstrated on MRI could be contributing to Petitioner's pain. The Arbitrator also notes that Dr. Giannoulias is a second opinion physician chosen by Dr. Sompalli. Dr. Sompalli was within the chain of referrals from Respondent's occupational medicine facility. PX 2.

Is Respondent liable for penalties and/or fees?

On December 18, 2019, Petitioner filed a Section 8(a) petition, seeking authorization of the revision surgery recommended by Dr. Giannoulias, along with a petition asking that penalties and fees be imposed on Respondent due to its "refusal to pay benefits." Arb Exh 2.

The Arbitrator, having reviewed the medical records, concludes that Respondent impeded Petitioner's treatment in some respects. Dr. Sompalli, for example, concluded that the lack of authorization for therapy resulted in significant left leg weakness. However, the Arbitrator finds no legal support for an award of penalties based on Respondent's refusal to authorize care. The Commission lacks statutory authority to impose Section 19(k) or 19(l) penalties based on a denial of treatment. See Hollywood Casino-Aurora, Inc. v. IWCC, 967 N.E.2d 848 (2nd Dist. 2012) and O'Neil v. IWCC, 2020 IL App. (2nd) 190427WC. The Arbitrator also declines to award attorney fees since those fees are derivative of an award of penalties.

The Arbitrator also declines to award penalties and fees on the awarded medical expenses. Petitioner filed a generic penalties petition but did not made a "written demand for payment" of the claimed medical bills, as required by Section 19(l) of the Act. See Theis v. IWCC, 2017 IL App (1st) 161237WC. Additionally, Respondent paid substantial medical expenses in this case, as evidenced by RX 1.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PEDRO CASTRO,

Petitioner,

20IWCC0719

vs.

NO: 19 WC 7757

PEPPER CONSTRUCTION,

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 ("TTD") and medical expenses both current and prospective, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner sustained his burden of proving a work accident on February 2, 2019 caused a current condition of ill-being of his right knee and awards benefits. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Findings of Fact – Testimony

Petitioner testified through an interpreter that at the time of the accident he had worked for Respondent for three months as a carpenter. Primarily he was putting up drywall for Respondent. It required "a lot of strength putting up ceilings." He estimated the drywall sheets weighed 50 pounds. He has always worked with drywall for 33 years. In all those years he never injured his right knee.

On February 7, 2019, he was working putting up drywall ceilings at UIC. He was working on a lift. The lift is an elevator with two steps. As he stepped off the lift, he placed his right foot on the floor, his left foot slipped, and his right knee hit the step of the lift. He also twisted the knee at the time of the accident. He immediately had pain and swelling in the knee. Petitioner reported the accident. He continued working as they prepared a safety report. His knee developed more pain and swelling. After Petitioner signed the prepared report he went to Physicians Immediate Care with the safety supervisor. They took x-rays, gave him some medication and a brace, and returned him to work at full duty. He continued to treat at that facility while working full time through February 19th. He had been sent from the UIC job to a job at Wrigley Field. His knee was getting worse while he was working.

On March 1, 2019, an MRI was prescribed by Physicians Immediate Care, which he had a week later. Petitioner then sought a second opinion from Dr. Lemus, a chiropractor, whom he first saw on March 12th. Dr. Lemus started physical therapy and also referred Petitioner to Dr. Koutsky, whom he saw two days later. Dr. Koutsky placed work restrictions on him. They discussed possible surgery, but Dr. Koutsky wanted to try conservative treatment first.

Petitioner identified PX6 which are text messages. On March 6, 2019, he received a message from Respondent's manager at the Wrigley Field job telling him to pick up his tools and contact "Mitch," Respondent's "highest manager" for his next assignment. He called and left messages, but Mitch never responded. Petitioner assumed that they did not have any work for him. He did not turn in his work restrictions because he had assumed he was already fired. He never received any call back from Mitch or any offer to work within his restrictions. The message was in English. Petitioner understands a little English and his daughter assists him in texting.

On April 18, 2019, Dr. Koutsky recommended surgery. Petitioner wanted to proceed so that he could return to work. Dr. Koutsky took Petitioner off work pending surgery. Petitioner has not worked since. Currently, Petitioner has pain in the center of his knee. His condition is affecting all aspects of activities of daily living "a lot." He takes prescribed medication twice a day. The medication helps with the pain but makes him dizzy and he has to take stomach mediation for "ulcers, or something." He never had ulcers prior to taking the pain medication. He tried to change the pain medication but his knee hurt more. He had no other accidents involving his knee either before or after the instant accident.

On cross examination, Petitioner acknowledged he had a prior workers' compensation settlement for his back. However, it did not also involve his right leg. Apparently, the settlement involved only an award for the person-as-a-whole. Petitioner testified he gave accurate histories to the Physicians Immediate Care and to Dr. Nho, Respondent's §12 medical examiner. Dr. Nho did not examine him. He looked at x-rays they had taken but he did not touch Petitioner. He never received a notice of termination from Respondent.

On re-direct examination, Petitioner again denied that his 2008 injury caused pain in his leg. If it had he would not have been able to work. There was no interpreter at Physicians Immediate Care and he had to converse in English. Petitioner also denied there was an interpreter at the §12 examination. However, on re-cross examination, Petitioner acknowledged there was an interpreter at the §12 examination.

Findings of Fact – Medical records

On February 7, 2019, Petitioner presented to PA Ramirez at Physicians Immediate Care for pain in the right knee after an accident at work that day. He reported that "his right knee was caught between a forklift, he tried to get out, and he twisted his knee." He denied any prior problems with the knee. He continued to work despite pain with stepping. Ms. Ramirez noted swelling and tenderness over the knee and positive McMurray on the right knee. X-rays showed no bony abnormality. She diagnosed "knee sprain, easy-to-read," prescribed Acetaminophen/Naproxen/knee brace, and returned Petitioner to work without restrictions.

Five days later, Petitioner returned to Ms. Ramirez for recheck. He reported 2/10 pain and that he was compliant with treatment. He denied weakness or instability. There was still mild swelling of the right knee. She noted that his condition was stable and improved, continued medications, and continued full-work status.

On March 1, 2019, Petitioner reported his pain was worsening with twisting. He could continue working but he had pain with stepping. Ms. Ramirez noted moderate swelling in the knee and positive McMurray test. She ordered an MRI due to Petitioner's worsening condition. Petitioner returned on March 7, 2019 and reported the pain and swelling was the same. He received a call about the MRI but did not answer it or return the call. Ms. Ramirez continued current treatment and advised Petitioner it was important to return the call to get the MRI scheduled.

The MRI, taken on March 8, 2019, showed medical meniscus tear, tricompartmental degenerative joint disease, most prominently in the patellofemoral joint space, mild strain of the popliteus myotendinous junction without discrete tear, and a large joint effusion.

On March 12, 2019, Petitioner presented to Dr. Lemus, D.C., for 4/10 right-knee pain. He reported that on February 7, 2019, he was "walking backwards down the steps of an elevated lift, he slipped on the last step and struck his right knee causing him to fall forward while striking the ground." He continued to work despite persistent symptoms. Petitioner had positive anterior/posterior drawer and McMurray tests. Dr. Lemus noted that the MRI showed a meniscus tear. He opined that the MRI findings were clinically significant, the findings correlated with his subjective complaints, and that the findings were caused by the work accident. He took Petitioner off work to prevent aggravation.

Two days later, Petitioner presented to Dr. Koutsky for evaluation of his right knee. Dr. Koutsky transcribed the history of the accident the same as Dr. Lemus. Anterior/posterior drawer and Lachman's were negative. He had an MRI and followed up at La Clinica and had started physical therapy.

Dr. Koutsky noted moderate effusion with some crepitus upon range of motion. Dr. Koutsky diagnosed right knee meniscus tear, which corresponded with Petitioner's subjective complaints. He recommended arthroscopic surgery with partial meniscectomy. In the meantime, he prescribed anti-inflammatories and Tramadol for severe pain, and gave Petitioner work restrictions of limited standing/walking. Petitioner would continue physical therapy.

On March 29, 2019, Dr. Lemus re-examined Petitioner, who reported 4/10 pain. He was off work and unable to work within his restrictions. He was currently under the care of Dr. Koutsky, an orthopedist, who recommended arthroscopy. Nevertheless, Dr. Lemus believed Petitioner would continue to benefit from treatment at La Clinica, and such treatment would continue.

While Petitioner was waiting for authorization for surgery recommended by Dr. Koutsky, Petitioner continued to treat with Dr. Lemus. On July 3, 2019, after about 49 physical therapy/chiropractic sessions, Dr. Lemus reported that Petitioner had no new complaints. He tolerated treatment well and discussed with Petitioner the importance of his home exercise program.

At Respondent's request, Dr. Nho examined Petitioner on May 14, 2019 and issued a report. Petitioner reported that on February 7, 2019 "he was at work coming down from a lift slipping and landing on the ledge with his right knee." He both struck and twisted the knee. He experience immediate pain and swelling. Dr. Nho then summarized treatment.

He noted that the MRI showed medial compartment joint degeneration with degenerative meniscus tear, with no evidence of bone edema, bone bruise, stress reaction, or insufficiency fracture. His examination appeared to be normal except for mild tenderness over the medial and lateral joint lines. Petitioner reported 4-5/10 pain which was constant, with associated swelling. The pain was aggravated by walking/standing.

Dr. Nho diagnosed right knee strain. His symptoms were consistent with his underlying condition of degenerative joint disease, and not related to the work accident. He noted that the MRI did not show evidence of bone edema, bone bruise, stress reaction, or insufficiency fracture that would suggest worsening of the pre-existing condition. While treatment to date was not unreasonable or excessive, he needed only occasional anti-inflammatories, he had no permanent disability or impairment from the work injury, and needed no work restrictions.

20IWCC0719

Conclusions of Law

The Arbitrator acknowledged that the medical records showed that Petitioner had a meniscus tear, tricompartmental degenerative joint disease, and a mild strain of the popliteus myotendinous junction. However, he found that Petitioner's current condition of ill-being was not causally related to the work accident. He stressed Petitioner's inconsistent histories to providers and to Dr. Nho. He also relied on Dr. Nho's conclusion that the MRI did not show any traumatic condition or any evidence that the work injury aggravated the underlying arthritic condition.

Petitioner argues that Arbitrator erred in finding that the accident did not cause Petitioner's current condition of ill-being. He acknowledges that his histories were not entirely consistent but stresses that those inconsistencies were minor, all the elements of banging and twisting the knee were always included, and that some of the inconsistencies could be related to language issues. In addition, Petitioner argues that Arbitrator should have relied on the opinions of Dr. Koutsky over those of Dr. Nho.

In looking at the entire record before us, the Commission reverses the Decision of the Arbitrator on the issue of causation. The Commission agrees with Petitioner that whatever inconsistencies in his histories were relatively minor, and that he consistently reported that his knee was both struck and twisted. In addition, the MRI showed a meniscus tear and there was no evidence that Petitioner had any such condition before the accident. He apparently worked with his degenerative condition without difficulty until the instant accident, and the instant accident at least caused the condition to become sufficiently symptomatic to interfere with his ability to work.

Finally, we do not find Dr. Nho's opinions particularly persuasive. He opined that the MRI did not show any significant traumatic injury, but the MRI showed large joint effusion a month after the accident, confirming a relatively substantial traumatic injury. Also Dr. Nho's report appears somewhat inconsistent. He opined that Petitioner sustained only a strain of the knee in the accident but nevertheless he also opined that the treatment provided (including about 45 chiropractic/physical therapy sessions at the time) was reasonable for Petitioner's work injury.

On the issue of TTD, the Arbitrator awarded Petitioner 9&1/7 weeks of TTD, from the date he was taken off work by Dr. Lemus at La Clinica, to the date of Dr. Nho's report. The Commission notes that while Dr. Lemus took Petitioner "off work" when he first saw him on March 12, 2019, he also referred Petitioner to Dr. Koutsky, and orthopedic surgeon, at the same time. Thereafter, Dr. Koutsky placed work restrictions on Petitioner, effectively superseding, the work status note of Dr. Lemus. Dr. Koutsky kept Petitioner on restricted duty throughout conservative treatment, and did not take him off work until he recommended surgery on April 18, 2019.

The Commission concludes that April 18, 2019 is the best date to start TTD, because Dr. Koutsky, as an orthopedic surgeon, was more knowledgeable about how Petitioner's knee condition would affect his ability to work than Dr. Lemus, a chiropractor. In addition, while Dr. Koutsky placed work restrictions on Petitioner which were not accommodated, Petitioner admitted at arbitration that he did not present the restrictions to Respondent because he thought he was already terminated. Therefore, Respondent was not provided the opportunity to accommodate Dr. Koutsky's restrictions. Accordingly, the Commission awards TTD from April 18, 2019 through the date of arbitration, July 2, 2019, for a total of 10&6/7 weeks.

On the issue of medical expenses, the Arbitrator awarded all unpaid medical bills submitted into evidence. However, as noted above, the Arbitrator denied prospective treatment recommended by Dr. Koutsky based on Dr. Nho's opinion that Petitioner's condition of ill-being was caused by his underlying degenerative joint disease and not the injury from the work accident. Based on our reversal of the Arbitrator on the issue of causal connection, the fact that there is universal acknowledgement that Petitioner has a meniscus tear, and considering that no doctor has opined that surgery is not indicated for the meniscus tear, the Commission awards prospective treatment as recommended by Dr. Koutsky.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,124.92 per week for a period of 10&6/7 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 pay unpaid medical expenses submitted into evidence under §8(a) of the Act, subject to the applicable medical fee schedule in §8.2.

IT IS FURTHER ORDERED BY THE COMMISSION, that Respondent authorize and pay for prospective treatment prescribed by Dr. Koutsky.

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.

20IWCC0719

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $70,00000. 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: DEC 7 - 2020

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/dw
O-10/22/20
46

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

IMELDA ARROYO,

Petitioner,

20IWCC0720

vs.

NO: 16 WC 16347
17 WC 15138 (cons.)

LABOR NETWORK, 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, causation, medical, temporary disability, and chain of referral, and being advised of the facts and law, finds Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment on February 27, 2016 or March 1, 2016.

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim; the first alleged an injury on February 27, 2016, and the second alleged a March 1, 2016 injury. At the April 1, 2019 hearing on the consolidated matters, Respondent disputed, *inter alia*, that Petitioner sustained accidental injuries arising out of or in the course of her employment on either February 27, 2016 or March 1, 2016. ArbX3, ArbX4.

Petitioner described the February 27, 2016 incident as follows: "I had an accident where I injured my shoulder and my neck as I was working as a packer for Labor Networks. There I hurt my neck and my right shoulder." T. 12. No follow-up questions were asked to elucidate any details of the incident. Petitioner testified Respondent sent to her to Physicians Immediate Care, which is the company clinic. T. 21.

On February 29, 2016, Petitioner presented to Physicians Immediate Care ("PIC") where she was evaluated by Physician's Assistant Jack Enter. The records reflect Petitioner complained of neck, right upper extremity, and back pain following a work-related injury on "2/29/2016." She indicated she was "hit on the head by a box that fell." After an examination, Petitioner was diagnosed with a neck contusion, given non-aspirin extra strength medication, and released to unrestricted duty. PX2.

The next day, Petitioner allegedly sustained a second work-related injury. She described the March 1, 2016 incident as follows: "I had another job accident where I got hurt, my lower back. Those pains are also very strong." T. 15. Petitioner was not asked any follow-up questions and thus did not provide testimony explaining the circumstances surrounding the incident.

Petitioner presented to PIC on the day of the alleged second accident. The records reflect Petitioner complained of lower back pain after being "struck in the back by a cart this afternoon." Examination findings included back pain with axial loading, distracted seated straight leg raise positive on the left, and skin hypersensitive to light touch over wide area on the left. The Physician's Assistant diagnosed low back pain, directed Petitioner to continue the same pain medications dispensed the day prior, and authorized Petitioner off work for one week. PX2.

On March 4, 2016, Petitioner was re-evaluated at PIC. Noting Petitioner's neck contusion was improved, PA-C Enter prescribed Nabumetone and released Petitioner to restricted duty. PX2. Petitioner testified Respondent provided an accommodated position. T. 20.

On March 15, 2016, Petitioner returned to PIC. Petitioner reported her neck pain had improved, down to 1/10, but she continued to have back pain with forward motion and prolonged sitting. Regarding Petitioner's neck and right upper extremity, PA-C Enter noted the condition had resolved, and Petitioner was at maximum medical improvement with no residual disability; Petitioner was released from care for that condition, fit for duty without restrictions. As to Petitioner's low back, PA-C Enter ordered a course of physical therapy, prescribed a different pain medication, and maintained Petitioner on modified duty, albeit with eased restrictions. PX2. Petitioner testified she continued to work a light duty position. T. 20.

Physical therapy commenced on March 24, 2016 and continued through April. PX2. On May 3, 2016, Petitioner presented to PIC where she was evaluated by Dr. Pooja Menon. Dr. Menon memorialized Petitioner completed a 12-visit course of physical therapy with mild residual neck and right shoulder discomfort but was improved overall. Dr. Menon recommended pain medications, home exercises, and released Petitioner to unrestricted duty. PX2.

Petitioner returned to full duty work following Dr. Menon's release. T. 21. She testified she had problems while working: "Yes, I worked with a lot of difficulty because the pain was not going away until the work made me immobilize or stiffen my right arm, and I couldn't move it anymore. So it was very painful, and at work they didn't want to respond to my - - they didn't want to respond - - they didn't want to take into account the pain that I had for my neck and my right arm and shoulder." T. 21.

On May 10, 2016, Petitioner was re-evaluated by Dr. Menon. Following an examination, Dr. Menon concluded Petitioner's condition had resolved, placed Petitioner at maximum medical improvement with no residual disability, and released her from care. PX2.

On May 18, 2016, Petitioner returned to PIC with complaints of worsening right-sided neck pain radiating down her right arm. Dr. Menon provided a sling and ordered a cervical spine MRI. PX2. Petitioner testified she went from PIC to the emergency room at John Stroger Hospital. T. 38. The ER records evidence Petitioner complained of neck pain with radiation to her right arm with associated paresthesia dating back to a February injury at work where "a box fell on top of her neck"; she reported the pain was exacerbated at work that day. Examination revealed tenderness to palpation of the right shoulder and paraspinal neck muscles; a CT scan of the cervical spine was negative for significant spinal canal or neuroforaminal narrowing. Following imaging, Petitioner reported having right upper extremity weakness and numbness for over 24 hours with no inciting new trauma; as Petitioner's complaints were suspicious for cerebrovascular accident, she was admitted and remained hospitalized until May 20, 2016. While inpatient, Petitioner underwent an EMG to rule out radiculopathy; the test revealed mild median mononeuropathy which did not explain Petitioner's symptoms. PX9.

Petitioner testified that following her stay at John Stroger, she came under the care of Dr. Erickson. T. 38. The Commission observes the only record from Dr. Erickson contained in the authenticated transcript is a January 31, 2018 office note.

On June 1, 2016, Petitioner was evaluated by Dr. Gregory Markarian of Orthopedic Associates of Naperville. Petitioner testified she was referred to Dr. Markarian by Dr. Erickson. T. 38-39. Petitioner gave a history of acute neck, back and right shoulder pain following a February 27, 2016 injury: "She packs bread on an assembly line and works with boxes. She basically was standing when someone was moving around a pallet that had over-stacked boxes. A whole slew of boxes fell on top of her back and onto her right shoulder." Petitioner advised she thereafter treated at the company clinic but "did not improve at all." On examination, Dr. Markarian noted pain in the impingement arc, good passive range of motion, tenderness over the AC joint and long head of biceps, pain with resisted abduction, and positive drop-arm test. Noting Petitioner may have a rotator cuff injury, along with acromioclavicular joint arthritis and tendonitis of the long head of the biceps, Dr. Markarian indicated he wished to review the imaging from Stroger. PX6.

On June 2, 2016, Petitioner started a course of physical therapy at New Life Medical Center. PX7. The next day, Petitioner underwent MRIs of her right shoulder and cervical spine. The right shoulder scan revealed the rotator cuff appeared intact; rotator cuff tendinitis and/or bursitis involving the distal supraspinatus tendon; AC inferior hypertrophic spurring measuring 3-4 mm indenting the supraspinatus tendon with narrowing of the subacromial space and probable impingement. The cervical spine scan demonstrated a 2-3 mm subligamentous posterior disc protrusion/herniation which indented the ventral surface of the thecal sac at C5-6, with the rest of the cervical spine appearing unremarkable. PX6, PX10, PX11, RX3.

On June 28, 2016, Petitioner underwent a cervical epidural steroid injection at C5-6 as well as a right subacromial joint injection. PX7. Over the next four months, she attended physical

therapy at both New Life Medical Center and John Stroger Hospital. PX8, PX9. On October 25, 2016, a repeat epidural steroid injection was performed, this at the C6-7 level. PX7.

On November 17, 2016, Dr. Lawrence Lieber performed an examination and record review pursuant to Section 12 of the Act at Respondent's request. Dr. Lieber memorialized Petitioner provided a history of two injuries: 1) February 27, 2016, she was stacking some boxes on a full pallet when boxes fell and struck her on her back, upper neck, and right shoulder area; 2) March 1, 2016, she was struck from behind by a cart in her low back region. Petitioner complained of neck pain with motion, numbness in her right arm, swelling about her neck, pain with overhead activity, weakness and popping in her shoulder, lower back pain with motion, occasional left leg pain, weakness about her lower back, swelling and stiffness in her back, right arm pain from her neck to her elbow, and swelling about her arm with motion. Upon examination, Dr. Lieber diagnosed tendinitis of the right elbow area, right shoulder tendinitis with arthritis, cervicalgia, and lumbago. Dr. Lieber opined Petitioner's subjective complaints were not supported by the objective abnormalities, indicating there was "no objective evidence of any significant abnormality within the Petitioner's right arm, right shoulder, neck or lumbar spine area to cause the present subjective complaints." Dr. Lieber further concluded there was no causal connection between Petitioner's diagnoses and the alleged accidents and opined Petitioner was at maximum medical improvement and capable of unrestricted activity. RX1, DepX2.

Over the next several months, Petitioner attended ongoing physical therapy at New Life Medical Center. PX8. On April 26, 2017, Petitioner was re-evaluated by Dr. Markarian. Noting Petitioner had not improved despite injections, Dr. Markarian recommended proceeding with right shoulder arthroscopy, biceps tenotomy, arthroscopic rotator cuff repair, subacromial decompression, distal claviculectomy, and open subpectoral biceps tenodesis. While awaiting approval, Petitioner was to continue with physical therapy and remain off work. PX6.

From May 2017 through January 2018, Petitioner underwent physical therapy and attended monthly follow-up visits with Dr. Markarian. PX8, PX6. The records from those visits reflect Dr. Markarian continued to recommend surgery. PX6.

On January 31, 2018, Petitioner presented to Dr. Robert Erickson of American Center for Spine & Neurosurgery. The office note indicates Petitioner "returns in consideration of ACDF at C5-6" which the doctor had recommended since October 2016. As noted above, Dr. Erickson's pre-2018 records are not in evidence. Dr. Erickson documented he reviewed Dr. Lieber's report and his records had apparently not been provided to Dr. Lieber. Dr. Erickson observed his examinations had consistently revealed loss of grip strength on the right side, but this was not reported by Dr. Lieber. Noting the MRI finding of a 2 to 3 mm disc herniation at C5-6, Dr. Erickson opined Petitioner "absolutely needs to proceed to surgery as soon as possible." PX4.

On February 14, 2018, Petitioner was re-evaluated by Dr. Markarian. Dr. Markarian too had been provided with Dr. Lieber's report and documented his disagreement therewith. Specifically, Dr. Markarian disagreed that Petitioner has no objective evidence of any significant abnormality with her right shoulder and, further, that there is no causal relationship between the underlying diagnosis and that of the work events of 2016 given the fact that she has never had neck or shoulder pain prior to the accident, but after the accident she continued to have difficulty.

Dr. Markarian reiterated he recommends surgical intervention. PX3, PX6.

On March 7, 2018, Petitioner presented to Stroger, where an MRI and EMG were ordered to evaluate Petitioner's ongoing neck complaints. PX9. The recommended EMG was performed on March 22, 2018. The study was abnormal and revealed evidence of right median mononeuropathy at the wrist, which was not felt to be contributing to Petitioner's overall symptoms. The administering physician noted there was no clear evidence of a right upper extremity cervical radiculopathy; however, recruitment was limited due to pain and possibly due to poor effort which limited motor unit analysis. PX9, PX14. When Petitioner followed up at Stroger on April 19, 2018, it was noted her EMG was unchanged from the 2016 study, revealing mild right median neuropathy but not clear evidence of radiculopathy. Petitioner was referred to neurosurgery. PX9.

On June 20, 2018, the repeat cervical spine MRI was performed at Stroger. The radiologist's impression was mild degenerative disc disease without spinal canal or neuroforaminal stenosis at all levels. PX9.

On June 29, 2018, Petitioner was evaluated in Stroger's neurosurgery clinic. Petitioner complained of neck pain with radiation into the right upper extremity after a work injury two years prior when multiple heavy boxes fell on her neck. After an exam and review of the MRI and EMG, Petitioner was diagnosed with neck pain which did not require neurosurgical intervention. Petitioner was instead referred for pain clinic evaluation. PX9.

From August 2018 through January 2019, Petitioner attended regular appointments with Dr. Markarian. Dr. Markarian continued to recommend surgery.

On January 23, 2019, Petitioner presented to the pain clinic at Stroger. Petitioner provided a history of blunt trauma to the right neck and right upper back after some heavy boxes fell on her, then two days later she was hit by a heavy object on her low back. She complained of pain from "head to toe," "everything hurts." After an examination, the physician concluded spinal cord stimulator placement was not an option and instead recommended acupuncture for Petitioner's generalized body aches. PX9.

On February 22, 2019, Petitioner underwent acupuncture at Stroger's pain clinic. Shortly thereafter, she began a further course of physical therapy at Stroger. PX9.

The June 20, 2018 evidence deposition of Dr. Lieber was admitted as Respondent's Exhibit 1. Dr. Lieber testified consistent with his report. As to causation, Dr. Lieber opined there is no relationship between Petitioner's work accidents and her condition of ill-being. RX1, p. 17. The basis of his opinion is "The history as obtained, physical exam as of the 2016 date, the review of records and my medical knowledge." RX1, p. 17. Directed to Dr. Markarian's and Dr. Erickson's surgical recommendations, Dr. Lieber stated as follows:

> Well, first of all, I don't know that I am denying any surgery. I'm just saying that I don't feel that the underlying abnormalities with which I evaluated and saw were related to the alleged work events, and in association with those alleged work

> events, I don't feel that she requires any further treatment. I'm indicating that at least concerning the shoulder, that she has abnormalities that may or not be improved by a surgical intervention. As far as the neck, based - - I will say as far as the neck is concerned, that I don't see any - - of the information that I had to evaluate, I wouldn't recommend surgery. RX1, p. 26.

Conclusions of Law

To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that she sustained an accidental injury arising out of and in the course of her employment. *820 ILCS 305/1(d)*. Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 105, 853 N.E.2d 799 (2006).

The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred; accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of the employment. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 57, 541 N.E.2D 665 (1989).

The requirement that the injury arise out of the employment concerns the origin or cause of the claimant's injury. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). The occurrence of an accident at the claimant's workplace does not automatically establish the injury "arose out of" the claimant's employment. *Parro v. Industrial Commission*, 167 Ill. 2d 385, 393, 657 N.E.2d 882 (1995). Rather, "[t]he '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.*, 207 Ill. 2d at 203.

The Commission finds the absence of any testimony describing the circumstances of Petitioner's two alleged accidents is fatal to her claims. To be clear, Petitioner was not asked to provide any details whatsoever regarding her claimed accidental injuries. Moreover, while we are cognizant the medical records memorialize relevant histories of accident, we emphasize those same histories contain inconsistencies. For instance, Petitioner alleges a February 27, 2016 accidental injury, but the initial treating records at Physicians Immediate Care document an injury on February 29. PX2. Moreover, there are variations as to the number of boxes which allegedly fell on Petitioner: Petitioner first reported one box fell on her (PX2); on April 4, 2016, she advised the physician at Stroger she was struck by three boxes (PX9); on May 18, 2016, she indicated one box fell on her (PX9); and Dr. Markarian was told "a whole slew of boxes fell on top of her back." PX6. Further, there is no evidence as to the size, weight, or dimensions of these boxes. Finally, while Petitioner consistently gave a history of being struck in the back by a cart, there are simply no details provided to establish the incident constituted an accidental injury arising out of and in the course of her employment.

Petitioner failed to describe the facts or circumstances of either incident. In the absence of the where, when, and how details of either incident, it is impossible to find Petitioner proved

by a preponderance of the evidence that the alleged accidents occurred in the course of or arose out of her employment.

Moreover, even if we assume, *arguendo*, that the medical records are sufficient to meet the burden on the accident issue, the Commission would nonetheless find her current conditions of ill-being are not causally related to the accidents as alleged. We note Dr. Lieber concluded Petitioner's subjective complaints are not supported by the objective abnormalities. RX1, DepX2. While Dr. Erickson disagreed with Dr. Lieber, that was based in part upon the purportedly contradictory information contained in his treating records, and those records are not in evidence. Further, the June 3, 2016 right shoulder MRI was seemingly benign, revealing tendinitis but an intact rotator cuff, yet Dr. Markarian has recommended extensive surgical repair: arthroscopy, biceps tenotomy, arthroscopic rotator cuff repair, subacromial decompression, distal claviculectomy, and open subpectoral biceps tenodesis. Under these circumstances, the Commission finds Dr. Lieber's opinions to be more consistent with the evidence.

The Commission finds Petitioner failed to prove she sustained an accidental injury arising out of or in the course of her employment on either February 27, 2016 or March 1, 2016. The Commission further finds Petitioner failed to prove her current conditions of ill-being are causally related to her alleged work accidents.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner failed to prove she sustained compensable accidental injuries on either February 27, 2016 or March 1, 2016.

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.

DEC 7 - 2020

DATED:

L. Elizabeth Coppoletti

LEC/mck

O: 10/7/2020

Stephen Mathis

43

D. Douglas McCarthy

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

20IWCC0720

ARROYO, IMELDA
Employee/Petitioner

Case# **16WC016347**

17WC015138

LABOR NETWORK INC
Employer/Respondent

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:

0226 GOLDSTEIN BENDER & ROMANOFF
JUNIRA A CASTILLO
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

5001 GAIDO & FINTZEN
MALLORY ZIMET
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

20IWCC0720

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)

Imelda Arroyo
Employee/Petitioner

v.

Labor Network, Inc.
Employer/Respondent

Case # **16** WC **16347**

Consolidated cases: **17 WC 15138**

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 1, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. [ ] Was there an employee-employer relationship?

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

D. [ ] What was the date of the accident?

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [ ] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [x] Other Chain

20IWCC0720

FINDINGS

On the date of accident, **February 27, 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 $**21,320.00**; the average weekly wage was $**410.00**.

On the date of accident, Petitioner was **58** years of age, ***single*** with **0** dependent children.

Respondent is not responsible for 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

Because Petitioner failed to prove she sustained accidental injuries that arose out of and in the course of employment, benefits 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

June 24, 2019
Date

ICArbDec19(b)

JUN 24 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

IMELDA ARROYO,

Petitioner,

20IWCC0721

vs.

NO: 17 WC 15138
16 WC 16347 (cons.)

LABOR NETWORK, 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, causation, medical, temporary disability, and chain of referral, and being advised of the facts and law, finds Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment on February 27, 2016 or March 1, 2016.

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim; the first alleged an injury on February 27, 2016, and the second alleged a March 1, 2016 injury. At the April 1, 2019 hearing on the consolidated matters, Respondent disputed, *inter alia*, that Petitioner sustained accidental injuries arising out of or in the course of her employment on either February 27, 2016 or March 1, 2016. ArbX3, ArbX4.

Petitioner described the February 27, 2016 incident as follows: "I had an accident where I injured my shoulder and my neck as I was working as a packer for Labor Networks. There I hurt my neck and my right shoulder." T. 12. No follow-up questions were asked to elucidate any details of the incident. Petitioner testified Respondent sent to her to Physicians Immediate Care, which is the company clinic. T. 21.

20IWCC0721

On February 29, 2016, Petitioner presented to Physicians Immediate Care ("PIC") where she was evaluated by Physician's Assistant Jack Enter. The records reflect Petitioner complained of neck, right upper extremity, and back pain following a work-related injury on "2/29/2016." She indicated she was "hit on the head by a box that fell." After an examination, Petitioner was diagnosed with a neck contusion, given non-aspirin extra strength medication, and released to unrestricted duty. PX2.

The next day, Petitioner allegedly sustained a second work-related injury. She described the March 1, 2016 incident as follows: "I had another job accident where I got hurt, my lower back. Those pains are also very strong." T. 15. Petitioner was not asked any follow-up questions and thus did not provide testimony explaining the circumstances surrounding the incident.

Petitioner presented to PIC on the day of the alleged second accident. The records reflect Petitioner complained of lower back pain after being "struck in the back by a cart this afternoon." Examination findings included back pain with axial loading, distracted seated straight leg raise positive on the left, and skin hypersensitive to light touch over wide area on the left. The Physician's Assistant diagnosed low back pain, directed Petitioner to continue the same pain medications dispensed the day prior, and authorized Petitioner off work for one week. PX2.

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Physical therapy commenced on March 24, 2016 and continued through April. PX2. On May 3, 2016, Petitioner presented to PIC where she was evaluated by Dr. Pooja Menon. Dr. Menon memorialized Petitioner completed a 12-visit course of physical therapy with mild residual neck and right shoulder discomfort but was improved overall. Dr. Menon recommended pain medications, home exercises, and released Petitioner to unrestricted duty. PX2.

Petitioner returned to full duty work following Dr. Menon's release. T. 21. She testified she had problems while working: "Yes, I worked with a lot of difficulty because the pain was not going away until the work made me immobilize or stiffen my right arm, and I couldn't move it anymore. So it was very painful, and at work they didn't want to respond to my - - they didn't want to respond - - they didn't want to take into account the pain that I had for my neck and my right arm and shoulder." T. 21.

On May 10, 2016, Petitioner was re-evaluated by Dr. Menon. Following an examination, Dr. Menon concluded Petitioner's condition had resolved, placed Petitioner at maximum medical improvement with no residual disability, and released her from care. PX2.

On May 18, 2016, Petitioner returned to PIC with complaints of worsening right-sided neck pain radiating down her right arm. Dr. Menon provided a sling and ordered a cervical spine MRI. PX2. Petitioner testified she went from PIC to the emergency room at John Stroger Hospital. T. 38. The ER records evidence Petitioner complained of neck pain with radiation to her right arm with associated paresthesia dating back to a February injury at work where "a box fell on top of her neck"; she reported the pain was exacerbated at work that day. Examination revealed tenderness to palpation of the right shoulder and paraspinal neck muscles; a CT scan of the cervical spine was negative for significant spinal canal or neuroforaminal narrowing. Following imaging, Petitioner reported having right upper extremity weakness and numbness for over 24 hours with no inciting new trauma; as Petitioner's complaints were suspicious for cerebrovascular accident, she was admitted and remained hospitalized until May 20, 2016. While inpatient, Petitioner underwent an EMG to rule out radiculopathy; the test revealed mild median mononeuropathy which did not explain Petitioner's symptoms. PX9.

Petitioner testified that following her stay at John Stroger, she came under the care of Dr. Erickson. T. 38. The Commission observes the only record from Dr. Erickson contained in the authenticated transcript is a January 31, 2018 office note.

On June 1, 2016, Petitioner was evaluated by Dr. Gregory Markarian of Orthopedic Associates of Naperville. Petitioner testified she was referred to Dr. Markarian by Dr. Erickson. T. 38-39. Petitioner gave a history of acute neck, back and right shoulder pain following a February 27, 2016 injury: "She packs bread on an assembly line and works with boxes. She basically was standing when someone was moving around a pallet that had over-stacked boxes. A whole slew of boxes fell on top of her back and onto her right shoulder." Petitioner advised she thereafter treated at the company clinic but "did not improve at all." On examination, Dr. Markarian noted pain in the impingement arc, good passive range of motion, tenderness over the AC joint and long head of biceps, pain with resisted abduction, and positive drop-arm test. Noting Petitioner may have a rotator cuff injury, along with acromioclavicular joint arthritis and tendonitis of the long head of the biceps, Dr. Markarian indicated he wished to review the imaging from Stroger. PX6.

On June 2, 2016, Petitioner started a course of physical therapy at New Life Medical Center. PX7. The next day, Petitioner underwent MRIs of her right shoulder and cervical spine. The right shoulder scan revealed the rotator cuff appeared intact; rotator cuff tendinitis and/or bursitis involving the distal supraspinatus tendon; AC inferior hypertrophic spurring measuring 3-4 mm indenting the supraspinatus tendon with narrowing of the subacromial space and probable impingement. The cervical spine scan demonstrated a 2-3 mm subligamentous posterior disc protrusion/herniation which indented the ventral surface of the thecal sac at C5-6, with the rest of the cervical spine appearing unremarkable. PX6, PX10, PX11, RX3.

On June 28, 2016, Petitioner underwent a cervical epidural steroid injection at C5-6 as well as a right subacromial joint injection. PX7. Over the next four months, she attended physical

therapy at both New Life Medical Center and John Stroger Hospital. PX8, PX9. On October 25, 2016, a repeat epidural steroid injection was performed, this at the C6-7 level. PX7.

On November 17, 2016, Dr. Lawrence Lieber performed an examination and record review pursuant to Section 12 of the Act at Respondent's request. Dr. Lieber memorialized Petitioner provided a history of two injuries: 1) February 27, 2016, she was stacking some boxes on a full pallet when boxes fell and struck her on her back, upper neck, and right shoulder area; 2) March 1, 2016, she was struck from behind by a cart in her low back region. Petitioner complained of neck pain with motion, numbness in her right arm, swelling about her neck, pain with overhead activity, weakness and popping in her shoulder, lower back pain with motion, occasional left leg pain, weakness about her lower back, swelling and stiffness in her back, right arm pain from her neck to her elbow, and swelling about her arm with motion. Upon examination, Dr. Lieber diagnosed tendinitis of the right elbow area, right shoulder tendinitis with arthritis, cervicalgia, and lumbago. Dr. Lieber opined Petitioner's subjective complaints were not supported by the objective abnormalities, indicating there was "no objective evidence of any significant abnormality within the Petitioner's right arm, right shoulder, neck or lumbar spine area to cause the present subjective complaints." Dr. Lieber further concluded there was no causal connection between Petitioner's diagnoses and the alleged accidents and opined Petitioner was at maximum medical improvement and capable of unrestricted activity. RX1, DepX2.

Over the next several months, Petitioner attended ongoing physical therapy at New Life Medical Center. PX8. On April 26, 2017, Petitioner was re-evaluated by Dr. Markarian. Noting Petitioner had not improved despite injections, Dr. Markarian recommended proceeding with right shoulder arthroscopy, biceps tenotomy, arthroscopic rotator cuff repair, subacromial decompression, distal claviculectomy, and open subpectoral biceps tenodesis. While awaiting approval, Petitioner was to continue with physical therapy and remain off work. PX6.

From May 2017 through January 2018, Petitioner underwent physical therapy and attended monthly follow-up visits with Dr. Markarian. PX8, PX6. The records from those visits reflect Dr. Markarian continued to recommend surgery. PX6.

On January 31, 2018, Petitioner presented to Dr. Robert Erickson of American Center for Spine & Neurosurgery. The office note indicates Petitioner "returns in consideration of ACDF at C5-6" which the doctor had recommended since October 2016. As noted above, Dr. Erickson's pre-2018 records are not in evidence. Dr. Erickson documented he reviewed Dr. Lieber's report and his records had apparently not been provided to Dr. Lieber. Dr. Erickson observed his examinations had consistently revealed loss of grip strength on the right side, but this was not reported by Dr. Lieber. Noting the MRI finding of a 2 to 3 mm disc herniation at C5-6, Dr. Erickson opined Petitioner "absolutely needs to proceed to surgery as soon as possible." PX4.

On February 14, 2018, Petitioner was re-evaluated by Dr. Markarian. Dr. Markarian too had been provided with Dr. Lieber's report and documented his disagreement therewith. Specifically, Dr. Markarian disagreed that Petitioner has no objective evidence of any significant abnormality with her right shoulder and, further, that there is no causal relationship between the underlying diagnosis and that of the work events of 2016 given the fact that she has never had neck or shoulder pain prior to the accident, but after the accident she continued to have difficulty.

Dr. Markarian reiterated he recommends surgical intervention. PX3, PX6.

On March 7, 2018, Petitioner presented to Stroger, where an MRI and EMG were ordered to evaluate Petitioner's ongoing neck complaints. PX9. The recommended EMG was performed on March 22, 2018. The study was abnormal and revealed evidence of right median mononeuropathy at the wrist, which was not felt to be contributing to Petitioner's overall symptoms. The administering physician noted there was no clear evidence of a right upper extremity cervical radiculopathy; however, recruitment was limited due to pain and possibly due to poor effort which limited motor unit analysis. PX9, PX14. When Petitioner followed up at Stroger on April 19, 2018, it was noted her EMG was unchanged from the 2016 study, revealing mild right median neuropathy but not clear evidence of radiculopathy. Petitioner was referred to neurosurgery. PX9.

On June 20, 2018, the repeat cervical spine MRI was performed at Stroger. The radiologist's impression was mild degenerative disc disease without spinal canal or neuroforaminal stenosis at all levels. PX9.

On June 29, 2018, Petitioner was evaluated in Stroger's neurosurgery clinic. Petitioner complained of neck pain with radiation into the right upper extremity after a work injury two years prior when multiple heavy boxes fell on her neck. After an exam and review of the MRI and EMG, Petitioner was diagnosed with neck pain which did not require neurosurgical intervention. Petitioner was instead referred for pain clinic evaluation. PX9.

From August 2018 through January 2019, Petitioner attended regular appointments with Dr. Markarian. Dr. Markarian continued to recommend surgery.

On January 23, 2019, Petitioner presented to the pain clinic at Stroger. Petitioner provided a history of blunt trauma to the right neck and right upper back after some heavy boxes fell on her, then two days later she was hit by a heavy object on her low back. She complained of pain from "head to toe," "everything hurts." After an examination, the physician concluded spinal cord stimulator placement was not an option and instead recommended acupuncture for Petitioner's generalized body aches. PX9.

On February 22, 2019, Petitioner underwent acupuncture at Stroger's pain clinic. Shortly thereafter, she began a further course of physical therapy at Stroger. PX9.

The June 20, 2018 evidence deposition of Dr. Lieber was admitted as Respondent's Exhibit 1. Dr. Lieber testified consistent with his report. As to causation, Dr. Lieber opined there is no relationship between Petitioner's work accidents and her condition of ill-being. RX1, p. 17. The basis of his opinion is "The history as obtained, physical exam as of the 2016 date, the review of records and my medical knowledge." RX1, p. 17. Directed to Dr. Markarian's and Dr. Erickson's surgical recommendations, Dr. Lieber stated as follows:

> Well, first of all, I don't know that I am denying any surgery. I'm just saying that I don't feel that the underlying abnormalities with which I evaluated and saw were related to the alleged work events, and in association with those alleged work

> events, I don't feel that she requires any further treatment. I'm indicating that at least concerning the shoulder, that she has abnormalities that may or not be improved by a surgical intervention. As far as the neck, based - - I will say as far as the neck is concerned, that I don't see any - - of the information that I had to evaluate, I wouldn't recommend surgery. RX1, p. 26.

Conclusions of Law

To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that she sustained an accidental injury arising out of and in the course of her employment. *820 ILCS 305/1(d)*. Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 105, 853 N.E.2d 799 (2006).

The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred; accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of the employment. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 57, 541 N.E.2D 665 (1989).

The requirement that the injury arise out of the employment concerns the origin or cause of the claimant's injury. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). The occurrence of an accident at the claimant's workplace does not automatically establish the injury "arose out of" the claimant's employment. *Parro v. Industrial Commission*, 167 Ill. 2d 385, 393, 657 N.E.2d 882 (1995). Rather, "[t]he '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.*, 207 Ill. 2d at 203.

The Commission finds the absence of any testimony describing the circumstances of Petitioner's two alleged accidents is fatal to her claims. To be clear, Petitioner was not asked to provide any details whatsoever regarding her claimed accidental injuries. Moreover, while we are cognizant the medical records memorialize relevant histories of accident, we emphasize those same histories contain inconsistencies. For instance, Petitioner alleges a February 27, 2016 accidental injury, but the initial treating records at Physicians Immediate Care document an injury on February 29. PX2. Moreover, there are variations as to the number of boxes which allegedly fell on Petitioner: Petitioner first reported one box fell on her (PX2); on April 4, 2016, she advised the physician at Stroger she was struck by three boxes (PX9); on May 18, 2016, she indicated one box fell on her (PX9); and Dr. Markarian was told "a whole slew of boxes fell on top of her back." PX6. Further, there is no evidence as to the size, weight, or dimensions of these boxes. Finally, while Petitioner consistently gave a history of being struck in the back by a cart, there are simply no details provided to establish the incident constituted an accidental injury arising out of and in the course of her employment.

Petitioner failed to describe the facts or circumstances of either incident. In the absence of the where, when, and how details of either incident, it is impossible to find Petitioner proved

by a preponderance of the evidence that the alleged accidents occurred in the course of or arose out of her employment.

Moreover, even if we assume, *arguendo*, that the medical records are sufficient to meet the burden on the accident issue, the Commission would nonetheless find her current conditions of ill-being are not causally related to the accidents as alleged. We note Dr. Lieber concluded Petitioner's subjective complaints are not supported by the objective abnormalities. RX1, DepX2. While Dr. Erickson disagreed with Dr. Lieber, that was based in part upon the purportedly contradictory information contained in his treating records, and those records are not in evidence. Further, the June 3, 2016 right shoulder MRI was seemingly benign, revealing tendinitis but an intact rotator cuff, yet Dr. Markarian has recommended extensive surgical repair: arthroscopy, biceps tenotomy, arthroscopic rotator cuff repair, subacromial decompression, distal claviculectomy, and open subpectoral biceps tenodesis. Under these circumstances, the Commission finds Dr. Lieber's opinions to be more consistent with the evidence.

The Commission finds Petitioner failed to prove she sustained an accidental injury arising out of or in the course of her employment on either February 27, 2016 or March 1, 2016. The Commission further finds Petitioner failed to prove her current conditions of ill-being are causally related to her alleged work accidents.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner failed to prove she sustained compensable accidental injuries on either February 27, 2016 or March 1, 2016.

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: DEC 7 - 2020

L. Elizabeth Coppoletti

LEC/mck

O: 10/7/2020

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Stephen Mathis

D. Douglas McCarthy

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

20IWCC0721

ARROYO, IMELDA
Employee/Petitioner

Case# **17WC015138**

16WC016347

LABOR NETWORK INC
Employer/Respondent

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:

0226 GOLDSTEIN BENDER & ROMANOFF
JUNIRA A CASTILLO
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

5001 GAIDO & FINTZEN
MALLORY ZIMET
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

20IWCC0721

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)

Imelda Arroyo
Employee/Petitioner

v.

Labor Network, Inc.
Employer/Respondent

Case # **17** WC **15138**

Consolidated cases: **16 WC 16347**

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 1, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 1, 2016, 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 $**21,320.00**; the average weekly wage was $**410.00**.

On the date of accident, Petitioner was **58** years of age, ***single*** with **0** dependent children.

Respondent is not responsible for 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

Because Petitioner failed to prove she sustained accidental injuries that arose out of and in the course of employment, benefits 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

June 24, 2019
Date

ICArbDec19(b)

JUN 24 2019

Imelda Arroyo v. Labor Network, Inc., No. 16 WC 16347; consolidated with 17 WC 15138

Preface

The parties proceeded to hearing April 1, 2019, on a Request for Hearing under Section 19(b) of the Act indicating the following disputed issues in both cases: 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 this injury; whether respondent is liable for unpaid medical bills; whether Petitioner is entitled to a period of temporary total disability; and whether Petitioner exceeded her two physician choice under 820 ILCS 305/8(a). Petitioner testified via an interpreter, and respondent offered the testimony of Dr. Lawrence Lieber via evidence deposition. Imelda Arroyo v. Labor Network, No. 16 WC 16347, consolidated with 17 WC 15138 Transcript of Evidence on Arbitration at 4; Arbitrator's Exhibit 1; Respondent's Exhibit 1.

Findings of Fact

Imelda Arroyo (Petitioner), a 58 year old female, testified on February 27, 2016, she "...had an accident where I injured my shoulder and my neck as I was working as a packer for Labor Networks. There I hurt my neck and right shoulder." Precisely how this happened was left unexplained. She testified the "...lesions caused by the accident brought as a consequence urgency, consequences, brought on some urgencies, urgent treatment at a clinic, medical treatments, job restrictions, and disability." There was no testimony as to the medical providers who treated her, or the providers or hospitals she sought treatment at, or the treatments she received. Petitioner testified doctors "...have done everything possible to improve my medical condition." What "everything" means and what her condition was or is was left unexplained. She said her "...medical condition is so grave that they are recommending a surgery of the neck and right shoulder." Who "they" are, and what is the medical condition were left unexplained. Arroyo at 12, 13, 14.

Petitioner was asked by her attorney, what happened on March 1, 2016. Petitioner said "I had another job accident where I got hurt, my lower back." Precisely how this happened was again left unexplained. Petitioner testified she "...went to the emergency room for medical treatment, job restrictions, and disability." Where and what treatment remained unexplained. She said the doctors are "...treating me with the same medications basically that they are treating me for my shoulder and my neck." What doctor and what medications were unexplained. Arroyo at 15, 16.

Petitioner testified she does not know what is in her medical records and doesn't remember what prescription medications she is taking. Petitioner repeatedly did not answer the questions asked of her. Arroyo at 31, 32, 34,41.

Dr. Lawrence Lieber, a board certified orthopedic surgeon, testified he conducted an independent medical examination of Petitioner on November 17, 2016, regarding her back, upper neck and shoulder. He conducted a physical examination of her and reviewed her medical records. He found no evidence of any objective abnormalities about the shoulders, neck, lower back or elbow area that could be related to either alleged work events. He found Petitioner's

subjective complaints not supported by objective findings. He found no relationship between any work injuries and AC joint arthritis, tendinitis of rotator cuff of the right shoulder, cervicalgia, lumbago and tendinitis of the right elbow based on Petitioner's history, physical exam, records, and his medical knowledge. Those conditions of Petitioner, he said, were not caused by any work injury. Respondent's Exhibit 1 at 7-8, 16, 17.

Conclusions of Law

16 WC 16347, date of accident February 27, 2016

Disputed issue **C** is, did Petitioner suffer an injury which arose out of and in the course of her employment. 820 ILCS 305/2; Arbitrator's Exhibit 1; Arroyo at 4.

To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that she suffered injury which arose out of and in the course of her employment. "In the course of employment" refers to the time, place, and circumstances surrounding the injury. The "arising out of" component is primarily concerned with causal connection and is satisfied when the claimant shows 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. Noonan v. Illinois Workers' Compensation Commission, 2016 Ill App(1st) 1520300WC, paragraph 16, 18. In order to demonstrate an accidental injury, a claimant must trace the injury to either a specific accident identifiable as to the time and place or the specific moment of collapse of one's physical structure identifiable as to time and place. Luckenbill v. Industrial Commission, 155 Ill. App. 3d 106, 110 (1987). It is not enough to simply show that an injury occurred during work hours or at the place of employment. Sisbro, Inc. v. Industrial Commission (Rodriquez), 207 Ill. 2d 193, 203 (2003).

Petitioner was asked 16 questions on direct examination that failed to elicit any coherent evidence on this issue. There was no background, scene or story told. The testimony lacked any detail whatsoever, and was completely conclusory. There was no testimony about the time, place, or circumstances surrounding any injury. There was no testimony as to the origin of any injury to Petitioner. No specific accident or moment of injury was recited. It is Petitioner's responsibility to testify as to the events substantiating her claim, and set forth the evidence that sustains her burden. Her failure to do so imperils her claim.

Moreover, at the close of proofs, the parties were required to tender a proposed decision. While not a part of the record, and not an admission of the party, it is a common and effective way to frame the issues and cite the evidence presented to support a decision for that party. Here Petitioner cited no portion of the testimony or evidence at all that would satisfy Petitioner's burden on this issue. Arroyo at 67-68. An Arbitrator can only decide a case on the testimony before them, they cannot make the case for either party, they cannot search the record and manipulate the testimony to cobble together a preponderance of evidence for Petitioner.

No testimony, no argument, and no evidence lead to a finding as a conclusion of law, Petitioner has failed to show, by any evidence, she sustained an injury that arose out of and in the course of her employment. Liability under the Act cannot rest upon imagination, speculation or

conjecture, but out of facts established by a preponderance of the evidence. Lyons. Michigan Boulevard Bldg. Co.,331 Ill. App. 482, 501 (1947).

Disputed issue **F** is whether Petitioner's current condition of ill-being is casually related to the injury. I find as a conclusion of law it is not, and rely on the credible testimony of Dr. Lieber. Respondent's Exhibit 1 at 16-17, 28.

In view of this, Respondent is not responsible for unpaid medical bills or temporary total disability. Any discussion of a break in the chain of referral is moot.

17 WC 15138, date of accident March 1, 2016

Disputed issue **C** is, did Petitioner suffer an injury which arose out of and in the course of her employment. 820 IICS 305/2; Arbitrator's Exhibit 1; Arroyo at 4.

I incorporate the law cited in the previously discussed issue **C** above. As there, Petitioner failed to elicit any evidence on this issue, and gave no background, scene or story. Petitioner's testimony was devoid of any detail on any specific accident or moment of injury. Arroyo at15.

As in the previous case, no testimony or argument in support of this issue leads to a finding, so as a conclusion of law, Petitioner has failed to show any evidence she sustained an injury that arose out of and in the course of employment.

Disputed issue **F**, is whether Petitioner's current condition of ill-being is casually related to the injury. I find as a conclusion of law it is not and relay on the testimony of Dr. Lieber. Respondent's Exhibit 1 at 16-17, 28.

In view of this, Respondent is not responsible for unpaid medical bills or temporary total disability. Any discussion of a break in the chain of referrals is moot.

Arbitrator

6/24/19
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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Douglas D. Rees,

Petitioner,

20IWCC0722

vs.

NO: 17 WC 34480

Buffalo Grove Park District,

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 and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the changes made below.

While affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of accident. The decision of the Arbitrator delineates the facts relating to the issues in detail.

The Arbitrator found that the circumstances of Petitioner's accident constituted an employment-related risk. Petitioner credibly, and without rebuttal, testified that he was rushing to move his work van when the accident occurred. Surveillance footage revealed a work terminal with several other vehicles parked, along with Petitioner's work van which was parked with several doors open. The video, at time stamp 4:36:46 a.m., shows Petitioner emerging from the rear of his van wearing a white cap, a light color jacket, and dark pants. He walks to the side doors of his van, which are open, and there appears to be a bucket and another item on the ground near the side doors. When Petitioner re-emerges, he is carrying what appears to be a bucket in his left hand. At that time the terminal garage door raises and a truck carrying lawn care equipment enters. It appears that Petitioner takes note of the truck entering and begins loading items into the front passenger and side doors of his van. After closing the side doors, he

20IWCC0722

closes the front passenger door. At that moment, Petitioner is seen bending over in apparent pain.

The Arbitrator found that Petitioner met his burden of proof regarding accident. The Commission agrees and finds that the totality of evidence, including the testimony, medical records, and surveillance video supports such a finding. There is no issue with the "in the course of" component required to establish a compensable accident in this case. This element encompasses injuries sustained on the employer's premises or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013-14 (2011). Petitioner was in Respondent's work garage unloading tools from his work van at the time of injury. Thus, the Commission finds that the 'in the course of' element has been satisfied.

The "arising out of" component required to establish a compensable accident is primarily concerned with causal connection and is satisfied when a 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 Comm'n*, 207 Ill. 2d 193, 205 (2003). However, the Commission, while recognizing that the Arbitrator's ruling pre-dates relevant case law, finds that the instant case must be evaluated in light of a very recent decision.

In *McAllister*, the Illinois Supreme Court reversed the Commission's determination that the claimant, a restaurant employee whose knee "popped" after kneeling to look for carrots at work, failed to show that his injury arose out of his employment. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828, ¶ 2. Our supreme court found that the claimant's knee injury "arose out of" an employment-related risk because the evidence established that at the time of the occurrence his injury was caused by one of the risks distinctly associated with his employment as a sous-chef. *Id.* ¶ 47. The court also observed that "that an employee who sustains an injury while rendering reasonably needed assistance to a coworker in furtherance of the employer's business is considered to have suffered an injury arising out of and in the course of employment when the act performed is within the reasonable contemplation of what the employee may do in the service of the employer." *Id.* ¶ 48; see also *id.* ¶ 52.

The *McAllister* court further held that *Caterpillar Tractor v. Industrial Comm'n*, 129 Ill. 2d 52 (1989), prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine "everyday activities." *Id.* ¶ 60. The court overruled *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC and its progeny "to the extent that they find that injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these common bodily movements or routine everyday activities to a greater extent than the general public." *McAllister*, 2020 IL 124828, ¶ 64. That is, "[o]nce it is established that the injury is work related, *Caterpillar Tractor* does not require claimants to present additional evidence for work-related injuries that are caused by common bodily movements or everyday activities." *Id.*

20IWCC0722

Accordingly, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* ¶ 46 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58).

Here, Petitioner was unloading his work van and parking his van in the employer's garage. He used his right hand to close the passenger door of one of Respondent's vans in response to a big truck with a trailer pulling in and approaching his van. The video surveillance confirms Petitioner's testimony that he noticed the truck. The act of closing the door to move Respondent's van so that the truck could park is "within the reasonable contemplation of what the employee may do in the service of the employer." Mr. Beckmann, Respondent's Superintendent of Facilities and Planning, agreed that the trucks do park in that area every night, are required to park in that location due to space constraints, and that Petitioner would have to move his vehicle for the truck to park in its designated spot. Thus, Petitioner was injured while performing an act Respondent might reasonably expect him to perform to fulfill his job duties.

In short, the Commission affirms the Arbitrator's finding of accident and, under the analysis set forth in the recent *McAllister* decision, reaches the same conclusion. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 22, 2019, is hereby affirmed and adopted, but changed with respect to the accident analysis.

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

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

No bond is required for 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: DEC 7 - 2020
o: 10/22/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0722

REES, DOUGLAS
Employee/Petitioner

Case# **17WC034480**

BUFFALO GROVE PARK DISTRICT
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:

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
TAMMY PAQUETTE
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

20IWCC0722

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

Douglas Rees
Employee/Petitioner
v.
Buffalo Grove Park District
Employer/Respondent

Case # 17 WC 34480
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 **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Waukegan**, on **July 3, 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 **11/9/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$36,400.00**; the average weekly wage was **$700.00**.

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.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $134.32 to Hand Surgery Associates, $384.79 to Northwest Community Occupational Health Services, 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.

The Arbitrator finds the Petitioner sustained permanent partial disability to the extent of 15% loss of use of the right index finger pursuant to §8(e) of the Act (See attached addendum for the Arbitrator's analysis pursuant to §8.1b(b) of the Act).

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

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

Signature of Arbitrator

9/3/19
Date

ICArbDec p. 2

SEP 6 - 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DOUGLAS D. REES	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 17 WC 34480
	)	
BUFFALO GROVE PARK DISTRICT	)	
	)	
Respondent.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

Petitioner was employed as a maintenance worker for the Buffalo Grove Park District ("Respondent") on November 9, 2017. He alleges he sustained a work-related injury on that day after closing a van door on his right index finger. Respondent disputes liability arguing the Petitioner's accident was not peculiar to his employment and the act of slamming his finger in the door of a vehicle is a "neutral risk".

Regarding the alleged accident, the Petitioner testified he completed a job at Respondent's golf dome facility and drove back to Respondent's yard where he parked his vehicle to unload equipment. He opened the passenger side front door of the vehicle to retrieve a bucket filled with his tools when some of Respondent's other work vehicles started pulling into the yard. Because his work van was parked in the area where these other work vehicles are supposed to park, he began rushing. With the bucket in his left hand, he closed the right passenger door with his right hand and the door slammed into his right index finger.

Petitioner presented later that day to Northwest Community Healthcare with complaints of right index finger pain and a laceration after slamming his right index finger in a car door. On exam, he had a laceration of approximately 5 cm. X-rays were obtained which revealed no acute fractures or dislocations. The laceration was repaired with 9 sutures. (PX 3)

On November 11, 2017 Petitioner returned to Northwest Community Healthcare for a follow up exam regarding his right index finger laceration. Petitioner reported tenderness and was referred to Dr. Michael Birman at Hand to Shoulder Associates whom he consulted with on November 20, 2017. At that time, a history of a right index finger crush injury after slamming his finger in a van door while at work was noted. On exam, a 2 cm laceration along the volar radial side extending from the pulp and curving approximately on the radial side of Petitioner's right index finger was noted. Petitioner

reported finger stiffness. X-rays revealed no fracture and Petitioner was released to return to work with restrictions of limited lifting/pushing/pulling of no greater than 5 pounds. (PX 2; PX3)

On November 30, 2017, Petitioner was again seen at Northwest Community Healthcare. He indicated his sutures had opened slightly and he was having intermittent pain when bumping his finger. Treatment was deferred to a hand surgeon. (PX 3)

Petitioner returned to Hand to Shoulder Associates on November 30, 2017 when Dr. Sam Biafora noted complaints of pain and swelling of the right index finger. On exam, the right index finger laceration was noted to be healing. Petitioner reported numbness to light touch. Petitioner was again advised he could continue to work with the same restrictions. (PX 2)

On December 11, 2017, Dr. Birman noted Petitioner's complaints of pain and numbness of his right index finger. Petitioner advised that his motion had improved. On exam, the tip of the proximal based flap was slightly elevated. Flexion of the finger was just short of the palm and a loss of sensation to light touch was noted. Petitioner was released to return to work with restrictions of no lifting, pushing or pulling greater than 30 pounds. (PX 2)

On January 8, 2018 Petitioner followed up at Hand to Shoulder Associates for the last time. On exam, Petitioner's right index finger was healed, but noted to have mild scar hypertrophy and mild DIP stiffness. Petitioner could make a near full composite fist. He had improved sensation to light touch at this point. Petitioner was released to return to work full duty at that point and released from care to return as needed. (PX 2)

Petitioner is currently working full duty and has not returned to the doctor, per his testimony.

Surveillance footage of the accident was admitted as Respondent's Exhibit 1. The video is grainy and does not clearly show Petitioner's accident. Other vehicles that appear to be occupied can be seen near to Petitioner's van. A vehicle loaded with lawn care equipment can be seen pulling into the work yard close to where Petitioner's vehicle was parked. It does not appear that Petitioner had anything in his hands. (RX 1)

Respondent's witness, Mr. Tim Beckmann, employed by Respondent as a Superintendent of Facilities and Planning since November of 2017, testified he had a conversation with Petitioner the day after the incident at Petitioner's work place. Petitioner demonstrated how the accident occurred. Petitioner told Mr. Beckman that he was in a rush at the time he slammed his finger in the truck's door as another work vehicle, a turf truck, pulled in after Petitioner to the location where Petitioner's truck was parked. Mr. Beckman testified the location that Petitioner had parked the truck is the location the turf trucks are supposed to park and that Petitioner was required to move his work van.

CONCLUSIONS OF LAW

The Arbitrator found Petitioner presented at the hearing as a credible witness. His overall demeanor during his testimony appeared truthful and sincere. His testimony was corroborated by the treating medical records, Respondent's surveillance footage and the testimony of Respondent's witness. Accordingly, the Arbitrator placed a great deal of weight on his testimony.

(C).
Whether Petitioner sustained accidental injuries that arose out of and in the course of his employment, the Arbitrator finds the following:

The Arbitrator finds the circumstances of Petitioner's accident constituted an employment-related risk. Petitioner's credible, unrebutted testimony established that he was rushing to move his work van when the accident occurred. Respondent's surveillance video footage depicts a crowded truck terminal with Petitioner's work van parked with the passenger door open when the accident occurred. The day after the accident, Petitioner reported to Tim Beckmann that he was rushing to move his vehicle so that another vehicle, a turf truck, could park in its designated spot when the accident occurred. Mr. Beckman testified the location that Petitioner had parked his truck is in fact a designated area for other vehicles and that Petitioner was required to move his van out of the way. Petitioner was in crowded truck terminal, a place he had a right to be, unloading his truck when the accident occurred. The Arbitrator finds he has sustained his burden by a preponderance of the evidence with respect to this issue.

(F)
Whether Petitioner's current condition of ill-being is causally related to the work injury, the Arbitrator finds the following:

The Arbitrator has already found the Petitioner sustained a work-related injury to his right index finger when the finger was slammed by the door of his work van vehicle. He sought immediate care for his injury that day and received appropriate follow up care with an orthopedic physician. The Petitioner testified credibly to continued pain, numbness, and tingling in his right index finger. It is not disputed that prior to this accident his finger was in a state of good health. Accordingly, the Arbitrator finds that the Petitioner's current condition of ill being in his right index finger is causally connected to his November 9, 2017 work injury with the Respondent.

(J)
Medical bills & services

The Petitioner alleges the following outstanding medical bills were not paid by Respondent:

Hand Surgery Associates	$134.32
Northwest Community Occupational Health	$384.79

The Petitioner testified to receiving conservative medical care for his injury including emergency care, therapy, diagnostic testing, and visits with an orthopedic physician. The Arbitrator finds such treatment modalities and the above disputed bills constituted reasonable and necessary medical care to address Petitioner's right index finger injury. Respondent has not paid the above charges for the reasonable and necessary medical services Petitioner received for his November 9, 2017 work injury.

Accordingly, the Arbitrator awards Petitioner the above medical bills as provided in Sections 8(a) and 8.2 of the Act.

Respondent is credited under Section 8(j) for any medical bills paid through Respondent's group health insurance carrier and Petitioner is held harmless and indemnified against any Reimbursement claims by Respondent's group health insurance carrier. Any 8(j) credit is not credited against the outstanding medical bills that are awarded.

(L) Nature & Extent of the injury

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes the Petitioner was employed as a maintenance worker at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. The Arbitrator also notes the Petitioner's work is physical in nature and does require use of his hands. The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 46 years old at the time of his accident. The Arbitrator therefore gives *some* weight to this factor as Petitioner has many years left to live with the consequences of the accident.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes no evidence indicating any impact on Petitioner's future earnings capacity was presented. 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 hospital records from the accident date note a laceration of approximately 5 cm on Petitioner's right index finger. The laceration was repaired with 9 sutures. On December 11, 2017, Dr. Birman noted Petitioner's complaints of pain and numbness of the finger. Petitioner advised that his motion had improved. On exam, the tip of the proximal based flap was slightly elevated. Flexion of the finger was just short of the palm and the doctor noted a loss of sensation to light touch. At his final appointment at Hand to Shoulder Associates, on January 8, 2018, Petitioner's right index finger was healed, but was noted to have mild scar hypertrophy and mild DIP stiffness. He could make a near full composite fist. He had improved sensation to light touch. Petitioner was released to return to work full duty and released from care to return as needed. The Arbitrator therefore *greater* weight to this factor.

The Arbitrator notes Petitioner's unrebutted, credible testimony that he never had an injury to his right index finger prior to November 9, 2017 and since this injury has had continued pain, numbness, and tingling in the right index finger.

Based on the foregoing, the Arbitrator awards Petitioner 15% loss of use of the right index finger.

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

GARY ROBERTS,

Petitioner,

20IWCC0723

vs.

NO: 16 WC 21788

ADVANCED AUTO PARTS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §§ 19(b) and 8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of 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, with the changes made 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).

While affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of causal connection. The Arbitrator ruled that Petitioner proved that he sustained a laceration to the left side of his head as a result of the December 16, 2015 work accident, causing an aggravation of headache symptoms. However, the Arbitrator also ruled that Petitioner failed to prove that his current cervical spine condition is causally related to that accident, due in part to Petitioner's admitted pre-accident history of migraines.

The Commission agrees with the Arbitrator, with one exception. The Arbitrator found that Petitioner's history of migraines is noted as an ongoing diagnosis when Petitioner saw Dr. Ashley Muhr in 2014. Petitioner correctly notes on review that this finding is incorrect. However, the migraines are noted in a December 2014 record from Physicians Express (the facility where Petitioner also went for initial treatment of the injury in this case).

20IWCC0723

Moreover, Petitioner's own testimony established a history of migraines for which he had stopped taking medication, but which still occurred periodically prior to the accident. Indeed, Petitioner testified that he may have experienced one or two migraines during the prior five years, but the Physicians Express treatment record for March 16, 2016 indicates Petitioner had a history of migraines which had been controlled to every six months previous to the injury. In April 2016, Petitioner underwent a neurological evaluation by Dr. Ronald Bukowy, whose diagnoses of Petitioner included post-traumatic migraine headaches.

The Commission observes that early in Petitioner's treatment, on December 24, 2015, Petitioner was noted to have frequent migraine headaches, but Petitioner reported that this headache felt different. Nevertheless, on March 16, 2016, Petitioner's diagnosis was migraine without aura and without status migrainosus, not intractable, and traumatic injury of head. The treatment note for that date from Physicians Express also states: "Discussed with pt possibility of headaches due to previous migraine history vs from the injury itself." On March 26, 2016, it was noted: "Cannot be sure if headaches are due to migraines or the trauma based on the MRI." On April 5, 2016, Petitioner underwent the aforementioned neurological evaluation by Dr. Bukowy, whose impressions included post-traumatic migraine headaches. The remainder of Petitioner's treatment records also refer to migraines without any indication that they differed from those Petitioner suffered prior to his work injury.

Dr. Elizabeth Kessler, Respondent's Section 12 examiner, testified that Petitioner stated on May 31, 2016 that his headaches were now like his migraines. Dr. Kessler also testified that the symptoms which Petitioner reported three months after the accident were not causally related to the accident and that the accident did not aggravate Petitioner's pre-existing condition of migraines.

Given that the totality of the medical records reflects a history of migraines and undermine Petitioner's assertion that his headaches differ in quality from his prior migraines following the treatment of his head laceration, the Commission concludes that the Arbitrator's reliance on Petitioner's history of migraines is amply supported by the record as a whole.

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

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner proved the aggravation of his headache symptoms is causally connected to the accident in this case, but failed to prove his current cervical spine condition or any other condition is causally connected to his current condition of ill-being.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay for Petitioner's reasonable and necessary services of $775.00 to the Center for Diagnostic Imaging, and $46.83 to Northwestern Medicine, pursuant to the fee schedule and §§8(a) and 8.2 of the Act. Respondent also shall reimburse Petitioner for $70.00 in out-of-pocket expenses. Respondent shall receive a credit of $232.39 for medical expenses already paid. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent this credit, pursuant to §8(j) of the Act.

20IWCC0723

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for prospective care is denied.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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 is hereby fixed at the sum of $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: DEC 7 - 2020
o: 11/5/20
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

20IWCC0723

ROBERTS, GARY
Employee/Petitioner

Case# **16WC021788**

17WC022595

ADVANCED AUTO PARTS
Employer/Respondent

On 2/24/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 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:

5669 ALEKSY BELCHER
MATT WALKER
350 N LASALLE ST SUITE 750
CHICAGO, IL 60654

6020 GOLDBERG SEGALLA LLC
MEGHAN MURRAY
222 W ADAMS ST SUITE 2250
CHICAGO, IL 60606

20IWCC0723

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
19(b)

Gary Roberts
Employee/Petitioner

v.

Advanced Auto Parts
Employer/Respondent

Case # **16** WC **21788**

Consolidated cases: **17 WC 22595**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **November 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. [ ] 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 _____

20IWCC0723

FINDINGS

On the date of accident, **December 16, 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 in part*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**16,871.92**; the average weekly wage was $**324.46**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **4** dependent children.

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

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

Respondent is entitled to a credit of $**232.39** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $775.00 to Center for Diagnostic Imaging, and $46.83 to Northwestern Medicine, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall reimburse Petitioner $70.00 for out-of-pocket payments. Respondent shall be given a credit of $232.39 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Petitioner's claim for prospective medical care 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.

Signature of Arbitrator

February 21, 2020
Date

ICArbDec19(b)

FEB 24 2020

Statement of Facts

This matter was tried in conjunction with consolidated claim 17 WC 22595 (DOA: 6/15/2017). A single transcript was prepared. The Arbitrator has issued separate decisions for each claim.

Petitioner Gary Roberts testified he was employed by Respondent Advanced Auto Parts beginning in 2014. He started as a part-time driver before he became a full-time salesperson/keyholder. A key holder is someone who opens and closes the store and takes care of the cash. Petitioner testified that his job duties included stocking of shelves to include rotors and hub assemblies, helping customers, placing batteries in cars, and installing headlights. He normally reported for work between seven and eleven o'clock in the morning. He would normally leave around eight thirty or nine thirty at night. Petitioner's position required him to lift different items, from headlights which weighed from a pound to a pound and a half, brake rotors and hub assemblies that would be anywhere from 25 to 30 pounds, and rack and pinions that could range anywhere from 75 to 100 pounds. Petitioner also pulled and pushed pallet jacks, and performed overhead work which included placing hub assemblies on shelving units, along with brake rotors, rack and pinions, radiators and various other parts. The Respondent's job descriptions for a delivery driver (RX 15) and a salesperson (RX 16) were admitted. The salesperson job requires constant standing/walking, lifting/carrying in excess of 100 pounds occasionally, and 35-40 pounds frequently, gross and fine finger dexterity, the ability to reach above shoulder level, and the ability to engage in frequent squatting, bending and reaching, occasional climbing, stooping, kneeling and crouching (RX 16).

Petitioner testified that prior to December 16, 2015, he was performing his full duty job. He testified that he had issues with headaches previously, but that they had subsided completely, and he had not taken medication for over 5 years. Petitioner was seen at Physician's Express in December 2014 for an unrelated ankle injury. Problem List/Past Medical lists migraine headaches (PX 1).

Petitioner testified that on December 16, 2015, he was taking a hub assembly and placing it up in the stock area on the shelf at head height, just a little bit above him. He was about three fourths of the way to put it up, almost arm's length. The hub assembly flipped in the box, and hit him over the left eye, and pushed him backwards. He was bleeding from the left upper eye. He did not lose consciousness. He testified he noticed some tingling in his left neck and shoulder. Kyle, a co-worker, got a first aid kit and started applying the pressure slow the bleeding. Petitioner testified the hub assembly weight 25 to 45 pounds. Petitioner drove himself to Physician's Express.

Petitioner was seen at Physician's Express on December 16, 2015 (PX 1) with a consistent history of accident. Petitioner presented for the laceration on the left side of the face. Facial x-rays were negative for fracture. Petitioner's laceration was sutured. Neurological and musculoskeletal assessment noted no abnormalities in the head, neck spine or extremities (PX 1). On December 24, 2015 Petitioner reported a complaint of head injury occurring in a persistent pattern for 1 week. Left sided and constant headache had persisted for one week, no nausea, vomiting, dizziness. Has frequent migraine headaches, but this headache feels different. Also needs sutures removed. The diagnosis was acute post-traumatic headache, not intractable. Petitioner was told to follow up if headache did not improve over the next 2-3 days (PX 1). A CT of the brain was performed on December 24, 2015. The impression was no acute pathology. There is asymmetry in the appearance of the lateral ventricles with bowing of the septum pellucidum towards the left. Although it is likely that this is anatomical variation rather than a significant abnormality, further evaluation with MRI is suggested

(PX 1, p 27). The patient information sheet prepared describes his symptoms as headaches, blurry vision and feeling sick to his stomach. He checked boxes for left neck pain and tingling. The pain diagram prepared only notes pain in the left side of the face (PX 2, p 8).

Petitioner was next seen on March 16, 2016. Patient states that he is still experiencing side effects from initial head injury. Patient states that symptoms are daily headaches localized on the left side (temporal, maxillary and occipital region), nausea/vomiting 1-2 times per week and blurred vision. Patient states vision tends to worsen with bright lights. He is sleeping less due to the headaches (about 3 hours/night). CT 3 months ago was normal. Patient has a history of migraines but had been controlled to every 6 months previous to the injury. Patient has been taking Aleve for the headaches, which helps somewhat but not 100%. The face, head and neck examinations were normal. Dr. Patel notes the headaches could be due to the previous history of migraines, or from the injury itself and recommended a neurology consult and MRI scan (PX 1, p 11-13). MRI of the brain performed on March 24, 2016 notes acute para nasal sinus inflammatory disease, a couple of nonspecific hyper intense T2 signal of I in the centrum semiovale, left insula and left temporal lobe are nonspecific. This could be related to migraine headaches, trauma, early chronic small vessel ischemic change or a demyelinating process such as MS (PX 1, p 29). On March 26, 2016, Petitioner was diagnosed with a traumatic injury of the head and again recommended to see neurology (PX 1, p 17). On March 29, 2016, Petitioner was released to perform the transitional duties listed on the Advance Auto Parts Retail Store Transitional Duty Checklist. Patient is physically able to perform all tasks, but has been suffering from daily headaches/migraines. Please allow to sit/rest for 10 minutes every 1-2 hours (PX 1, p 17-19).

Petitioner testified he was continuing to have left arm pain and his neck twisting. On April 5, 2016, Petitioner was seen by neurologist Dr. Ronald Bukowy (PX 5, RX 8). He noted a history of headaches since the work injury on December 16, 2015 and a past history of migraines going back to Petitioner's teen years. Prior to the accident, Petitioner would experience one to two migraines a year that would last several hours and resolve. Dr. Bukowy diagnosed post traumatic migraine headaches, cerebral concussion and probable benign paroxysmal positional vertigo. The concussion appears to be resolving or is resolved. He recommended Depakote for the headaches, noting the MRI and CT scan were unremarkable. Dr. Bukowy suggested an EEG (PX 5, RX 8).

Dr. Kessler examined Petitioner at Respondent's request on May 31, 2016 and prepared a report dated June 7, 2016 (PX 3). Dr. Kessler took Petitioner's history and complaints of severe daily headaches, which are the same as his prior migraines, seeing spots, being easily agitated, easily irritated and memory loss. She reviewed Petitioner's treating records. Examination noted tenderness over the left frontal area. There was full range of motion of the cervical spine with no reported tenderness or muscle spasm. Dr. Kessler diagnosed a closed head injury and facial laceration on December 16, 2015. She opined that he could have had headaches for several days, but that he sustained no injuries that would account for increasingly severe headaches over time. She stated that his use of Aleve could cause rebound headaches. She opined that Petitioner did not sustain a concussion or any other brain injury in the accident. She did not attribute his complaints of agitation, irritability, lightheadedness or memory impairment to the accident (RX 3). Kessler authored an addendum on June 20, 2016 following review of Dr. Bukowy's records. Her opinions expressed in her prior report were unchanged (RX 4).

On August 8, 2016, Petitioner saw a primary care physician, Dr. Muhr for a comprehensive physical exam. Petitioner reported passing out during a stress test years ago and undergoing an angioplasty. He reported

having chest pain at times. Petitioner also reported of 2-3 migraines per week with vomiting associated with the migraines. He had a history of seizures when he was a child. Dr. Muhr noted a C3-4 herniated disc. He was in a brace for a long time and told to go to a rehab center but did not want to do this. He noted his neck bothers him on occasion. Is still able to function and do things. Examination of the neck and extremities note no abnormalities. No treatment was recommended other than blood work and a stress test (PX 3, p 3). Petitioner testified he does no know anything about the C3-4 disc. On August 15, 2016, Dr. Muir noted that she had a telephone call with Petitioner advising him his shortness of breath is not due to his prior neck injury from years ago.

On December 12, 2016, Dr. Muhr recorded ongoing complaints of headache. Petitioner has had headaches for years. They are increased since injury. Petitioner's neck felt "twisted" in the morning at times. Petitioner had been off headache medications for 2 years and was doing well prior to the work accident. Petitioner reported tingling in his left upper extremity at night when texting or doing other things. Dr. Muhr suspected cluster headaches of unspecified chronicity, and recommended follow up with neurology, Dr. Iacob (PX 3, p 8-11).

On January 18, 2017, Petitioner was seen by Dr. Gutti, because Dr. Iacob was not available. Both Dr. Gutti and Dr. Iacob practice at the Northwestern Medicine Neurosciences Institute at CDH. Dr. Gutti's history was 46 year old presents for evaluation of headaches. Has had history of headaches previously treated with Inderal and Max alt 10 years ago. Was doing well up until December 2015 when he was hit in the head on the left side above the eye, requiring stitches with possible associated whiplash at the time. Since then he has been having increased frequency of headaches occurring at least 3-4 times a week on the left side at an intensity of 5-10/10, associated with nausea, vomiting, light and sound sensitivity. Pain radiates from the left temple to the top of the left side of the head to the back of the head on the left side of the neck. Complains of mild tightness on the left side of the neck and reports tingling in the ulnar distribution of the left upper extremity with certain hand positions (PX 4, p 6). Dr. Gutti's assessment was cervico-occipital neuralgia. He recommended an MRI of the cervical spine, muscle relaxant and possible PT for the neck (PX 4, p 9).

The February 14, 2017 MRI assessment was degenerative disc disease in the lower cervical spine, most significant at C5-6. The MRI noted at C5-6 a large diffuse disc bulge and a broad posterior protrusion indenting the thecal sac contributing to moderate central canal narrowing with moderate to severe left neural foraminal narrowing in part due to left uncovertebral; joint hypertrophy and some left-sided facet hypertrophy with likely some impingement on the left C6 exiting nerve root (PX 4, p 20-21).

On March 6, 2017, Dr. Gutti noted left sided headaches originating from the left cervico-occipital area and radiating to the left side of the head, severe throbbing sensation with nausea along with occasional tingling in the left arm while laying down. Dr. Gutti reviewed the February 24, 2017 MRI. The assessment was left sided headaches after injury to the head at work, likely resulting from a whiplash injury. Dr. Gutti recommended PT for the neck and continued medication (PX 4, p 14-17).

Petitioner sustained another work injury on June 15, 2017 to his lower back. That accident is addressed in the consolidated case 17 WC 22595. It is referenced in this decision for the sake of continuity of the medical record. Petitioner testified that on June 15, 2017, a customer brought in a couple of batteries. One of the batteries that the customer had, he almost dropped to the floor. Petitioner reached out to grab the battery and tweaked his lower back. The incident report prepared the same day states that customer bought 2

fleet/commercial batteries. Went to pick them up. While doing so, felt a sharp pain in lower back. Customer almost dropped one because of it being too heavy for him (RX 10).

Petitioner was seen at Physician's Express on June 16, 2017. Petitioner reported an injury to the low back lifting a battery. Examination noted tenderness and tightness with a normal neurological testing and negative straight leg raise. Petitioner was diagnosed with a lumbosacral strain, left side worse than right (PX 1).

Petitioner saw Dr. Sean Salehi on July 17, 2017 (PX 7). Dr. Salehi recorded histories of the work injuries on December 16, 2015 and June 15, 2017. Petitioner reported ongoing headaches in the back of the head associated with neck pain and pain radiating down the left arm into the hand with intermittent numbness and tingling in the first three digits since the December 2015 injury. Petitioner reported pain in the left side of his back and hip region without radiation into the leg since the June 2017 injury. Cervical exam noted tenderness in the left trapezius with a positive Spurling test to the left. Strength was 4+/5 in the left deltoid. Lumbar exam noted mild tenderness in the left posterior iliac crest. Neurological examination and straight leg raising were negative. Dr. Salehi diagnosed low back pain and cervical radiculopathy. Dr. Salehi stated that Petitioner had left radicular symptoms secondary to the 2015 work injury and low back pain secondary to the more recent work injury a few weeks earlier. An updated MRI of the cervical spine was ordered. (PX 7, p 1-5).

MRI of the cervical spine was performed on July 17, 2017. The radiologist's impression was "multilevel spondylosis of the cervical spine with mild to moderate spinal canal stenosis at C5-6, mild at C6-7. The C5-6 level was read as a small disc bulge with bilateral uncovertebral arthropathy, mild bilateral facet arthropathy, and partial effacement of the ventral CSF with mild flattening of the ventral cord, mild to moderate spinal canal stenosis and moderate to severe bilateral neural foraminal stenosis (PX 9).

Petitioner followed up with Dr. Salehi on July 31, 2017. Dr. Salehi read the MRI as showing a moderate herniated disc at C5-6 resulting in moderate central canal stenosis, and significant foraminal stenosis on the left at C5-6 and moderate foraminal stenosis on the right at C5-6. He opined that Petitioner had neck pain and left radicular pain secondary to a disc herniation at C5-6 causally related to the 2015 work injury. He recommended a C5-6 anterior cervical discectomy and fusion. He imposed restrictions of lifting no more than 35 pounds, no push/pull in excess of 35 pounds, no overhead work (PX 7, p 6-9). Petitioner testified that Respondent accommodated these restrictions.

On October 4, 2017, Dr. Muhr noted Petitioner's treatment with Dr. Salehi. He reported the recent injury twisting his low back. Petitioner complained of his leg giving out. Dr. Muhr referred Petitioner back to Dr. Salehi for ongoing treatment (PX 3, p 14-18). On October 9, 2017, Petitioner was involved in a motor vehicle accident. Petitioner testified that it was low impact. On October 16, 2017, Petitioner saw Dr. Muhr. He reported he was sideswiped and that he bounced around in his truck. He reported the left side of his back hit the driver's door. He felt that his low back and neck pain has been worsening. He reported some tingling in the back of his left lower extremity. Dr. Muhr suspected that Petitioner exacerbated his already existing back pain, and recommended Petitioner return to Dr. Salehi (PX 3, p 18-22). On October 19, 2017, Dr. Salehi imposed restrictions of no lifting in excess of 35 pounds, no push/pull in excess of 50 pounds and no overhead work (PX 7, p 11).

Dr. Salehi authored a narrative report on November 27, 2017. He reviewed previous medical records and diagnostic testing, and the report of Dr. Kessler. He opined that Petitioner suffers from neck pain, arm pain and

headaches due to a herniated disc at C5-6. The complaints are related to the December 16, 2015 injury. The auto accident on October 9, 2017 did not cause an increase in his cervical complaints. Petitioner requires a C5-6 discectomy and fusion for his cervical complaints. His lumbar complaints will likely improve with conservative care (PX 7, p 12-14).

Petitioner was examined by Dr. Harel Deutsch on March 2, 2018 (RX 5). He diagnosed Petitioner with mild cervical degenerative changes, and a lumbar strain. Dr. Deutsch opined that Petitioner's cervical condition was not causally related to the work accidents. He did indicate that Petitioner suffered a lumbar strain as a result of the June 15, 2017 work accident. He stated that Petitioner was at maximum, medical improvement for both work accidents, noting MMI would have been reached 3 months after each alleged work injury. Dr. Deutsch opined that no additional treatment was required (RX 6).

Dr. Salehi testified by evidence deposition taken May 15, 2018 (PX 8). He testified he is a board certified neurosurgeon. Dr Salehi testified that he had reviewed medical records from Physician's Express, Dr. Bukowy, Dr. Muhr, Dr. Gutti, Dr. Kessler and records and films from CDI Geneva. He first saw Petitioner on July 17, 2017, and noted the history received. He ordered a new MRI, and noted a moderately sized herniated disc at C5-6 resulting in moderate central canal stenosis with significant foraminal stenosis on the left and moderate foraminal stenosis on the right at the same level. In light of Petitioner's lack of response to conservative treatment, Dr. Salehi recommended a cervical discectomy and fusion. Dr. Salehi also imposed restrictions of no lifting in excess of 35 pounds in order to lessen the chances of aggravating the already herniated disc. If Petitioner does not undergo surgery, his restrictions are permanent in nature. (PX 8).

Dr. Salehi opined that Petitioner suffers from neck pain, arm pain and headaches due to a herniated disc at C5-6. All of these complaints were related to the work accident that occurred on December 16, 2015. The work injury of December 16, 2015 was a direct cause of Petitioner's herniated disc. Petitioner suffered cervicogenic headaches. These are caused by the muscles in the neck tightening resulting in pain along the base of the skull. Dr. Salehi notes the notation in the March 24, 2016 CDI records of pain and tingling along the left side of the neck (PX 8).

Dr. Salehi opined that the auto accident that occurred in October of 2017 resulted in an exacerbation of symptoms, and was not enough to sever causal connection from his prior work accident. The June 2017 incident related only to the lumbar spine (PX 8). He testified that he reviewed Dr. Muhr's August 8, 2016 note referencing a C3-4 herniated disc. He interpreted that note as referring to the December 2015 accident. He stated that it refers to the wrong disc. He found no evidence of a C3-4 disc herniation on the MRI. It was poor documentation. He testified an acute injury would result in an onset of pain within days. He testified that Petitioner had a distracting injury with the head trauma, and everyone was focused on that (PX 8).

Dr. Kessler testified by evidence deposition taken December 4, 2018 (RX 6). Dr. Kessler testified that Petitioner's symptoms at the time of the May 31, 2016 independent medical evaluation were headaches up to three to four times per week that lasted eight to nine hours rated at a 15-20/10, with a 10/10 pain level as the worst pain imaginable. Dr. Kessler testified that people who are dramatic about their pain rate their pain higher than 10/10. Dr. Kessler testified that Petitioner said his headaches would reach extreme intensity if he did not lie down right away. At 10/10 pain, a person would not be able to work a normal job and should not drive a vehicle. Dr. Kessler testified that Petitioner's description of severe, daily headaches and multiple associated symptoms without any missed time from work did not "make neurological sense." Dr. Kessler opined that the

only injury Petitioner sustained on December 16, 2015 was a scalp laceration and closed head injury. Petitioner's medical history and symptoms did not support Dr. Bukowy's concussion diagnoses. Dr. Kessler testified that Petitioner may have an increase in frequency of headaches after the injury due to his pre-existing migraine condition, but any causally related headaches would resolve within a month and then the headaches would return to Petitioner's baseline pre-existing migraines condition. She opined that Petitioner currently had medication overuse headaches from his use of over-the-counter analgesics. Dr. Kessler testified that Petitioner told her his headaches at the time of the May 31, 2016 evaluation felt the same as the pre-existing migraines. This is inconsistent with his statements to prior history at Physician's Express. She stated that his additional complaints of mood changes and memory loss were inconsistent with his prior medical histories and inconsistent with her normal physical examination (RX 6).

Dr. Kessler testified that she evaluated Petitioner's head and the cervical spine to determine whether there were signs of cervical radiculopathy relative to the December 16, 2015 injury. Dr. Kessler testified that Petitioner did not have any complaints in the cervical spine and that she conducted a physical examination of the cervical spine, which was normal. Dr. Kessler testified that her examination confirmed Petitioner had no cervical spine symptoms or cervical spine pathology. Dr. Kessler testified that Petitioner completely recovered from the December 16, 2015 injury within days of the accident (RX 6).

Dr. Deutsch testified by evidence deposition taken August 22, 2018 (RX 7). Dr. Deutsch reviewed medical records for the December 15, 2015 and June 15, 2017 injuries. Dr. Deutsch opined that Petitioner did not injure the cervical spine on December 15, 2015. If the December 15, 2015 injury caused a cervical spine injury, Petitioner would have felt pain at the cervical spine or neck. Dr. Deutsch testified that sometimes neck pain radiates to the head or causes pain in the head, but you can't have an injury to the neck and not have pain in the neck. There were not any significant complaints of neck pain or radiculopathy until Petitioner's initial evaluation with Dr. Salehi, a year and a half post-accident. Dr. Deutsch testified that there were no signs of a traumatic cervical spine injury or cervical radiculopathy throughout Petitioner's diagnostic treatment. He read the MRI as essentially normal with mild degenerative changes mostly at C5-6. He does not find evidence of a herniated disc or any radiculopathy. His physical examination noted left arm numbness and an essentially normal examination, He had a negative Spurling test. Dr. Deutsch testified that a cervical fusion was not appropriate (RX 7).

Dr. Deutsch testified that Petitioner sustained a lumbar strain on June 15, 2017, and that there was no causal connection for a cervical spine injury or exacerbation relative to that date of loss. Dr. Deutsch testified that Petitioner did not require any work restrictions due to either work accident. He does not think the October 2017 motor vehicle accident affected his condition. Dr. Deutsch testified that Petitioner showed no signs of malingering, Dr. Deutsch agreed that for an aggravation to be temporary, the condition would have to return to baseline (RX 7).

Petitioner testified that he continued to work for Respondent within his restrictions until he took a new job at Bridgestone as a service manager. He supervises 8 employees. He testified that he took this job because it was a better opportunity. He does not have to do any heavy lifting or carrying. Petitioner denied he was fired for cause on December 22, 2017. He testified he quit when he did not get a GM spot that was available. He testified that his current employer is aware of his restrictions. Records from Bridgestone reflect he began work on January 1, 2018 as a retail salesperson (RX 11).

Petitioner testified he still has headaches three to four days per week. He still has neck pain going into his left shoulder. His left arm is weak with tingling into his fingers. He has difficulties with sleep and concentration. He has not returned to EMT duties despite his training. He is taking Aleve for pain. Petitioner has not returned to Dr. Salehi. He is waiting authorization for the recommended surgery.

Conclusions of Law

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

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill.Dec. 83, 444 N.E.2d 122). Petitioner sustained an undisputed accident when he was struck with a hub assembly on December 16, 2015. Respondent has disputed that Petitioner's ongoing condition of ill being is causally connected to this accident.

The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

Petitioner alleges that he had complaints of neck and left arm pain in addition to the increased headaches beginning immediately after the accident. This allegation is challenged by the bulk of the medical records. Petitioner's testimony is repeatedly contradicted by the histories and symptoms documented. Petitioner has an admitted prior history of migraine headaches. He initially testified that they had subsided completely, but his medical records repeated document ongoing episodes continuing through his date of accident. They are noted as an ongoing diagnosis when he sees Dr. Muhr in 2014. When Petitioner first raises actual complaints in his neck in August 2016, Dr. Muhr records a prior cervical disc herniation including description of the treatment recommended. Petitioner has no explanation for this entry. Petitioner has had bilateral shoulder surgeries which he only grudgingly admitted on cross-examination.

Petitioner raises no complaints of neck pain at Physicians Express. Neurological and musculoskeletal assessment noted no abnormalities in the head, neck spine or extremities. On December 24, 2015, Petitioner reported left sided and constant headache had persisted for one week, no nausea, vomiting, dizziness. Has frequent migraine headaches, but this headache feels different. While Petitioner checked a box in March listing neck pain, he fails to note this on the pain diagram and does not list these symptoms in the narrative portion. Dr. Patel's March 2016 notes do not include any complaints other

than left-sided headaches with nausea and vision disturbances, additional symptoms that did not appear until then. The face, head and neck examinations were normal. Dr. Patel notes the headaches could be due to the previous history of migraines, or from the injury itself and recommended a neurology consult and MRI scan. On April 5, 2016, Dr. Bukowy diagnosed post traumatic migraine headaches, resolved or resolving cerebral concussion and probable benign paroxysmal positional vertigo. It is only beginning in August 2016, over 18 months after the accident, that the first complaints in the neck are seen in the medical treatment records.

The Commission has considered such a gap in care in determining causal connection. See: *Richard Olcikas v. Dominick's Finer Foods, Inc.*, 2009 Ill. Wrk. Comp. LEXIS 1098, affirmed *Olcikas v. IWCC*, 2012 Ill. App. Unpub. LEXIS 26; 2011 IL App (1st) 103274WC-U; 2012 WL 6951575; *Jacob Haltom v. Center for Sleep Medicine*, 2013 Ill. Wrk. Comp. LEXIS 509; 13 IWCC 563, affirmed *Haltom v. IWCC*, 2015 IL App (1st) 133954WC-U; 2015 Ill. App. Unpub. LEXIS 1568; *Jose Ruben Meraz vs. Minute Men Staffing*, 2015 Ill. Wrk. Comp. LEXIS 30; 15 IWCC 30. Based upon the pre-existing condition and this gap in care, the Arbitrator finds the chain of events does not apply to the facts in this case.

Petitioner also presented the causation opinion of Dr. Salehi who opined that Petitioner suffers from neck pain, arm pain and headaches due to a herniated disc at C5-6. All of these complaints were related to the work accident that occurred on December 16, 2015. The work injury of December 16, 2015 was a direct cause of Petitioner's herniated disc. Petitioner suffered cervicogenic headaches.

Respondent offered the opinions of Dr. Kessler that the only injury Petitioner sustained on December 16, 2015 was a scalp laceration and closed head injury. Dr. Kessler testified that Petitioner may have an increase in frequency of headaches after the injury due to his pre-existing migraine condition, but any causally related headaches would resolve within a month and then the headaches would return to Petitioner's baseline pre-existing migraines condition. Petitioner currently had medication overuse headaches from his use of over-the-counter analgesics. Dr. Kessler testified that Petitioner did not have any complaints at the cervical spine and that she conducted a physical examination of the cervical spine, which was normal. Dr. Kessler testified that her examination confirmed Petitioner had no cervical spine symptoms or cervical spine pathology. Respondent also offered the opinions of Dr. Deutsch who opined that Petitioner did not injure the cervical spine on December 15, 2015.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill.

App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts.

Having heard the testimony and reviewed the exhibits, the Arbitrator finds the opinions of Dr. Kessler and Dr. Deutsch more persuasive and based upon the preponderance of the medical treating evidence. Dr. Kessler noted the multiple inconsistencies in Petitioner's medical history and progression of symptoms as noted by the Arbitrator above. The Arbitrator considers these inconsistencies as well as Petitioner's consistent diminution of his prior conditions and dramatic presentation of his symptoms in weighing the opinions provided. Dr. Kessler and Dr. Deutsch considered not only the lack of cervical spine complaints and treatment in the medical records prior to August 2016, but also the multiple negative cervical spine examinations including that of Physician's Express, Dr. Kessler and Dr. Deutsch. The Arbitrator notes that Dr. Deutsch's reading of the MRI agrees with the radiologists that there is no disc herniation. Dr. Salehi recorded Petitioner's history that he had immediate neck and left arm pain, which is unsupported by the bulk of the medical evidence. He discounts the specific history of prior cervical disc findings, which the Arbitrator finds unpersuasive. Based upon the multiple inconsistencies, the multiple initial negative cervical spine examinations, the gap in care, and the persuasive readings of the diagnostics, the Arbitrator finds that Petitioner failed to prove that his current cervical spine condition is causally related to the accident.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that, as a result of the accidental injury on December 16, 2015, he sustained a laceration to the left side of his head and an causally related aggravation of headache symptoms. Petitioner failed to prove any other causally related condition of ill-being.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers ' Compensation Commission*, 409 Ill. App. 3d 258,267 (1st Dist., 2011). Petitioner has submitted PX 9 claiming additional medical bills owed as well as bills which have been paid, not by Workers Compensation, but by Petitioner's group insurance coverage with Blue Cross/Blue Shield pursuant to Section 8(j) of the Act. Respondent has submitted its payment ledger as RX 14. Based upon the Arbitrator's finding with respect to Causal Connection, only treatment related to the causally connected condition of ill-being would be recoverable.

Having reviewed the exhibits submitted, the Arbitrator finds as follows:

Center for Diagnostic Imaging: The unpaid balance showing is for the 12/24/15 head CT preformed. This service was reasonable, necessary and causally related to the December 16, 2015 accident.
Northwestern Medicine (Dr. Muhr and MRI): Petitioner has submitted visits with Dr. Muhr which have been paid by Blue Cross/Blue Shield. The Arbitrator finds the visits on 12/12/2016, 1/8/2017 and 3/6/2017 to be related to completing a differential diagnosis for Petitioner's condition of ill-being and therefore reasonable, necessary and causally related to the December 16, 2015 accident. The Arbitrator finds the MRI performed on 2/14/2017, the physical therapy performed in April 2017, and the office visits on 10/4/2017 and 10/16/2017 not causally

related. The billing notes Petitioner made direct payment of $70.00 and the balance for the awarded visits of $46.83.
Physicians Express: The only bill claimed unpaid is the 6/16/2017 visit. The Arbitrator finds this is not causally related to the December 16, 2015 accident. It will be addressed in the decision in the consolidated case 17 WC 22595.

Based upon the record as a whole and the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $775.00 to Center for Diagnostic Imaging, and $46.83 to Northwestern Medicine, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall reimburse Petitioner $70.00 for out-of-pocket payments. Respondent shall be given a credit of $232.39 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In support of the Arbitrator's decision with respect to (K) Prospective Medical, the Arbitrator finds as follows:

Petitioner is seeking prospective medical based upon Dr. Salehi's recommendation that he undergo a C5-6 cervical discectomy and fusion. Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. *City of Chicago v. Illinois Workers ' Compensation Commission*, 409 Ill. App. 3d 258,267 (1st Dist., 2011). Based upon the Arbitrator's finding with respect to Causal Connection, this recommended treatment would not be causally related to the accident on December 16, 2015.

Based upon the record as a whole, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he is entitled to prospective medical care causally related to the accidental injury sustained on December 16, 2015.

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

Duncan Jay Rohl,
Petitioner,

vs. No: 14 WC 14889

20IWCC0724

State of Illinois Department of Transportation,
Respondent.

DECISION AND OPINION ON REVIEW

Petition for Review having been timely filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, 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 on May 28, 2020, is hereby affirmed and adopted.

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

20IWCC0724

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. 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: DEC 8 - 2020

Marc Parker

Marc Parker

mp/dk
o-12/3/20
68

Stephen Mathis

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROHL, DUNCAN
Employee/Petitioner

Case# **14WC014889**

IDOT
Employer/Respondent

20IWCC0724

On 5/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.16% 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 LAW OFFICE OF PETER FERRACUTI
ALEXIS P FERRACUTI
110 E MAIN ST PO BOX 859
OTTAWA, IL 61350

5002 ASSISTANT ATTORNEY GENERAL
JOSEPH BLEWITT
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 BUREAU OF RISK MANAGEMENT
801 S 7TH ST
6TH FL
SPRINGFIELD, IL 62703

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

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

MAY 28 2020

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

20 IWCC0724

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

Duncan Rohl
Employee/Petitioner

v.

IDOT
Employer/Respondent

Case # **14** WC **14889**

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 **Barbara Flores**, Arbitrator of the Commission, in the City of **Ottawa**, on **February 25, 2019**. The parties have agreed to the rendering of a decision, based on the record as submitted, by Arbitrator Thomas L. Ciecko. 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 **May 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**4460.00**; the average weekly wage was $**1029.20**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **1** dependent children.

Petitioner ***has*** received 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, by agreement of the parties, of medical bills paid through its group medical plan under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall, if not already paid or written off, pay reasonable and necessary medical services incurred by Petitioner from May 7, 2013 through July 18, 2013 as provided in Section 8(a) of the Act. No other medical benefits are awarded.

Permanent partial disability

Respondent shall pay Petitioner permanent partial disability benefits of $617.52/week for 25 weeks because the injuries sustained caused the 5% loss of a person as a whole 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

5/16/2020
Date

MAY 28 2020

Preface

The parties proceeded to hearing February 25, 2019, before Arbitrator Barbara Flores. Both parties agreed to receive a decision based on the record by an Arbitrator to be assigned to this case by the Commission. I have been assigned to write this decision, and have reviewed the Transcript of Proceedings, as well as the exhibits offered by the parties. The Hearing proceeded on a Request for Hearing indicating the following disputed issues: whether Petitioner's current condition of ill-being is causally connected to an injury sustained May 7, 2013; whether Respondent is liable for unpaid medical bills; and what is the nature and extent of the injury. Duncan Jay Rohl v. IDOT, No. 14 WC 14888 Hearing on Arbitration February 25, 2019, at 4-5; Arbitrator's Exhibit 1.

Petitioner testified, as did Dr. Tom Stanley, Dr. Alexander Ghanayem, Dr. Cary Templin, and Dr. Udit Patel, via evidence deposition. In the testimony of Dr Patel, three exhibits were referenced. None were attached to the deposition or introduced into evidence during the deposition. They will not be considered. Petitioner's Exhibit 4, purportedly "Ottawa Regional Medical Center Records", were not attached to the subpoena cover of the exhibit. Petitioner's Exhibit 13, two copies of an Illinois Traffic Crash Report, are excluded and rejected as such police reports are not admissible in Illinois. Jacobs v. Holley, 3 Ill. App. 3d 762 (1972); Ill. R. Evid. 803(a); S. Ct. Rule 236(b).

Findings of Fact

Duncan Rohl (Petitioner), a 39 year old male, testified he worked as a highway maintainer for IDOT (Respondent). On May 7, 2013, he said he was blocking a road, I-80, with a TMA Crash Annenuator, a large dump truck, in connection with a traffic accident, when a semitruck him from behind. He "guessed" the semi was going 45-55 mph. Rohl at 10-14. Reports of the injury indicate there were no witnesses to the accident. Petitioner's Exhibit 2.

Petitioner testified he sought medical treatment at OSF Saint Elizabeth on the day of the accident or right after. Petitioner offered no testimony and there is nothing in any of the records about any description of a mechanism of injury about what happened to a specific part of Petitioner's body, the motion of his vehicle, or the movement of his body. The only record of any medical provider is an Initial Workers' Compensation Medical Report by a Physician Assistant, Timothy Peterson, dated May 7, 2013. He notes Petitioner was in a three ton truck and was rear ended at 35-10 mph. He noted in describing the nature and extent of the injuries, he indicated "patient without injury/illness, denies pain or other symptoms. States he feels well." This completely contradicts Petitioner's testimony that he started feeling pain in his neck or back. Peterson indicated Petitioner should follow up with his primary care physician. He was returned to work with no restrictions. A work status slip by Peterson of May 7, 2013, returned Petitioner to work without restrictions and checked "yes" on all 15 job requirement tasks. Rohl at 17; Petitioner's Exhibit 2. Petitioner testified, at the time of hearing, he was still working full duty and at no time did not work full duty. Rohl at 27. All of the records from all of the medical providers in this matter reflect Petitioner always working full duty.

The records of OSF Saint Elizabeth Medical Center are separated from disparate descriptions of other records as either from Ottawa Regional Medical Center Records, OSF Medical Group Ottawa, or OSF Glen Park, Peoria, Illinois. It appears Petitioner simply failed to attach records to its Exhibit 4, leaving it to drift in the pile of records submitted in this case. This clutter of records will be referred to as the enigma exhibit. Those records indicate Petitioner was first seen May 14, 2013, a week after the accident, by Amy Dose, a nurse practitioner. Petitioner testified and the records corroborate the fact that Dose is not a physician. Petitioner presented with back pain, saying he was rear ended May 7, 2013. Petitioner said he was able to work without any problems. Dose noted mild muscle tenderness, and no tenderness, pain or swelling in the lumbar spine. Petitioner was wondering if he should see a chiropractor. By May 20, 2013, Petitioner was seen again by Dose, whose plan was physical therapy based on a complaint of "some" back pain. Petitioner was seen on June 11, 2013, by Dose. He said he had done physical therapy and was sore. He was working full duty with no restrictions. Petitioner had an x-ray of his thoracic spine June 28, 2013, that revealed mild degenerative changes at T1 and T2. At trial, Petitioner exaggerated the findings of the x-ray. Petitioner's physical therapy notes indicate Petitioner complained of pain along his spine when riding his motorcycle. On July 18, 2013, Petitioner saw Dose, saying his pain was improving, he had completed physical therapy. A physical examination showed no tenderness in either his cervical or thoracic spine and a normal range of motion. Dose noted no other treatments were needed at the time. He continued to work full duty. Enigma Exhibit; Rohl at 17-18; Petitioner's Exhibit 3. Petitioner admitted Dose did not recommend orthopedic care. Rohl at 19-20.

The records reveal an approximately one year gap in medical treatment by Petitioner, a situation also noted by orthopedic surgeon Dr. Tom Stanley. On May 1, 2014, Petitioner saw Dose, indicating he had not seen a chiropractor and complained of mid back pain. He continued to work full duty without restrictions. Petitioner testified he had physical therapy at OSF in 2014. Those records, from May through July 2014, indicate Petitioner was working and able to perform all activities of daily living. He was working around his house, and working on his truck at home. He told therapists he was able to perform all work related activities, and all recreational activities without difficulty. He was taking motorcycle rides of over several hours, including into Wisconsin. By July 2014, he had no significant back pain. On July 17, 2014, Petitioner saw Dose. He had completed physical therapy and Dose noted nothing further could be done for Petitioner. His latest pain was not constant. Yet Petitioner saw Dose two months later, September 2, 2014, complaining of mild thoracic pain, saying he was troubled by the fact he used to be able to ride his motorcycle for long periods of time and now cannot ride longer than an hour. He said he had no work restrictions and takes some ibuprofen. In October 2014, Dose sent Petitioner for an MRI. Enigma Exhibit; Respondent's Exhibit 1; Rohl at 21; Petitioner's Exhibit 3. Petitioner offered little to no testimony on his medical treatment from the accident to well over a year afterwards.

Petitioner testified he submitted to an independent medical examination by Dr. Tom Stanley. Stanley, an orthopedic surgeon, testified he examined Petitioner October 31, 2014, and wrote a report. Stanley said he reviewed medical records, and discussed the accident with Petitioner. The report indicated a complaint of thoracic back pain running up and down the thoracic spine along the paraspinal musculature with no radiation into an extremity. Stanley

noted Petitioner worked full duty. Petitioner told him his physical therapy made no difference in his pain symptoms, and he only took ibuprofen. Stanley, alone among any medical provider or therapist so far, noted Petitioner had a tattoo that covered the majority of his thoracic spine. Stanley noted Petitioner's pain was localized from T3-T12 with no midline pain and no particular symptoms. He reviewed records of OSF from May 7, 2013, through September 4, 2014. Petitioner's testimony that he saw Dr. Stanley for less than five minutes lacks believability. Rohl at 23; Respondent's Exhibit 3; Respondent's Exhibit 1; Rohl at 23-25.

In assessing Petitioner, Stanley noted his history is consistent with thoracic strain injury. He found no objective findings on physical exam and found Petitioner was treated appropriately with physical therapy. Stanley wrote that by the record, Petitioner reached MMI July 18, 2013. He noted a ten month gap in Petitioner's subsequent reevaluation. He found Petitioner able to return to work full duty, which he had been doing since the accident, with no restrictions, and at MMI. Respondent's Exhibit 1.

Dr. Stanley testified that based on Petitioner's symptoms and the absence of objective findings of injury, Petitioner's history and examination, all of that is consistent with thoracic strain injury. He testified Petitioner's pain plateaued in July 2013, and he was not taking medication. Stanley testified thoracic strains are self limited and near resolution within a couple of months. He said Petitioner's documentation is consistent with that, two months after the initial accident pain plateaued, Petitioner was off pain medication and that was an appropriate time to say he was at MMI. That was July 18, 2013. On cross examination, Dr. Stanley testified Petitioner had an event that resulted in a strain injury that was treated appropriately and was minimally symptomatic. Petitioner had recurrent myofascial pain in that area, but given that it was ten months after the prior visit, those two were not causally related. Dr. Stanley testified that Petitioner's history, the onset of symptoms, the subsequent treatment and near resolution of the symptoms are all consistent with a thoracic strain injury. Stanley testified that in an MVA, the most common reason people have pain in their spine is from a strain injury and that is unrelated to a chronic arthritic degenerative diagnosis. Stanley testified Petitioner was in an MVA, developed pain a week later in his upper back consistent with a strain. He said the delay in the onset of symptoms is also consistent with a strain. Stanley testified Petitioner was treated appropriately with physical therapy and after two to three months was minimally symptomatic and no longer required any treatment. Dr. Stanley testified it is rare for someone to require treatment for arthritic changes in the thoracic spine. Logically, Petitioner had myofascial pain, not arthritic pain. Stanley noted that at the time of his examination, Petitioner localized his pain to the paraspinal musculature, which is consistent with myofascial pain, as opposed to arthritic upper back pain. Respondent's Exhibit 3.

Petitioner testified he asked Stanley about pain in his thumb, and Stanley told him the thumb had nothing to do with his injury. Rohl at 24. That is not true. There is nothing in the testimony of Dr. Stanley or his reports to support that claim by Petitioner.

Petitioner testified that he was referred to Dr. Eugene Becker of the IVCH Pain Clinic, and claimed Becker recommended referral to a spinal surgeon and given a consult to Resin Orthopedics. The records of Dr. Becker indicate Petitioner was seen once, March 17, 2015, almost two years after the MVA. Becker indicated Petitioner was referred by Dr. Rosborough's

office. We do not know who that is. Becker's notes indicate Petitioner was there for evaluation and treatment of pain in the thoracic spine radiating into his chest. Petitioner, though working full duty and had not missed any work, claimed pain at 10/10, that is severe pain, disabling to the point one is unable to perform the activities of daily living. Becker assessed Petitioner with degenerative disc disease thoracic spine, and recommended a Medrol dosepak. If that did not provide relief, he would consider epidural steroid injections. Becker recommended evaluation of Petitioner from a spine surgeon as to his MRI. He did not reference which MRI. At almost the same time, March 13, 2015, Petitioner saw Ami Dose. He made no mention of radiating pain. Petitioner said he had intermittent thoracic back pain. There was no mention of severe disabling pain or any interference with the activities of daily living. Rohl at 24-25; Petitioner's Exhibit 6; Enigma Exhibit.

Petitioner testified he ". . . ended up treating with Dr. Templin. . . ." Dr. Cary Templin testified he is an orthopedic surgeon, with no independent recollection of Petitioner. He referred to his notes throughout his testimony. He did not recall how he came to see Petitioner. Templin thought Petitioner saw another provider before June 29, 2015. The records of Hinsdale Orthopaedics indicate Templin first saw Petitioner June 29, 2015, over two years post accident. Petitioner told Templin he was in a car accident at work and pain began the next day. That was far different from what Petitioner told Dose and what he initially reported. Although Petitioner told Dr. Becker just a few weeks earlier that his pain was 10/10, he told Templin he had good days and bad days and no radiation of pain into his neck, lower back or down his legs. Templin, like Stanley, noted a large tattoo over Petitioner's dorsal spine. Templin indicated Petitioner had full ROM of his cervical spine and both shoulders without pain. Templin recommended an EMG. Rohl at 25; Petitioner's Exhibit 12; Petitioner's Exhibit 11.

Templin testified he believes the injuries Petitioner suffered were the result of a work injury sustained May 7, 2013, based on Petitioner's report of the onset of symptoms after the incident. He either ignored or was ignorant of Dr. Stanley's indication the symptoms began a week later, there was no radiating pain complaint until February 2016, and no treatment for 10 months. Incredibly, Templin was unaware Petitioner had an IME. Templin gave divergent testimony as to whether Petitioner was at MMI, first saying he was not, then saying he was in July 2016, then saying it was possible he had reached it before his last visit. Templin testified it was possible Petitioner had degenerative disc disease before the MVA, and possible that the problems resolved during the gap in treatment. The remainder of Templin's records indicate he simply recommended diagnostics and a follow up with a Dr. Patel. Petitioner continued to work full time. Petitioner was to see Templin as needed. He quickly lost contact with Templin. Petitioner's Exhibit 12; Petitioner's Exhibit 11.

Petitioner testified Templin referred him to Dr. Udit Patel. Patel testified his profession was "Interventional Pain." He said he ". . . did medical school training in Florida. . . ." He said he uses injections to diagnose and treat pain. His testimony largely shows he was unaware of Petitioner's prior medical treatments or diagnostics. He first saw Petitioner February 16, 2016. He offered no testimony about the mechanics of injury. By February 29, 2016, he had injected Petitioner, and indicated he would see Petitioner as needed with no follow up. Rohl at 28; Petitioner's Exhibit 8.

Yet Patel continued to see Petitioner, ultimately giving him nine injections and blocks, and two radiofrequency ablations. He last saw Petitioner June 26, 2018. Petitioner worked and told Patel he was able to work the entire time. Patel testified he did not know what Petitioner did for Respondent. He said the only records he looked at were from Dr. Templin. Petitioner's Exhibit 8.

Of note, Petitioner saw Dose March 11, 2016, during his treatment with Templin and Patel. He presented for a physical examination because of a new wellness program by his insurance company. Petitioner was assessed as a well adult exam, hypertension, hyperlipidemia impaired fasting glucose. There were no complaints or notations of neck or back pain. The remainder of Petitioner's records contain dozens and dozens of pages of irrelevant medical visits concerning strep tests, chlamydia tests, ear pain, virus coughs, poison ivy exposure, diarrhea, screening for STDs, colonoscopy, upper respiratory infections, and erectile dysfunction. The medical care to a Petitioner required to cure or relieve from the effects of an accidental injury are the only medical records that should be offered into evidence that becomes the record in a case. These records have the potential to be filed in courts across Illinois, and Petitioners are not well served when other than relevant records are simply carelessly dumped into evidence. Enigma Exhibit; Petitioner's Exhibit 13.

Petitioner testified he saw two IME doctors in the same month, Dr. Ghanayem and Dr. Stanley. That is deceptive, implying he saw them both nearly in the same timeframe. He saw Stanley in 2014 and Ghanayem in 2017. Relying on his vast medical knowledge, Petitioner testified Ghanayem "did a really thorough examination." Rohl 22, 23. Dr. Ghanayem testified he is an orthopedic spine surgeon. He "situationally" recalled performing an independent medical examination of Petitioner. Given the definition of "situationally," this makes no sense. He said he had to use his reports. He couldn't even get the date of examination right, finally settling on October 30, 2017, almost four and a half years post MVA. His "report" is curiously ensconced in the records of Loyola Hospital, which clearly treat Petitioner as a self referral patient. That was not true, given Ghanayem's "Letters signed by Ghanayem, Alexander J, MD at 11/20/17 1603," directed to Petitioner's attorney. Loyola's records also refer to and treat Petitioner as a patient, including "Instructions and Follow-Up." Loyola specifically acknowledged, as did Petitioner, he was a patient. Petitioner consented to medical treatment. This was hardly an independent medical examination, rather just another doctor in Petitioner's lengthening list of medical providers for nearly five years. Petitioner's Exhibit 10; Petitioner's Exhibit 9.

The records of Loyola Hospital indicate Ghanayem saw Petitioner only once, October 31, 2017. He testified that date was not accurate. He indicated he reviewed records and radiographs, but did not specify which ones. He testified the history he had were his own words, not Petitioner's. Reviewing the previous medical records of Petitioner casts doubt on the credibility of that history. Ghanayem noted Petitioner was working and taking no medications, and that Petitioner had degenerative changes in the cervical spine. He thought Petitioner aggravated cervical spondylosis and may have sustained disk herniation at C3-C4 from a work injury. He would not recommend surgical intervention, but intermittent pain management, may be required. Petitioner's Exhibit 9; Petitioner's Exhibit 10.

Ghanayem testified he recommended nonsurgical care because neurologically, Petitioner was without deficits and had predominantly neck pain. He said Petitioner " . . . was able to do stuff. . . ." Ghanayem said Petitioner should restrict activities based on the neck pain from central disk herniation or ongoing work activities. There is no indication Ghanayem knew what Petitioner did for Respondent, nor did he acknowledge Petitioner never complained of neck pain well into 2015. On cross examination, Ghanayem never answered the question, " . . . how can you be sure that his spondylosis aggravation is related to the May 2013 accident?" Ghanayem testified he did not think any thumb problems were related to the accident. He was asked, "Do you believe that he permanently aggravated his spondylosis as a result of the accident?" Ghanayem said, " . . . to have a definite answer, wait until he dies and ask him the day before." Ghanayem said at the time of his examination, Petitioner was functionally at MMI and did not require constant treatment. He thought an EMG Petitioner had suggesting CG radiculopathy was a fake positive. Petitioner's Exhibit 10.

Petitioner testified he still has pain in his neck and upper back and in his right thumb when it is cold. He never answered the question, " . . . tell me a little bit about your job and the tasks that are more difficult." Rohl at 36, 39, 32.

Conclusions of Law

Disputed issue **F** is, is Petitioner's current condition of ill-being causally connected to the injury sustained by Petitioner May 7, 2013. To obtain compensation under the Act, an employee must establish, by a preponderance of the evidence, a causal connection between a work related injury and the employee's condition of ill-being. Vogel v. Illinois Workers' Compensation Commission, 354 Ill. App. 3d 780, 786 (2005). In preexisting cases, recovery depends on an employee's ability to show that a work related accidental injury aggravated or accelerated a preexisting condition such that the employee's current condition of ill-being can be said to have been causally connected to the work injury, not simply the result of a normal degenerative process of the preexisting condition. Sisbro v. Industrial Commission (Rodriguez), 2007 Ill. 2d 193, 204-205 (2003).

Here, Petitioner had a preexisting condition, degenerative disk disease in the cervical and thoracic spine. Petitioner's Exhibit 10; Petitioner's Exhibit 3; Respondent's Exhibit 3; Petitioner's Exhibit 6; Petitioner's Exhibit 12; Petitioner's Exhibit 11; Petitioner's Exhibit 9; Petitioner's Exhibit 10.

What is also readily evident by a close review of Petitioner's testimony and the record is the total absence of any evidence of what, if anything, happened to Petitioner in the MVA. Did he fly forward? Was his body jarred? Was there internal collision in his body? Did his body hit anything in the vehicle? Did his head fly forward and backward? The absence of evidence on this, as well as Petitioner's denial of pain or other symptoms and saying he "feels well" in the Initial Worker's Compensation Medical Report of May 7, 2013, strongly suggest, as stated by Dr. Stanley, a minor thoracic strain injury. Both the testimony of Petitioner and his entire medical record show he never stopped working full duty without restrictions, from the date of the accident, May 7, 2013, through the date of the hearing, February 25, 2019.

I find, as a conclusion of law, Petitioner's current condition as set forth by Dr. Ghanayem as aggravated cervical spondylosis and possible disk herniation at C3-C4, Petitioner's Exhibit 9, is not causally related to the injury of May 7, 2013. At most, Petitioner suffered a thoracic strain injury that resolved by July 18, 2013.

I rely on the Initial Worker's Compensation Medical Report indicating a denial of pain and return to work full duty; the recorded records of Ami Dose of May 2013 and June through July 2013; the therapy notes of May through July 2013, and the testimony and examination of Petitioner, by Dr. Tom Stanley.

Dr. Stanley's testimony and examination are clear, direct and credible. He based his finding of thoracic strain injury on Petitioner's symptoms, the absence of objective finding of injury, Petitioner's history, and his examination. He testified that thoracic strain injury nears resolution within a couple of months and contemporaneous documentation of Petitioner is consistent with that. Two months after the accident, Petitioner's pain plateaued and he was off pain medication. MMI was July 18, 2013. Stanley testified Petitioner's myofascial pain 10 months after his last treatment was not causally related. Petitioner had sought no treatment for almost a year and worked full duty continuously.

Stanley is in a superior position to both Templin and Ghanayem because of being closer to the date of injury, his review of records and awareness of treatment not shown by Templin or Ghanayem; and explanation of his findings, clearly are without the equivocation of Ghanayem or Templin.

Disputed issue **J** is, is Respondent responsible for unpaid medical bills. 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 respondent is responsible for "Please see attached medical bills exhibit."

Petitioner's Exhibit 1 is a dog's breakfast of unidentified charts that are not at all bills or statements, unspecified balances with no dates of service, zero balance invoices, purported bills without supporting medical records, documents marked on their face "This is not a bill." It is the obligation of Petitioner to prove every element of his case. It is not the duty of an Arbitrator to cull disparate documents to cobble together a list of medical benefits due Petitioner. Petitioner fails to sustain his burden of proof.

To the extent there remain unpaid bills for medical or hospital services incurred from May 7, 2013, through July 18, 2013, those changes are specifically awarded subject to the fee schedule or negotiated rate. This award is based on reliance on the conclusions of law in disputed issue **F**.

Disputed issue **L** is, what is the nature and extent of the injury. This Arbitrator concludes Petitioner suffered a thoracic strain injury that was treated conservatively for two months. Here 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. I give this factor no weight in determining the level of disability. I note Petitioner worked full duty without restrictions since the accident.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the record indicates he was and remains a highway maintainer working full duty with no restrictions. Physical therapy records of June 26, 2014, from OSF indicate Petitioner was able to perform all work related activities and all recreational activities without difficulty. One year after the accident, May 22, 2014, physical therapy records indicate Petitioner was able to perform all activities of daily living. Because of this, 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 39 years old at the time of the accident. I note the record contains many examples of his recreational activities and hobbies, and his continuous working. Because of his relatively young age and active life, I give this factor no weight in determining the level of disability.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earning capacity, I note Petitioner misrepresents his wages from the time of the accident to the time of the hearing as the same. Upon confrontation, he testified he received one raise since the accident. That was false. He has received five increases since the accident. Petitioner's Exhibit 2. Because of this, I give no weight to this factor 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 received medical treatment from May 14, 2013, to July 18, 2013, when it was determined by Dose no other treatments were needed. I give some weight to this factor in determining the level of disability.

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

Arbitrator

5/26/2022
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MELISSA DRONE,

Petitioner,

vs. Nos. 14 WC 12757

STATE OF ILLINOIS/VIENNA CORR. CTR.,

20IWCC0725

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §8(a) and §19(h)

This matter comes before the Commission on Petitioner's §8(a) and §19(h) Petition, seeking medical benefits for treatment after arbitration and alleging a material increase in her permanent disability. On January 17, 2018, in her nature and extent decision, the Arbitrator awarded Petitioner permanent partial disability of 17.5% loss of use of the person as a whole for her right upper extremity injury and 10% loss of use of her right hand for her traumatic carpal tunnel syndrome.

Petitioner filed this Petition for Review of Prior Award and Prospective Medical Care Pursuant to §19(h) and §8(a) on October 9, 2018. A hearing was held before Commissioner Parker on July 15, 2020. Petitioner seeks medical benefits for post-arbitration treatment under §8(a) and an increase in permanent partial disability from the 17.5% loss of person as a whole to 19.5% loss of person as a whole under §19(h).

FINDINGS OF FACT

Petitioner sustained compensable injuries on October 23, 2013, when she was employed as a correctional officer at Respondent's Dixon Springs Boot Camp. An inmate who was running in front of the doorway through which she was passing collided with Petitioner. His momentum forced her right arm outward. She immediately felt pain in her right shoulder, elbow and wrist, left hip and back. Her hip and back pain resolved shortly after the accident.

Pre-Arbitration Treatment. Petitioner's primary care physician recommended conservative treatment and referred her to Dr. Treg Brown when her right shoulder, elbow and wrist pain persisted. On March 24, 2014, Dr. Brown debrided a partial thickness tear of the posterior aspect of the supraspinatus tendon and shaved the adhesive capsulitis. When Petitioner continued to have shoulder and elbow pain after therapy and restricted duty, Dr. Brown referred her to Dr. Steve Young, who diagnosed right carpal tunnel syndrome, right cubital tunnel syndrome, and right medial epicondylitis. Dr. Young recommended a right medial epicondylar release.

Before undergoing another surgery, on December 3, 2014, Petitioner sought a second opinion from Dr. George Paletta, who diagnosed medial and lateral epicondylitis and a focal full-thickness rotator cuff tear. Dr. Paletta performed a biceps tenotomy, tenodesis, and debridement of the rotator cuff tear and subacromial space on April 7, 2015.

Dr. Paletta continued to monitor Petitioner's condition and prescribed opioid analgesics, but Petitioner complained of pain at nine out of 10. She had diminished grip strength and altered sensation over some of her fingertips. Dr. Paletta referred Petitioner to Dr. Phillips for electrodiagnostic studies. Dr. Phillips diagnosed musculocutaneous neuropathy and prescribed Lyrica for the associated pain. Dr. Paletta also referred Petitioner to Dr. Helen Blake, an anesthesiologist and pain management physician at Pain & Rehabilitation Specialists of St. Louis, for persistent post-operative pain that was limiting her ability to function and perform her job.

Dr. Blake evaluated Petitioner on January 14, 2016 and found she was having severe pain in the anterior aspect of her right arm that radiated through her upper extremity and caused her to have numbness, burning and tingling. PX6, p. 8. Dr. Blake ruled out complex regional pain syndrome and diagnosed her with chronic post-operative neuropathic pain, which she treated with an increase in Petitioner's Lyrica dosage.

With the increased dosage of Lyrica, Petitioner's pain improved from eight out of ten to four out of ten. Dr. Blake added lidocaine cream, an anesthetic, applied to the arm for localized pain in the front of her shoulder. On September 1, 2016, Dr. Blake found Petitioner at maximum medical improvement.

In September of 2016, Petitioner reported to Dr. Blake that she could not obtain a refill of her anesthetic cream because Respondent would not approve it. This created a significant increase in her nerve pain and worsened her symptoms, impacting her ability to perform her job. Dr. Blake prescribed a menthol cream to augment Lyrica's effect. The following year, Petitioner was taking Lyrica and applying the compounded pain cream, which provided relatively good pain relief. On May 4, 2017, Petitioner asked if pain patches were available, since she was returning to work and was afraid the compounded pain cream would rub off. Dr. Blake suggested a LidoPro patch and the pain cream, patch, and Lyrica worked to keep Petitioner's pain level around four out of 10 at the time of her hearing.

Prior to arbitration, Petitioner was transferred to Respondent's Vienna correctional facility and promoted to supply supervisor. In that position, she is required to repeatedly lift and carry boxes of food and drink for the facility. Despite her pain, diminished strength, and restricted range of motion in her right upper extremity, Petitioner has continued to perform her job for Respondent.

Arbitration. At the time of Petitioner's arbitration hearing on July 12, 2017, she continued to rely on the medications prescribed by Dr. Blake. She testified that she was taking Lyrica three times a day, uses Lidocaine topical cream for the tips of her fingers, and pain patches under her arm for the musculocutaneous nerve. She had difficulty reaching overhead, and despite the use of topical cream and Lyrica, she had elbow pain with activity and constant numbness and tingling in the fingertips of her right hand.

The sole issue at arbitration was nature and extent. The Arbitrator found that Petitioner's complaints were corroborated by the medical records and awarded her 17.5% loss of the person as a whole and 10% loss of use of the right hand.

Post-Arbitration Treatment. Since the Arbitrator's Decision issued on January 17, 2018, Dr. Blake has continued to monitor Petitioner's status and renew her prescriptions for Lyrica, the compounded pain cream, and the pain LidoPro patch.

On September 5, 2018, Respondent obtained a record review from Dr. Richard Katz, a physiatrist. He found that Petitioner was doing very well controlling her pain but he could not provide an opinion on the necessity of further care without examining Petitioner. He did offer an opinion as to the cost of her current pain prescriptions from Dr. Blake. He found Lyrica was "expensive, yet no better than generic gabapentin," and compounded medicines were "relatively unproven" and "ridiculously expensive."

Dr. Blake reviewed Dr. Katz's opinion regarding Lyrica and compound creams and testified in her deposition on November 18, 2019 that Petitioner had tried gabapentin and numerous other medications with no significant benefit. Dr. Blake maintained that compounded creams can be highly effective, especially at diminishing other medication use and allowing patients to avoid taking high doses of narcotic pain medications. Dr. Blake explained that a patient's reaction to any drug is highly individual, and when Respondent refused to approve her prescribed medications, Petitioner had experienced a significant increase in symptoms that impacted her ability to perform her job. Dr. Blake recognized that Petitioner might require ongoing medication management for the rest of her life.

Dr. Katz authored a supplemental report on January 30, 2020, again challenging Dr. Blake's recommendation of compounded pain creams. On April 30, 2020, Dr. Katz testified via deposition there are now reasonably priced generic versions available for the prescribed Lyrica or Lidocaine patches. However, Dr. Katz continued to challenge Dr. Blake's recommendation of compounded creams and cited to articles finding compounded creams as "no more effective than a placebo," although he admitted that the journals publishing these articles were not authoritative. Dr. Katz also conceded that his own practice was limited to physical rehabilitation or physiatry; he was not board certified in anesthesiology or pain management. He agreed with Dr. Blake that Petitioner's neuropathic pain was chronic and he did not expect her condition to change. He agreed with Dr. Blake's recommendations for pain medications with the exception of the compounded creams, which he felt were too expensive and of unproven efficacy. He agreed that chronic pain is more subjective than objective and that the topical cream prescribed by Dr. Blake was widely used

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in the anesthesiology pain community. Additionally, Dr. Katz admitted that he was not even aware of the ingredient formula prescribed by Dr. Blake.

Petitioner testified at the review hearing that she had filed a Petition for Review pursuant to Section 8(a) because Respondent stopped paying for some of her prescription medications. Her complaints were similar to those made at Arbitration. However, Respondent switched Petitioner's Lyrica prescription to one for generic gabapentin for four or five months in 2019. Petitioner testified that the gabapentin failed to provide her with the same relief as the name brand product. Dr. Blake revised the prescription to require the name brand medication, and Petitioner was responding well, as Lyrica continued to relieve her symptoms as before the substitution.

Respondent is also denying payment for the compounded cream prescribed by Dr. Blake, arguing that it is not reasonable and necessary to alleviate Petitioner's work-related chronic pain. Respondent bases its denial of benefits on Dr. Katz's cost/benefit analysis, in which Dr. Katz concludes that the cost of compounded cream is extremely high, while the benefit is unproven.

CONCLUSIONS OF LAW

Section 8(a)

Pursuant to §8(a) of the Act, Petitioner is entitled to any and all necessary care to cure or relieve the effects of her work-related injuries. 820 ILCS 305/8(a). Upon establishment of a causal nexus between the injury and Petitioner's current condition of ill-being, Respondent is liable for all medical care reasonably required in order to diagnose, relieve, or cure the effects of her work injuries. *Plantation Mfg. Co. v. Industrial Comm'n,* 294 Ill. App. 3d 705, 709 (2d Dist. 1997). An employer's liability for medical services under §8(a) of the Act is continuous so long as it as the services are required to relieve the injured employee from the effects of the injury. *Efengee Elec. Supply Co. v. Industrial Comm'n,* 36 Ill. 2d 450, 453 (1967).

Petitioner argues that she relies on the drugs prescribed by Dr. Blake to allow her to function without the heavy use of narcotics. The State does not dispute that Petitioner's current condition is causally related to her work accident or that it is liable for the cost of her reasonable and necessary care. Its sole argument is that the Lyrica and compounded pain cream prescribed by Dr. Blake are not reasonable and necessary. According to Dr. Katz, the cost of these medications is too high given the level of benefit, and Petitioner must use generics when available. Petitioner responds that these medications work for her and allow her to function at a higher level than she might otherwise reach. Substituting generic gabapentin for the Lyrica resulted in increased symptoms, which improved only after Petitioner was able to continue receiving the prescribed Lyrica.

Petitioner testified and Dr. Blake confirmed that she achieved good pain control with the mixture of creams and oral medications she prescribed, including the disputed Lyrica and compounded pain cream. Dr. Katz admitted that he did not know the formula for the pain cream prescribed, so his objections to the efficacy of the cream, including his citations to non-authoritative literature, are not persuasive. Petitioner's clear and credible testimony that the Lyrica prescribed by Dr. Blake performed better than the generic gabapentin substituted by Respondent

is unrebutted. Dr. Blake testified that the medications she chose were selected for their efficacy in Petitioner's individual case. Petitioner achieved the most successful reduction in pain by employing the combination of Lyrica, compounded pain cream, and pain patches, which allowed her to continue working for Respondent despite her injuries.

Further, the record contains no evidence that Petitioner has been involved in any post-arbitration accidents. Therefore, the Commission finds that Petitioner continues to suffer from the ill effects of her work injury and that her pain management treatment by Dr. Blake is reasonable and necessary to relieve her from the effects of her work injury. The Commission therefore grants Petitioner's §8(a) petition with regard to her post-arbitration medical expenses and awards Petitioner the treatment recommended by Dr. Blake, pursuant to §8(a) and §8.2 of the Act.

Section 19(h)

Petitioner also seeks relief under §19(h) of the Act for her alleged increase of 2% loss of use of the person as a whole. (Petitioner does not seek an increase in the permanency awarded for her right-hand injury.) Pursuant to §19(h) of the Act, at any time within 30 months of any award providing for compensation in installments, the Commission may review the reward at the request of either party on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended. 820 ILCS 305/19(h). To obtain an increase in the permanent partial disability award under §19(h), Petitioner must show that the disability at the time of her initial hearing has increased and the increase must be material. *Gay v. Industrial Comm'n,* 178 Ill. App. 3d 129, 132 (1989); *Motor Wheel Corp. v. Industrial Comm'n,* 75 Ill. 2d 230, 236 (1979). Section 19(h) seeks to redress changes in circumstances after the entry of an award and is particularly remedial in nature. It should be construed liberally so as to allow review of alleged changes in circumstances. *Hardin Sign Co. v. Industrial Comm'n,* 154 Ill. App. 3d 386, 389-90 (1987). In order to determine whether Petitioner's condition materially deteriorated from the time of the Arbitrator's award to the present, it is necessary to compare her conditions at the two relevant times. *Howard v. Industrial Comm'n,* 89 Ill. 2d 428, 430-31 (1982).

The Arbitrator's Decision issued on January 17, 2018. Petitioner timely filed her Petition for Review on November 7, 2018, within 30 months of the award. Thus, the Commission has jurisdiction to consider Petitioner's Petition for Review under §19(h).

At the time of arbitration, Petitioner testified to weakness in her dominant right upper extremity, elbow pain with increased activity, and numbness and tingling in her right-hand fingertips. She also complained of pain and tenderness where the button was placed for the biceps tenodesis. She testified that although Dr. Blake's medication regimen alleviated some of the symptoms, she continued to suffer these at the time of hearing and required the addition of over-the-counter pain medications.

At the time of the review hearing, Petitioner testified that after arbitration she continued to experience constant pain and numbness, tingling and decreased sensation in her fingertips, and tenderness of the nerve running under her arm through her shoulder. She had a "dead spot" in her forearm that was de-innervated at the time of arbitration but had since then resolved and recovered.

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The Commission notes that in her Decision in 14 WC 012757, the Arbitrator set forth facts relevant to a determination of permanent partial disability, as required by §8.1b(b) of the Act. In order to prove that Petitioner's permanent partial disability at the time of the review hearing had materially increased so as to justify an increase in the permanency awarded by the Arbitrator, the Commission must consider the same factors.

(i) Disability impairment rating: *no weight.* Neither party presented an AMA impairment rating at the time of this review.

(ii) Employee's occupation: *significant weight,* because Petitioner continued to work as a supply supervisor, which required lifting boxes of food to place on shelving.

(iii) Employee's age: *some weight,* because Petitioner is continuing to work despite her pain and numbness complaints and continues to require treatment of pain medications.

(iv) Future earning capacity: *no weight,* because no evidence was presented that Petitioner's injury had affected her future earning capacity. She continued to work as supply supervisor for the State at the time of the review hearing.

(v) Evidence of disability corroborated by the treating records: *significant weight.* Petitioner's complaints regarding her condition are similar to those at arbitration. Petitioner continues to improve now that she is again taking Lyrica.

After applying the relevant factors as discussed above and after comparing Petitioner's subjective complaints at the time of both the arbitration and review hearing, the Commission finds that Petitioner's disability has not materially increased since arbitration. She remains disabled to the extent of 17.5% loss of the person as a whole and 10% loss of use of the right hand.

The Commission, therefore, denies Petitioner's §19(h) petition.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §8(a) Petition for additional medical benefits, as documented in Petitioner's Exhibit 3 and as recommended by Dr. Helen Blake, is granted, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's §19(h) Petition for increased permanency is denied.

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.

20IWCC0725

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: DEC 8 - 2020

r-7/15/20
mp/dak
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

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

Broderick Hawkins,

Petitioner,

vs. No. 13 WC 25715

20IWCC0726

City of East St. Louis,

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §19(h) and §8(a)

This matter comes before the Commission on Petitioner's §19(h) and §8(a) Petitions, seeking additional medical expenses, prospective medical care and additional permanent partial disability benefits for his low back condition, allegedly due to a material increase in his disability since the Arbitrator's January 6, 2017 decision. In that decision, the Arbitrator awarded Petitioner his reasonable and necessary medical expenses through the date of arbitration, plus permanent partial disability of 20% person as a whole under §8(d)2 of the Act. On December 10, 2018, Petitioner filed a timely Petition for Review of Prior Award and Prospective Medical Care pursuant to §19(h) and §8(a) of the Act. A hearing on those Petitions was held before Commissioner Parker on August 13, 2020. At the hearing, the parties stipulated that the only remaining issue to be decided was to what extent the Petitioner's disability increased. Respondent suggests a 5% increase while Petitioner now seeks a 17.5% person as a whole increase in his permanent partial disability under §19(h), from 20% to 37.5% person as a whole.

Findings of Fact:

At the time of his original accident on May 25, 2013, Petitioner was a captain in the East St. Louis Fire Department. On that day, he sustained injury to his low back while riding in a

vehicle en route to a fire, and then sustained further injury to his low back when he fell through a hole in the burning building. Although Petitioner had a history of prior lumbar degenerative disc disease, he was able to perform the heavy work of a firefighter without restrictions prior to his accident.

Following his accident, Petitioner experienced low back pain; and weakness, numbness and tingling in his bilateral lower extremities. A November 25, 2014 lumbar MRI revealed disc protrusions at L4-5 and L5-S1, stenosis and multilevel foraminal narrowing. On March 7, 2015, Dr. Young performed an interlaminar decompression at L3-4 and L4-5. However, following that surgery, Petitioner continued to experience tingling, paresthesias and weakness in his left leg, and radicular symptoms in his right leg. Petitioner then saw Dr. Hurford, who administered nerve root and epidural steroid injections. Petitioner participated in physical therapy and work conditioning through April 1, 2016, and his condition improved. On April 20, 2016, he underwent a Fit for Duty/FCE, at which he was found capable of returning to work at a very heavy level. Petitioner returned to work at his prior position without restrictions.

At the April 18, 2016 arbitration hearing, Petitioner testified that he continued to have symptoms of sciatic nerve pain from his back down the right leg to his big toe. Prolonged walking and standing made it worse. When he lifted heavy objects, he experienced tingling in his back and sciatic nerve pain. He did not sleep well due to his pain.

At the August 13, 2020 §19(h)/8(a) hearing on Petitioner's Petition for Review, Petitioner testified that since the arbitration hearing, he continued to work as a fire captain until April 3, 2017, when he retired from the Fire Department. His low back pain increased, and he returned to Dr. Heaney, his primary care physician. Dr. Heaney documented that Petitioner's sciatica was worsening, and sent him for physical therapy, which did not provide much relief. On October 29, 2018 Petitioner returned to Dr. Hurford, his prior pain management physician, and was treated with lumbar injections. Those also provided only temporary relief. Dr. Hurford diagnosed Petitioner with lumbar radiculopathy, spinal stenosis and neurogenic claudication. Petitioner testified that at that time, the nerve pain down his right leg had become excruciating. He was referred to orthopedic surgeon, Dr. Rutz, who recommended another lumbar surgery.

On February 7, 2020, Dr. Rutz performed revision decompressions and fusions at L3-4 and L4-5, along with a right L5-S1 microdiscectomy. That surgery significantly improved Petitioner's symptoms. On May 26, 2020, Dr. Rutz reported that while Petitioner's back was achy at times, he rarely had pain in his right leg, and overall he looked good. At that time, Dr. Rutz released Petitioner from care with no permanent restrictions.

Petitioner testified that currently, he experiences occasional numbness and soreness in his leg. His condition is now better than it was before his February 7, 2020 surgery, and that he is now able to do more than he could before it. Since retiring from the Fire Department, Petitioner has operated his own lawn service and cuts grass. His current pain is tolerable, and he manages it by taking rests and trying not to overdo it.

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Conclusions of Law:

Section 19(h) seeks to redress changes in circumstances after the entry of an award, and is particularly remedial in nature. It should be construed liberally so as to allow review of alleged changes in circumstances. *Hardin Sign Co. v. Industrial Comm'n*, 154 Ill. App. 3d 386, 389-90 (1987). To obtain an increase in the permanent partial disability award under §19(h), Petitioner herein must show that his disability at the time of his initial arbitration hearing on April 18, 2016, had increased by the August 13, 2020 review hearing, and that that increase was material. *Gay v. Industrial Comm'n,* 178 Ill. App 3d 129, 132 (1989); *Motor Wheel Corp. v. Industrial Comm'n*, 75 Ill. 2d 230, 236 (1979). In order to determine whether Petitioner's condition materially deteriorated from the time of the Arbitrator's award to the present, it is necessary to compare his condition at those two relevant times. *Howard v. Industrial Comm'n,* 89 Ill. 2d 428, 430-31 (1982).

Regarding Petitioner's §19(h) Petition, the Commission notes that the Arbitrator, in his January 6, 2017 decision, set forth facts relevant to a determination of permanent partial disability as required by §8.1b(b) of the Act. The Commission now considers those same factors in order to determine whether Petitioner's permanent partial disability had materially increased enough to justify an increase in the permanency awarded by the Arbitrator. The Commission assigns the following weights to these factors:

(i) **Disability impairment rating:** *no weight,* because neither party submitted an impairment rating.

(ii) **Employee's occupation:** *no weight,* because Petitioner is currently retired from his prior occupation, and has acknowledged that that no weight should be given to this factor.

(iii) **Employee's age:** *some weight,* because Petitioner was 51 years old at the time of his original injury and will have to deal with the effects of his injuries and surgeries for several more years.

(iv) **Future earning capacity:** *no weight,* because Petitioner presented no evidence of any decrease in earning capacity, and has acknowledged that no weight should be given to this factor.

(v) **Evidence of disability corroborated by the treating records:** *significant weight,* because Petitioner's low back condition continued to worsen after the Arbitration hearing. He resumed treatment with his primary care physician and a pain management physician, before having to undergo a second lumbar surgery on February 7, 2020. Petitioner underwent revision decompressions and fusions at the L3-4 and L4-5 levels and a microdiscectomy at L5-S1. Petitioner made a good

recovery following that procedure, but still experiences occasional numbness and soreness in his leg.

Based upon the above factors and the record as a whole, the Commission concludes that Petitioner has proved a material increase in his disability, pursuant to §19(h), in the amount of 12.5% person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §19(h) Petition is granted to the extent discussed above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $708.00 per week for a period of 62.5 weeks, as provided in §19(h) of the Act, for the reason that Petitioner sustained a material increase in his permanent disability to the extent of 12.5% loss of the person as a whole. As a result of his work-related accident, Petitioner is now permanently disabled to the extent of 32.5% person as a whole under §8(d)2 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.

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

DATED: DEC 8 - 2020
r-08/13/20
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

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

Yvette Chandler

Petitioner,

20IWCC0727

vs. NO. 12WC035802

Impaq Security Solutions and the Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund,

Respondents.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 19, 2019 is hereby affirmed and adopted.

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: DEC 10 2020
SJM/sj
o-11/18/20
44

Stephen J. Mathis

Douglas D. McCarthy

L. Elizabeth Coppoletti

20IWCC0727

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

Yvette Chandler Case # **12** WC **35802**
Employee/Petitioner

v.

IMPAQ Security Solutions, and the Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **06/19/19** . 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 **Is respondent IWBF liable? Was notice proper?**

FINDINGS

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner lacked credibility as to certain issues and failed to prove she was working for Impaq Security Solutions as of the claimed assault of September 16, 2012. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues. The Injured Workers' Benefit Fund is not implicated as the Arbitrator makes no award.

ORDER

See above and the attached decision. 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.

Molly C Mason

Signature of Arbitrator

7/18/19
Date

JUL 19 2019

Yvette Chandler v. Impaq Security Solutions and Injured Workers' Benefit Fund
12 WC 35802

20IWCC0727

Background/Summary of Disputed Issues

Petitioner testified she worked as a security guard for seventeen years before her alleged accident of September 16, 2012. She identified Loss Prevention as the first company that employed her as a security guard. She testified she began working as a security supervisor for the named respondent, Impaq Security Solutions, about three years prior to her alleged accident of September 16, 2012. T. 68-69. She claimed to have received paychecks and W2 forms from Impaq during those three years but did not produce any of these documents. She worked the night shift at a senior living facility. She testified she was at her post at about 7:30 AM on Sunday, September 16, 2012, accompanied by an elderly resident who was waiting for a ride, when she observed a male individual outside the facility. She testified that any visitor would typically have had to be "buzzed in" through electric doors but, on September 16, 2012, the doors were broken. The male individual realized this when he touched the door handle. He proceeded to enter the facility. Petitioner testified she jumped up after observing this and asked the individual for identification. The individual retrieved his wallet but then unexpectedly struck her in the mouth, using brass knuckles. She testified she was initially pushed back into a corner but then moved forward "like a spring," landing on her knees and wrists. T. 33. She spat out several upper teeth. Three of her bottom teeth were pushed in. The assailant left the facility. Police officers arrived. Petitioner was transported to the Emergency Room at St. Bernard Hospital. The Emergency Room records identify Loss Prevention, not Impaq Security Solutions, as Petitioner's employer.

Petitioner subsequently underwent dental treatment as well as care for claimed back, left knee and bilateral wrist injuries and posttraumatic stress disorder.

Petitioner's original Application, filed on October 15, 2012, names Impaq Security Solutions as the sole respondent. In May 2013, Petitioner filed an Amended Application naming the Injured Benefit Workers' Fund as an additional respondent. Petitioner never named Loss Prevention as a respondent and did not address the discrepancy at any point.

No representative of Impaq Security Solutions appeared at the hearing. Petitioner's counsel introduced evidence indicating he attempted, via certified mail, to provide Impaq Security Solutions with notice of a previously scheduled hearing (PX 4) and notice of the June 19, 2019 hearing (PX 22). He also established, via NCCI records and an affidavit, that, while Impaq Security Solutions purchased a workers' compensation insurance policy from Zurich on October 4, 2011, Zurich cancelled that policy due to non-payment of the premium on November 22, 2011 and there was no evidence of coverage as of September 16, 2012. PX 2-3. The Fund did not object to any of Petitioner's exhibits. T. 7-13.

All issues other than penalties and fees are in dispute. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified she was born on March 4, 1960. T. 18. As of the hearing, she was 59 years old. T. 18-19. She graduated from high school and attended Daley College for two years. She worked for Public Aid between 1998 and 1999 and then embarked on a 17-year career as a security guard. Loss

Prevention was the first company that employed her as a security guard. She later worked for an offshoot of that company before starting to work for Impaq Security Solutions in August 2009. T. 68-69.

Petitioner testified that, prior to September 16, 2012, Impaq Security Solutions maintained an office at 180th and Torrence. T. 19. She did not work at the office. During her entire tenure with Impaq, she worked the night shift, from 1 AM to 9 AM (T. 23), at a senior living facility known as "Fellowship." This facility was located at 50th and Princeton in Chicago. T. 20.

Petitioner testified she worked 40 hours per week and earned $10 per hour as of September 16, 2012. T. 21. Impaq paid her via checks that were supposed to be issued every two weeks. The checks were not always paid timely. The checks bore the name "Impaq." Taxes were deducted from her earnings. She netted approximately $700 every two weeks. T. 21-23.

Petitioner testified her duties at "Fellowship" involved walking the building, checking the exits and completing incident reports. Before September 16, 2012, she encountered aggressive individuals at the facility on a couple of occasions. The entry was not equipped with a metal detector. T. 24. Any visitor had to check in with her. T. 24.

Petitioner testified her health was great prior to the September 16, 2012 incident. T. 25. She denied experiencing any facial injuries before that incident. Shortly before the incident, she had had two wisdom teeth pulled. T. 26.

Petitioner denied experiencing any low back injuries prior to the September 16, 2012 incident. Her knees and wrists were okay as of that incident. T. 27. She was not taking any pain medication. T. 28. Her hobbies included walking and biking. She walked to and from work each day. "Fellowship" was about seven blocks away from her home. T. 28-29. As of September 16, 2012, she lived with her daughter, son and 18-year-old grandson. T. 29.

Petitioner testified she started her shift at 1:00 AM on September 16, 2012. She performed her usual "walk down" and also checked the entrances. T. 30. She did not notice anything unusual. T. 30. At about 7:30 AM, she was sitting in the vestibule with one of the residents, an 86-year-old wheelchair-bound female who was waiting to go to church. No one else was with them. Petitioner testified she observed a male individual outside. When she first saw this individual, he was checking the residents' mailboxes. He then pushed on the handle of the door. Normally, he would have had to be buzzed in but the door was broken. T. 31. After he entered the facility, she jumped up, approached him and asked him for identification. He took his wallet out of his pocket. The next thing she knew, she was on the floor, spitting teeth out. The male individual had struck her in the mouth, using brass knuckles. She thinks she briefly lost consciousness after he hit her. T. 33. When she woke up, the elderly resident was hollering. She saw the assailant put the brass knuckles in his pocket and walk out.

Petitioner testified that, at the moment the assailant struck her, she was standing in a corner. The force of the blow was sufficient to knock her backward into the crevice. She felt an impact on her back. She then moved forward, "like a spring," ultimately landing on her hands and knees. She spat out four or five upper teeth. Three of her bottom teeth were pushed inward. Her shirt was covered in blood. T. 33.

Petitioner testified she used the house phone to contact her supervisor after the assault. No one answered. She left a message describing what had happened. T. 35. Paramedics and police officers

arrived. She told the police officers about the assault. T. 34. The paramedics packed her mouth with gauze and transported her to the Emergency Room at St. Bernard's Hospital. She waited about 1 ½ hours to be seen, only to be told that no dentist was available.

A Chicago Police Department incident report dated September 16, 2012 reflects that officers arrived at the Fellowship Manor Senior Center at 5041 South Princeton at 7:25 AM and encountered Petitioner, "who related she was on duty as a security guard for the building, heard a knock on the front door, went to the door and opened it to find an unknown offender standing there." The report reflects that Petitioner described the offender as saying nothing, striking her in the face with a closed fist and fleeing the scene on foot southbound on Princeton. The reporting officer noted that Petitioner lost teeth as a result of the assault. He described the injury as minor and the identity of the offender as "unknown." PX 7.

A Chicago Fire Department report reflects that paramedics arrived at 5041 South Princeton Avenue at 7:28 AM on September 16, 2012 and encountered Petitioner "walking at scene." The report describes Petitioner as "in mild distress with bleeding from mouth and missing 3 teeth after being punched in mouth by unknown offender trying to enter building." The report indicated that Petitioner denied losing consciousness and denied head, neck and back pain. The paramedics retrieved the missing teeth and brought them along to the hospital. The report reflects Petitioner was taken to St. Bernard Hospital. PX 8.

The Emergency Room cover sheet (PX 9) identifies Loss Prevention, 3315 S. Halsted, Chicago, as Petitioner's employer.

The Emergency Room records set forth the following history:

> "52 y/o F presents after assault from an unknown offender while working as security in a senior citizen home this morning. Pt lost three upper front teeth and has two loose teeth on the bottom. Denies LOC but did fall backwards and hit head. +HA and dizziness."

The examining physician, Dr. Dengler, noted the loss of three upper teeth, including the central incisors and one lateral canine tooth. He also noted that the two central lower incisors were loose. He indicated that Petitioner needed an oral surgery evaluation. A separate patient record reflects that "patient was punched in face, causing oral injury and teeth loss." A facial CT scan, performed without contrast, showed some loose teeth in the midline in the mandible and other findings consistent with sinusitis.

Petitioner testified she went to Cook County Hospital three days later. She had the three damaged lower teeth pulled at the hospital.

Records in PX 10 reflect Petitioner saw Dr. Singhal, a dentist, at St. Bernard Hospital Dental Services on September 18, 2012. The records include pre-printed forms that Petitioner completed and signed that day. On one form, Petitioner indicated she "got hit in mouth by stranger while at work." On another form, she identified her employers as Impaq Security Solutions and "Sam Parr." Dr. Singhal obtained panoramic X-rays and examined Petitioner. He indicated he informed Petitioner he could not salvage her lower front teeth "as there is not enough bone support." He noted Petitioner was already taking antibiotics. He provided Petitioner with a list of dentists. PX 10.

On October 16, 2012, Petitioner filed an Application for Adjustment of Claim alleging she was injured in a battery occurring on September 16, 2012. The Application identifies Impaq Security Solutions as Petitioner's employer. PX 5. At no point during the hearing did Petitioner attempt to explain to the Arbitrator why she named Impaq Security Solutions, a company with offices on Torrence Avenue in Lansing. as the respondent when her initial Emergency Room records reflect she worked for Loss Prevention, a company located on Halsted in Chicago.

Petitioner testified she began a course of back- and knee-related care at MidCity Spine and Ortho in October 2012. A patient information sheet in the MidCity records (PX 12) reflects Petitioner reported injuring her mouth, left side and back while working on September 16, 2012. Petitioner identified her employer as: "Sam Parr (Impaq Security), 18300 South Torrence, Lansing, Illinois." Petitioner's signature and the date October 16, 2012 appear at the bottom of the sheet.

Dr. Dzielawski, a chiropractor, evaluated Petitioner on October 16, 2012. The doctor's history reflects that Petitioner reported being assaulted at 7:42 AM on Sunday, September 16, 2012, while working as a security guard for Impaq at a nursing home. Petitioner reported that a man came in off the street and punched her in the mouth, using brass knuckles. Petitioner described being unconscious for five minutes. She indicated she landed on her left hip and the left side of her back and lost seven teeth as a result of being struck. She reported having undergone Emergency Room care at St. Bernard's Hospital and subsequent dental care at Cook County. She described reporting the injury "to her supervisor, Sam Pratt." She indicated she was in good health before the assault. She complained of left hip pain and lower back pain shooting into her left lateral thigh and lower leg. She denied having low back or left hip pain before the assault. There is no indication of any knee complaints. Dr. Dzielawski ordered a lumbar spine MRI and indicated he would set Petitioner up for a pain management evaluation once the MRI results were available. PX 12.

The lumbar spine MRI, performed on September 16, 2012, showed mild lumbar spondylosis with neuroforaminal and annular disc bulging contributing to mild neuroforaminal narrowing. PX 13.

On September 24, 2012, Petitioner saw Dr. Panos, a dentist affiliated with Stroger Hospital. The doctor noted a complaint of pain associated with the lower teeth. He also noted a history of "previous trauma in which the upper teeth were avulsed and now has loose lower teeth." On examination, he noted significant mobility of tooth #23, tooth #24 and tooth #25. He indicated he presented various treatment options, with Petitioner opting for extraction of these teeth. He also extracted tooth #31, which he described as significantly decayed. PX

On November 27, 2012, Petitioner returned to MidCity and saw Dr.Ather. The doctor noted some improvement, with Petitioner rating her low back pain at 1/10 and her left hip pain at 2/10. There is no indication Petitioner voiced knee complaints. Petitioner walked on a treadmill and performed various exercises. Dr. Ather performed trigger point therapy over Petitioner's thoracic and lumbar regions. This is the last MidCity treatment note in evidence. PX 12.

On November 29, 2012, Petitioner completed a pain questionnaire at Illinois Orthopedic Network. She saw Dr. Murtaza, a physical medicine physician, the same day. The doctor recorded the following history:

> "The patient is a 52-year-old female who works as a supervisor in security. Unfortunately, on 9/6/12 [sic], the patient was attacked

> by an assailant who punched her in the mouth with brass knuckles, knocking out most of the teeth in her mouth. The patient did stumble back and fell onto her back side and has pain in her back with radicular pain going down the left lower extremity all the way down to her foot. Her pain level is currently 8/10. She has tried Vicodin for pain. She also suffers from anxiety, crying and some depression, and signs of post-traumatic stress disorder. The patient states that physical therapy is helping but she continues to have pain going down the lateral aspect of her left lower extremity."

Dr. Murtaza described Petitioner's affect as flat. He noted an antalgic gait and tenderness to palpation throughout the lower lumbar spine and left leg, with positive straight leg raising on the left. He reviewed the MRI results. He diagnosed lumbar pain, left-sided radiculopathy, facial and mouth trauma, post-traumatic stress disorder and "complaints of bilateral hand neuropathy." He recommended continued therapy, a transforaminal injection on the left at L5-S1 and a psychological evaluation. He started Petitioner on Lyrica and took her off work. PX 14.

On December 20, 2012, Dr. Murtaza noted ongoing left-sided back complaints. He also noted a complaint of bilateral hand numbness. He again recommended the L5-S1 injection. He also recommended a bilateral EMG/NCV study for the hand complaints. He continued to keep Petitioner off work. PX 14.

Dr. Arayan conducted EMG/NCV studies on January 4, 2013. In his report of that date, he recorded a history of the September 16, 2012 assault. He noted that Petitioner described being "punched in the face and knocked into a wall." He noted back pain, rated 4/10, and bilateral hand numbness, tingling and weakness. He described the EMG/NCV results as abnormal, noting "electrodiagnostic evidence of a severe right and mild left median nerve mononeuropathy suggested of carpal tunnel syndrome." He saw no evidence of a cervical spine radiculopathy. PX 16.

At the next visit, on January 10, 2013, Dr. Murtaza noted that Petitioner had undergone the recommended EMG/NCV and that this study showed severe carpal tunnel syndrome, worse on the right. He also noted some improvement of the back and radicular symptoms secondary to therapy. He again recommended the lumbar injection. He kept Petitioner off work and directed her to continue therapy for her hands as well as her back. PX 14.

On February 7, 2013, Dr. Murtaza noted that Petitioner had experienced some relief of her hand symptoms secondary to therapy. He again recommended the lumbar injection. He continued to keep Petitioner off work. PX 14.

Petitioner returned to Dr. Murtaza on February 21, 2013. She reported some improvement but continued to complain of left-sided radicular pain, down to the left foot, and "severe carpal tunnel syndrome." The doctor again recommended a back injection. He also recommended that Petitioner see a specialist for the carpal tunnel. He continued to keep Petitioner off work. PX 14.

The itemized MidCity Spine and Ortho bill reflects Petitioner continued treatment through March 19, 2013.

Petitioner testified she became very depressed after her grandmother died and her grandson was shot while standing next to her. She felt as if she did not want to go on living. Her nieces took her to the Emergency Room at St. Bernard's Hospital on March 24, 2013. She underwent a mental assessment there. The records set forth the following history:

> "According to the patient she has never been in a psychiatric hospital before or given a diagnosis or psychiatric medications. The patient reported feeling severely depressed after September 16, 2012 when a strange man came into her workplace and jumped on her, knocking out 8 of her teeth and hurting her body all over. Patient stating 'I have not been to work since this happen[ed] and now I am afraid of people and can't stop crying.'"

After a period of observation, Petitioner was transferred to Madden Mental Health Center on March 26, 2013. She applied for voluntary admission. PX 9.

The Madden Mental Health Center intake sheet reflects Petitioner reported being punched in the face at work, losing teeth and allegedly sustaining a disc herniation. The sheet also reflects that Petitioner "came to find out that her employer does not have workman's compensation." Petitioner expressed suicidal ideation and denied any past history of significant mental health issues. Her diagnoses included major depression – single episode. She was admitted and treated via therapy and medication for about three weeks. She received medication for sleep, anxiety and depression along with Tramadol for back pain. The records reflect a discharge date of April 16, 2013. The records set forth a history of the September 16, 2012 assault. They also reflect that her grandson was shot on September 12th. [The Arbitrator notes this was four days before the claimed assault.] Petitioner reported being afraid to leave her house due to fear of seeing her assailant. A handwritten note dated March 28, 2013 reflects that Petitioner had felt depressed since being assaulted while working as a security guard at a senior citizens residence. Petitioner reported losing teeth and injuring her back as a result of the assault. She also reported that, "when she contacted her employer of 4 years, there was no insurance." She indicated she was unable to work due to "workmen's comp as well as her back pain." She also described having difficulty sleeping due to "reliving her ordeal." A subsequent handwritten note reflects Petitioner was "unable to obtain workers' compensation" and did not receive a W2 form "to file for her income tax because the job she worked as a security guard closed." Petitioner reported some improvement secondary to taking Prozac. The discharge note of April 16, 2013 reflects that Petitioner "improved a great deal with time." She was given a 2-week supply of Prozac and was directed to Greater Lawn Mental Health Center for after care. PX 17.

On May 1, 2013, Petitioner saw Dr. Papiez at Stroger Hospital or another County facility. The doctor noted that Petitioner had recently been discharged from Madden. He refilled Petitioner's Clonidine and other medication. PX 11.

Petitioner returned to Dr. Murtaza on May 16, 2013 and reported having been hospitalized due to psychiatric issues. Petitioner again complained of left-sided back and leg pain as well as carpal tunnel pain. The doctor recommended a selective nerve root block at L5-S1. He continued to keep Petitioner off work. He referred Petitioner to Dr. Weisman for her carpal tunnel. PX 14.

On May 17, 2013, Petitioner filed an Amended Application for Adjustment of Claim naming the Injured Workers' Benefit Fund as an additional respondent. PX 6.

Petitioner returned to Dr. Murtaza on August 8, 2013. Petitioner reported being unable to undergo the recommended back and hand treatment. She also reported "definitely recovering" from post-traumatic stress disorder. The doctor described his examination findings as unchanged. He again recommended a lumbar injection, along with intervention for the carpal tunnel. He continued to keep Petitioner off work. PX 14.

There is no evidence indicating Petitioner returned to Dr. Murtaza after August 8, 2013.

On February 6, 2014, Petitioner saw a physician's assistant at Stroger Hospital or another County facility and requested a refill of depression medication. The assistant refilled the medication and recommended follow-up care. PX 11.

On August 25, 2014, Dr. Papiez of Stroger Hospital (or another County facility) noted that Petitioner requested a refill of depression medication and complained of left knee pain. He also noted an "alleged injury to the back in 2012 while at work." He noted no abnormalities on left knee examination. He prescribed Clonidine and ordered left knee X-rays. The X-rays showed mild osteoarthritis and no acute findings. PX 11.

On September 17, 2014, Dr. Lee Noll of Stroger Hospital (or another County facility) evaluated Petitioner for multiple problems, including depression, anxiety and left-sided radicular symptoms. She noted a history of a fall down stairs one month earlier. She prescribed Meloxicam and a lumbar CT scan. She also referred Petitioner to psychiatry. PX 11.

A lumbar spine CT scan, performed without contrast on October 2, 2014, showed left L5/S1 neural foramina stenosis with mild deformity of the exiting L5 nerve and small posterior bulges at multiple levels, with no significant deformity of the thecal sac or stenosis. PX 11.

On October 22, 2014, Petitioner saw Dr. Lee Noll at Stroger Hospital or another County facility. The doctor indicated Petitioner was there for management of low back pain, depression and other general health conditions. She noted that Petitioner described her back and left knee pain as having improved markedly since starting Meloxicam. PX 11.

On March 27, 2015, Petitioner returned to Dr. Lee Noll. The doctor noted a complaint of constant numbness in the first three fingers of both hands. She indicated that this had been "happening on and off" since Petitioner was diagnosed with carpal tunnel syndrome following an assault in 2012. She also noted that Petitioner still seldom left her house "due to fear of meeting her attacker." She recommended bilateral splints and ongoing psychiatric care. PX 11.

On April 24, 2015, Petitioner saw Dr. Bell at Stroger Hospital or another County facility. The doctor noted a complaint of bilateral knee pain. She described Petitioner as being assaulted at her job, having her teeth knocked out and being "knocked into a groove in the wall," with a resulting back injury. She administered a left knee injection and recommended therapy. PX 11.

On July 10, 2015, Petitioner saw Dr. Clar at Stroger Hospital or another County facility. Dr. Clar described Petitioner as developing "bilateral hand numbness after an assault at work as a security guard in 2012." He noted that some of Petitioner's teeth were knocked out and "she fell backwards causing back pain, chronic leg pains and eventual depression." He recommended occupational therapy. PX 11.

On July 24, 2015, Petitioner returned to Dr. Bell. The doctor again noted a chief complaint of bilateral knee pain. She indicated that the injection helped for only two weeks. On left knee examination, she noted a mild effusion, positive grind, quadriceps tenderness and medial and lateral joint line tenderness. She recommended an MRI and directed Petitioner to continue Capsaicin and Lidoderm patches. PX 11.

A left knee MRI performed at Stroger Hospital or another County facility on July 28, 2015 showed a long segment tear of the medial meniscus and a smaller, peripheral longitudinal tear of the posterior horn of the lateral meniscus, along with tricompartmental osteoarthritis and edema in the quadriceps fat pad. PX 11.

On October 9, 2015, Dr. Clar noted that Petitioner purchased wrist braces at Walgreen's and was scheduled to begin therapy at Loyola the following week. He indicated that Petitioner "developed bilateral hand numbness after an assault at work as a security guard in 2012." He described Petitioner as being knocked out and falling backward, "causing back pain, chronic leg pain and eventual depression." He recommended that Petitioner continue wearing splints at night and return in three months for consideration of a repeat EMG and possible injections. PX 11.

On October 15, 2015, Petitioner saw Dr. Bednar at Loyola secondary to bilateral hand numbness, worse on the left. Petitioner reported having undergone a nerve study two years earlier. She also reported having been given splints two weeks earlier. She described the splints as ill-fitting.

Dr. Bednar noted a history of hypothyroidism. On examination, he noted positive Tinel's signs bilaterally and positive Phalen's maneuver bilaterally. He tentatively diagnosed bilateral carpal tunnel syndrome. He prescribed EMG/NCV studies and "better-fitting splints." Petitioner received new splints the same day. PX 18.

On October 28, 2015, Petitioner saw Crystin Robbins, PA, at Loyola. She complained of left knee pain which she attributed to an altercation occurring two years earlier, while she was working as a security guard. She described twisting her left knee after being "pushed into a wall." She indicated she had previously undergone two MRI scans, with the most recent occurring on July 28, 2015. She also indicated she had undergone therapy and a cortisone injection. She denied having any knee problems before the altercation.

Robbins described Petitioner's gait as antalgic. On left knee examination, she noted a slight effusion, tenderness to palpation about the patellofemoral joints and medial joint line, pain with McMurray's testing and 5/5 strength. Straight leg raising was negative. Robbins indicated the report concerning the July 28, 2015 MRI documented tears to both medial and lateral menisci as well as changes consistent with osteoarthritis. She obtained left knee X-rays, which showed "moderate to severe arthritic changes." She recommended a repeat injection and prescribed Naproxen and therapy. PX 18.

On December 3, 2015, Petitioner returned to Loyola and saw Dr. Rees. The doctor noted a complaint of left knee pain which Petitioner attributed to "an altercation while working as a security guard on 9/16/2012." He also noted that Petitioner was relying on a cane and reported only two weeks of relief following the October 2015 repeat injection. He diagnosed osteoarthritis of the left knee. He indicated that Petitioner expressed interest in a left knee replacement and that he agreed. PX 18.

Petitioner underwent a bilateral upper extremity EMG at Loyola on December 29, 2015. Dr. Kostidis, the physician conducting the study, described Petitioner as a "55 yo [right handed] woman who worked on computers for 15 yrs." He described the results as abnormal, indicating it showed mild carpal tunnel syndrome on the left, "with purely demyelinating features," and moderate on the right. PX 18.

Petitioner returned to Dr. Clar on January 8, 2016. The doctor noted ongoing bilateral carpal tunnel syndrome symptoms following three therapy sessions. He also noted that Petitioner had undergone an EMG but "did not bring report." He administered a left carpal tunnel injection and directed Petitioner to rest, apply ice and return in three months. PX 11.

On March 18, 2016, Dr. Clar noted that Petitioner had experienced good relief of tingling and pain in her left hand and wrist since undergoing an injection in October. He also noted that the numbness persisted and that the tingling was starting to return. He described Petitioner's right-sided symptoms as very mild. He indicated that Petitioner declined a repeat injection. He recommended home exercises and bracing. PX 11.

On April 14, 2016, Dr. Lee Noll noted that Petitioner described her sciatic pain as having returned a month earlier, starting when she was vacuuming. The doctor also noted a complaint of left knee pain and swelling. She restarted Tramadol and noted Petitioner was now seeing a knee surgeon through Mount Sinai. PX 20.

Petitioner testified she underwent a left knee replacement at Mt. Sinai in 2016, after undergoing two knee injections. She denied having any knee pain prior to the assault.

Records in PX 19 reflect Petitioner was discharged from Mt. Sinai Hospital on December 23, 2016, following a left knee replacement performed on December 20, 2012. The discharge summary documents a history of chronic left knee pain "since an injury in 2012, with progressive worsening of symptoms."

Records in PX 19 reflect Petitioner was an inpatient at Schwab Rehabilitation Hospital for about a week after being discharged from Mt. Sinai Hospital. She underwent left knee therapy while an inpatient and continued attending therapy on an outpatient basis in January and February 2017.

On March 6, 2017, Dr. Lee Noll noted that Petitioner described her left knee pain as having greatly improved since the surgery. She recommended that Petitioner continue taking Tramadol as needed. PX 20.

On May 5, 2017, Dr. Lee Noll noted worsening low back pain but indicated Petitioner described her left knee as "great since surgery." PX 20.

On August 24, 2017, Petitioner underwent bilateral upper extremity EMG/NCV testing at Stroger Hospital. Dr. Saeed, the physician who performed this testing, noted a 3-year history of bilateral hand numbness, left worse than right. His note contains no mention of the September 16, 2012 assault. He described the results as abnormal and consistent with a moderate right median neuropathy at the wrist and a left ulnar neuropathy at the elbow. PX 11.

On July 5, 2018, Dr. Lee Noll noted that Petitioner felt she no longer needed Clonidine for anxiety. She quoted Petitioner as saying: "I've stopped claiming that I'm so sick." She noted a complaint of left great toe pain with extension and scar-related left knee pain. She switched Petitioner from Clonidine to Nifedipine. She ordered left knee X-rays and prescribed physical therapy. PX 20.

On December 5, 2018, Dr. Lee Noll referred Petitioner to a hand specialist and wrote a new prescription for bilateral splints. She indicated that Petitioner reported "doing well in terms of her mood." PX 20.

Petitioner testified she has not returned to work since September 16, 2012. Her doctors have kept her off work.

Petitioner testified she continues to take Prozac. T. 50, 54. Hugo Solari, who is associated with Austin Health, prescribes this medication for her. She sees Solari every two months for talk therapy. She finds this very helpful. T. 60, 67.

Petitioner testified she underwent X-rays of her left big toe in August 2018. She does not know if there is any relationship between the assault and her left big toe problems. T. 63.

Petitioner testified she previously used County Care to undergo treatment. Starting 2 ½ years ago, when she qualified for disability, she began using Humana/Medicaid. T. 64-65.

Petitioner described her hands as numb and feeling "dead." She used to enjoy drawing in coloring books, using gel pens, but her hand symptoms prevent her from doing this anymore. T. 69-70.

Petitioner testified she never obtained dentures because she does not want to have her remaining teeth pulled. Because she has so few teeth, she cannot chew properly. This causes constipation and other digestive problems. T. 70-71.

Under cross-examination, Petitioner testified a female employee of Impaq met with her in August 2009, prior to her being hired. She signed a contract with Impaq. T. 71. She learned of Impaq from a former co-worker who began working for Impaq after being fired. T. 72. She met "Mike," the owner of Impaq. She also worked as a dispatcher while performing her security guard duties. She had a radio at her desk. "Mike" acted as her supervisor. She always worked from 1 AM to 9 AM. T. 75. She clocked in and out using a computer that was on site. When Impaq hired her, she was asked where she wanted to work and she indicated she wanted to work at the "Fellowship" facility. At some subsequent points, Impaq contacted her and asked her if she wanted to work somewhere else. She could have opted to be sent to a different location but chose to stay at "Fellowship." T. 76-77. She wore a white shirt and blue pants while on duty for Impaq. She bought these items at Impaq's direction. She carried handcuffs. She had a gun but kept this in the office because "Fellowship" was classified as an "unarmed site." T. 77. She had purchased the handcuffs and gun earlier, when she worked for Loss Prevention. T. 78.

Petitioner testified that taxes were withheld from her paychecks. She received W2 forms from Impaq. She did not undergo any security guard training after Impaq hired her. She had already attended a class and passed a certification test. Impaq did not allow her to have other employment. T. 78.

Petitioner testified that her station at "Fellowship" was about 15 to 20 feet away from the doors. The doors were electric but were broken as of the September 16, 2012 assault. Normally a tenant would have had to "buzz in" a visitor. She would have been able to hear the buzzer from where she was stationed. She got to her feet after the assailant came through the doors. The assailant produced his wallet before striking her. T. 80-81.

Petitioner testified there was a phone at her work station. Impaq provided this phone. After the assault, she used this phone to try to reach Impaq but then the paramedics arrived. T. 83. Later the same day, at about 9 PM, "Mike" called her to ask if she was going to be reporting to work at 1 AM to start her shift. She mentioned the assault to "Mike" but he was already aware of it since he had gone to her work site earlier that evening and no supervisor was there. T. 84-85.

Petitioner testified she went to Impaq's office the day after the assault but the company had "closed up." She called about her paycheck but never received it. T. 86.

Petitioner testified that "Fellowship" had surveillance equipment. The assault was captured on video but she never watched the video. Her doctors did not see the video either. T. 87. Personnel at St. Bernard's gave her an "off work" slip but she never had the chance to give this document to "Mike" because Impaq closed. She was released to work with respect to her dental issues but not with respect to her back, knee or wrists. She was never released to security guard work. T. 88.

Petitioner testified she does not currently take any medication for her back or wrists. Her knees are "fine." T. 89. She takes Prozac, Trazadone and another anti-anxiety medication. She underwent a total of three back injections. She performed therapy for about three months following her knee replacement. T. 91.

On redirect, Petitioner testified that her supervisor's full name was Mike Simmons. T. 91-92.

The Fund did not call any witnesses, offer any documentary evidence or object to any of Petitioner's exhibits.

Arbitrator's Credibility Assessment and Finding of Law as to the Threshold Issue of Employment

The Arbitrator had a number of problems with Petitioner, credibility-wise. Petitioner's testimony concerning her employer, the manner in which the assailant gained access to her, the mechanism of injury and the extent of her physical injuries does not line up with the documents she offered into evidence.

Petitioner testified she worked for Loss Prevention in the remote past, when she first became a security guard. She claimed she was working for Impaq Security Solutions, a business located on Torrence Avenue in Lansing, as of September 16, 2012 but, when she went to the Emergency Room on that date, hospital personnel indicated she worked for Loss Prevention on Halsted in Chicago. Petitioner did not address this significant discrepancy at any point. She claimed that Mike Simmons owned Impaq Security Solutions, and was her supervisor as of the incident, but various documents in evidence, including forms she completed shortly after September 16, 2012, identify Sam Parr or Sam Pratt as Impaq's owner. She claimed Impaq Security Solutions issued W2 forms and paychecks printed with the name "Impaq" to her during the three years preceding September 16, 2012, but failed to offer these documents into evidence.

Petitioner testified that the man who punched her in the face on September 16, 2012 was only able to enter the facility because the doors were broken. T. 31, 81. This is a significant detail. She also let slip, however, that she "thought he was somebody," implying she, at least initially, recognized him. T. 31. The police report describes Petitioner as opening the door in response to a knock and finding the man standing there, only to have him strike her. The report contains no mention of a broken security door. Nor does it reflect that the man entered the facility.

Petitioner testified that the impact of the punch sent her backward, causing her to strike her back against a wall or corner. She further testified that she then moved forward "like a spring," landing on her hands and knees. T. 33. She claims back, left knee and bilateral wrist conditions in addition to her dental injuries and post-traumatic stress disorder. The paramedics noted that Petitioner denied head, back and neck pain. The initial Emergency Room records reflect Petitioner went backward and hit her head. Those records contain no mention of back, knee or wrist complaints. The chiropractor who evaluated Petitioner a month after the accident described her as falling backward, landing on her left hip and back. His records contain no mention of knee or wrist complaints. The first medical record to mention hand/wrist complaints is Dr. Murtaza's note of November 29, 2012. Dr. Murtaza never described Petitioner as landing on her hands and knees. An EMG report dated December 29, 2015, reflects that Petitioner attributed her hand and wrist symptoms to working on computers for fifteen years. The first medical record to mention left knee complaints is dated August 25, 2014. In her note of October 28, 2015, Crystin Robbins, a physician's assistant, described Petitioner as twisting her left knee when she struck a wall after getting hit in the face. Petitioner did not testify to twisting her knee.

The Arbitrator believes Petitioner was assaulted and struck in the mouth on September 16, 2012, with this unfortunate event resulting in the loss of teeth and post-traumatic stress disorder. The Arbitrator is unable to conclude, however, that Petitioner was working for Impaq Security Solutions, the only named employer, at the time of the assault. Emergency Room records generated on the day of the assault identify Petitioner's employer as Loss Prevention, a company located on Halsted in Chicago. Petitioner testified she worked for Loss Prevention long ago, at the beginning of her 17-year security career, and then worked for an offshoot of Loss Prevention before being hired by Impaq Security Solutions in August 2009. She also testified that the office of Impaq Security Solutions was on Torrence in Lansing. The individual she identified as the owner of Impaq Security Solutions is not the individual she identified in paperwork she completed shortly after the assault. She maintained that Impaq Security Solutions issued paychecks and W2 forms to her between August 2009 and the assault but she offered none of these documents into evidence.

Petitioner failed to meet her burden of proving that the named respondent, Impaq Security Solutions, was her employer as of the assault. The Arbitrator declines to find in Petitioner's favor on the threshold issue of employment. The Arbitrator views the other disputed issues as moot and makes no findings as to those issues. Compensation is denied. The Injured Workers' Benefit Fund is not implicated as the Arbitrator makes no award.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GONZALO TENORIO,

Petitioner,

vs. NO: 19 WC 2661

XPO LOGISTICS,

Respondent.

20IWCC0728

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Order section of the Arbitrator's Decision with respect to the period of temporary total disability (TTD) benefits. The Arbitrator had indicated December 14, 2018 as the start date of TTD benefits. However, the evidence demonstrated that Dr. Parreno first ordered Petitioner off work on December 4, 2018. Accordingly, the Commission modifies the period of TTD benefits, and finds that Petitioner is entitled to TTD benefits from December 4, 2018 through January 13, 2019, and from July 14, 2019 through October 28, 2019.

The Commission further modifies the credit due Respondent. The parties stipulated that Respondent was due credit for medical bills, TTD benefits, temporary partial disability (TPD) benefits, non-occupational indemnity disability benefits, and a permanent partial disability (PPD) advance previously paid. Respondent provided evidence for the requested credit in its Exhibits 5-

7; the total credit due is $35,063.62. The Commission modifies the amount of credit due to Respondent to $35,063.62.

The Commission additionally modifies the Arbitrator's award for medical bills. The Commission notes that Petitioner requested payment of outstanding medical bills in the amount of $6,845.13. This amount included Dr. Parreno's charges of $314.13. However, Petitioner's Exhibit 1, Dr. Parreno's itemized statement, showed no outstanding balance due. Respondent's Exhibit 6 demonstrated that it paid the charges listed on Dr. Parreno's statement. Therefore, the Commission modifies and reduces the award of medical bills to $6,531.00 as evidenced by the record.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed February 5, 2020, is hereby modified, as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to the prospective medical care as recommended by Dr. Goldberg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $6,531.00, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary partial disability benefits of $405.20/week for 25 6/7 weeks, commencing January 14, 2019 through July 13, 2019, as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $971.99/week for 21 1/7 weeks, commencing December 4, 2018 through January 13, 2019, and from July 14, 2019 through October 28, 2019, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $35,063.62 for medical bills, temporary total disability benefits, temporary partial disability benefits, non-occupational indemnity disability benefits, and a permanent partial disability advance previously paid 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.

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.

20IWCC0728

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: DEC 11 2020

D. Douglas McCarthy

Stephen J. Mathis

L. Elizabeth Coppoletti

DDM/pm
O: 11/18/2020
052

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

TENORIO, GONZALO
Employee/Petitioner

Case# **19WC002661**

XPO LOGISTICS INC
Employer/Respondent

20IWCC0728

On 2/5/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 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:

0013 DUDLEY & SCHLAX LLC
PETER M SCHLAX
325 N MILWAUKEE AVE SUITE 202
CHICAGO, IL 60648

0507 RUSIN & MACIOROWSKI LTD
GLENN BLACKMON
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Gonzalo Tenorio
Employee/Petitioner

v.

XPO Logistics, Inc.
Employer/Respondent

Case # **19** WC **2661**

Consolidated cases: _____

20IWCC0728

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub**, Arbitrator of the Commission, in the city of **Waukegan**, on **10/28/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **12/3/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$75,814.96**; the average weekly wage was **$1,457.98**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **2** dependent children.

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

ORDER

Credits

Respondent shall be given a credit of $23,272.42 for temporary total, temporary partial, non-occupational benefits, PPD advances, and medical bills that have been paid – per Petitioner's attorney's oral stipulation on the record.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $6,845.13, as provided in Section 8(a) and 8.2 of the Act.

Temporary Partial Disability

Respondent shall pay Petitioner temporary partial disability benefits of $405.20/week for 26 weeks, commencing 1/14/19 through 7/13/19, as provided in Section 8(a) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $971.99/week for 21 2/7 weeks, commencing 12/14/18 through 1/13/19 and 7/14/19 thru 10/28/19, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total and temporary partial disability benefits that have accrued from 12/3/18 through 10/28/19, and shall pay the remainder of the award, if any, in weekly payments.

Prospective Medical Benefits

Respondent shall pay for the reasonable/related medical expenses attendant to Dr. Goldberg's proposed spine surgery per the Medical Fee Schedule.

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

February 4, 2020
Date

ICArbDec19(b)

FEB 5 - 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION

GONZALO TENORIO, Petitioner, v. XPO LOGISTICS, INC., Respondent.	)	Case Number: 19 WC 2661

20IWCC0728

PETITIONER'S PROPOSED FINDINGS OF ARBITRATOR

I. STATEMENT OF FACTS

Petitioner's Stipulation Regarding Respondent's Credit

At the outset of the hearing, Petitioner's attorney stipulated that Respondent is entitled to a credit for any payments hereinafter proven to have been made by way of medical expense, TTD, TPD, employer provide short term disability and any PPD advances paid in lieu of disputed TTD. (Trans. p. 5-6).

Petitioner's Testimony

Petitioner testified he was a seven year employed truck driver with Respondent. (Trans. pp. 10-11). His duties included making deliveries which occasionally required unloading. (Trans. p. 11).

Petitioner had undergone the previous low back fusion performed by Dr. Edward Goldberg in 2005 following a back injury. He improved with the surgery and was released without any type of restriction whatsoever by Dr. Goldberg on April 23, 2007. (Trans. p. 12). Petitioner testified that during the seven years of his employment with Respondent, he did not experience any level of back pain which inhibited him from fulfilling his job duties. (Trans. pp. 12-13). These job duties included loading and unloading trucks requiring him to lift, push, pull and carry weights ranging from 10 to 2000 pounds. Heavy loads would be moved with the aid of manual and, more recently, electric pallet

jacks. (Trans. pp. 13-14). He reiterated that during the seven years of his employment with Respondent, he was able to fulfill of these job duties. (Trans. p. 14).

Petitioner testified that on December 3, 2018, he was required to move, with the aid of a manual pallet jack, a large hydraulic car lift which was strapped to a metal pallet weighing 1,800 pounds. (Trans. pp. 15-17). Because of the size and length of the machine, he was required to alternatively push and pull the pallet in order to move it from its diagonal position in the truck back to the lift gate. (Trans. pp. 15-17). Petitioner testified that after approximately 5 minutes of pushing and pulling, he felt a sudden sharp pain in his lower back. He felt pain and tingling in his left leg which particularly concerned him. (Trans. p. 17).

Petitioner reported the incident to his boss, Josh, via cell phone, (Trans. pp. 18-19) and then reported the incident and injury to the company nurse who advised him to be seen by a doctor. (Trans. pp. 20-23).

Petitioner scheduled an appointment the next day, December 4, 2018, to be seen by his family physician of three years, Dr. Parreno. An MRI was ordered after which he was referred by Dr. Parreno to the care of Dr. Arbor for injections. (Trans. pp. 23-24). Petitioner experienced only temporary relief with injections and physical therapy and thereafter was referred by Dr. Parreno and Dr. Arbor back to the care of Dr. Goldberg. (Trans. p. 25). An additional injection was performed without significant lasting relief and thereafter Dr. Goldberg recommended surgery. (Tran. Pp. 25-27).

Petitioner testified currently he has daily constant pain of variable intensity in his low back. He also continues to experience daily leg pain and weekly tingling in his leg. (Trans. p. 27). Petitioner testified that he wishes to proceed with the recommended surgery. (Trans. p. 28).

Petitioner testified that Dr. Parreno restricted him from working from December 4, 2018 through January 13, 2019. Dr. Arbor released Petitioner to return to work light duty between January 14, 2019 and July 13, 2019. During this time, he received both regular pay and temporary partial

disability payments until being advised by Respondent on July 14, 2019 that light duty would no longer be available. (Trans. pp. 28-29).

Petitioner was thereafter evaluated at the request of Respondent by Dr. Wehner following which an EMG was obtained. Following the EMG, Dr. Goldberg persisted in his recommendation that Petitioner undergo surgery. (Trans. pp. 29-30).

On cross examination, Petitioner testified his injury occurred between 11:00 and 11:15, was unwitnessed and that the was able to finish his shift, dropping off 16 pallets at Sterigenics before completing three pick ups and returning to the terminal. (Trans. pp. 31-32). He stated that at each of these drop offs and pick ups the actual loading and unloading was performed by personnel at these locations rather than by himself. (Trans. p. 33). He acknowledged having an accident on October 28, 2017 and that his 2005 back surgery followed a work accident which occurred in 2004 while employed at LTD Commodities. (Trans. pp. 34-35). He treated at at that time with a number of different medical providers before Dr. Goldberg ultimately performed fusion surgery in 2005. (Trans. p. 36).

He admitted to post-surgical pain in both his back and leg which was ultimately resolved after physical therapy. (Trans. pp. 36-37). He denied seeking any medical attention whatsoever after being released by Dr. Goldbeg in 2007 until his December 3, 2018 work accident. (Trans. pp. 37-38).

He testified he was truthful during Dr. Wehner's IME examination. (Trans. p. 39). He understands his current limitations are to lift no more than 10 pounds and not do too much standing or walking. He acknowledged Dr. Goldberg imposed "sedentary" restrictions. (Trans. pp. 40-41). He has not returned to work as a truck driver nor had any other employment since the accident. (Trans. p. 41). He has not played sports. (Trans. p. 42). He does not cut his grass anymore, (Trans. p. 43), nor has done any work on his house since the accident. (Trans. p. 44).

On redirect examination, he testified that his October 28, 2017 work accident at XPO resulted from his transferring a number of 10 to 15 pound boxes from a pallet with a combined total weight

of perhaps 500 pounds, during which he developed back pain. (Trans. pp. 45-46). He reported it to the company nurse, replied to her question that the pain did not go down his legs (Trans. p. 46) and on her advice purchased Advil. The pain resolved without the need for any medical attention whatsoever. (Trans. p. 47).

GOLDBERG DEPOSITION

Dr. Edward Goldberg is a board certified, published, orthopedic spine surgeon who holds academic appointments as Assistant Attending and Assistant Professor in the Department of Orthopedic Surgery at Rush University Medical Center. (Goldberg Dep. Ex. No. 1 to Pet. Ex. 5). His specialty is in the operative care of the spine. (Ex. 5, p. 4). He testified he successfully operated on Petitioner in 2005 to address the degenerative disc disease with spinal stenosis at L5-S1 for back pain and left leg radicular pain or sciatica, after which Petitioner had significant improvement from his pre-operative state and was able to return to work full duty in 2007. His last contact with Petitioner prior to his new injury in 2018 was a April 2007 phone call wherein he reported "moderate pain relief with Celebrex and that his back pain and radicular symptoms had improved." (Ex. 5, p. 6).

After an interim of almost 12 years, Petitioner was again evaluated by Dr. Goldberg on March 4, 2019. He reported that he had developed low back and left leg radicular pain after hurting himself at work on December 3, 2018. He was unimproved after treatment with his primary care physician and injections with Dr. Arbor and was working light duty. On examination he exhibited decreased strength at L5 and weakness in his left extensor longus muscle. He recommended a trial of additional therapy and additional epidural injection. (Ex. 5, pp. 6-8). On return on April 17, 2019, he was not significantly improved and on re-examination revealed new weakness in his left ankle dorsiflexion suggestive of nerve compression at L4-5. Having failed to improve with non-operative care, physical therapy, two epidurals and narcotic anti-inflammatory, and muscle relaxant medication, surgery in the form of a L4 laminectomy and extension of fusion from L5-S1 to L4-5 was recommended. (Ex. 5,

p. 9). Dr. Goldberg reviewed and considered Dr. Wehner's IME reports. He disagreed that Petitioner had suffered only a lumbar strain. He stated Petitioner had true radicular pain based upon the spinal stenosis revealed on the recent MRI. He disagreed that Petitioner suffered from peroneal neuropathy or that the pain in his foot resulted from plantar fasciitis. (Ex. pp. 10-11).

Dr. Goldberg reviewed an EMG which was ordered on the suggestion of Dr. Wehner. He felt the EMG did confirm chronic L4-5 radiculopathy but no true peroneal neuropathy. Dr. Goldberg stated that a prior EMG conducted in 2004-2005 did not reveal radiculopathy at the same level and that upon examination Petitioner did not exhibit either a tinel sign suggestive of peroneal neuropathy nor evidence of any plantar fasciitis. (Ex. 5, pp. 11-12).

Dr. Goldberg opined that Petitioner was "suffering from lumbar stenosis at L4-5 which is causing nerve root compression in the neural foramen which would be L4 as well as L5 nerve root which caused the numbness we discussed, the pain in the top of your foot". (Ex. 5, p. 13). He opined that Petitioner "aggravated his asymptomatic lumbar stenosis at L4-L5 from the accident of 12/3/18", He opined that, as a result of his December 3, 2018 accident, Petitioner aggravated his asymptomatic lumbar stenosis at L4-5. He appreciated the stenosis pre-dated, but that that the 12/3/18 accident could aggravate which was previously an asymptomatic condition resulting in his low back left leg radicular pain. (Ex. 5, pp. 13-14).

On cross-examination, Dr. Goldberg acknowledged that he is unaware of any treatment history between releasing Petitioner from his care in 2007 and his new accident in December of 2018. (Ex. p. 15). He acknowledged the L4-S1 dermatomal distributions (Ex. 5, p. 16), the specific areas of Petitioner's left leg radicular symptoms (Ex. 5, pp. 17-18), and that Petitioner did have a degenerative condition in his spine (Ex. 5, p. 18). He acknowledged that adjacent level disc disease "could" happen irrespective of any work injuries. (Ex. 5, pp. 19-20).

He acknowledged that Petitioner first came under his care in 2005 after coming to him for an IME following work accidents in 2002 and 2004. (Ex. 5, p. 20). He acknowledged that after the L5-S1 fusion, Petitioner had some residual symptoms including radicular symptoms which were treated with anti-inflammatories through April 7, 2007. (Ex. 5, pp. 21-22). He acknowledged that he does not know how long the L4 radiculopathy was present, but based upon an EMG that had been performed prior to the 2005 surgery, it had not been present at that time. (Ex. 5, pp. 22-23). He acknowledged having not seen Petitioner between April 2007 and 2019 and he cannot state whether Petitioner continued to have symptoms in the interim. (Ex. 5, p. 24).

He is relying on Petitioner's description of his accident but does not know the specific level of force required to move the 1,800 pound jack. (Ex. 5, p. 24). He acknowledged that 20% to 30% of his patients have workers' compensation claims. (Ex. 5, p. 25).

On redirect examination, he stated that a 2007 post-surgical MRI revealed no adjacent level disc disease. (Ex. 5, p. 25). He stated that but for one mention of back pain noted by Dr. Wehner in her thorough review of any medical records through November 3, 2018, there is no mention of any lumbar complaints at all in those records. He now notes a new type of radiculopathy. (Trans. pp. 26-28).

DR. WEHNER DEPOSITION

Dr. Wehner testified she is a board certified orthopedic surgeon concentrating 90% of her practice to spine problems. (Resp. Ex. 3, pp. 5-6). She examined Petitioner and prepared a report but only has a minor recollection of him. (Resp. Ex. 3, pp. 6-7). Petitioner described his December 3, 2018 work accident to her and the resulting symptoms. He admitted to his prior back injury and fusion surgery in 2005. He stated that he had been released full duty without intervening problems. He reported some back pain following a work injury in October of 2018 and also some back pain in 2015 but did not miss work and treated it with only Tylenol and ice. (Resp. Ex. 3, pp. 7-9).

Wehner testified that Petitioner had a normal neurologic exam but for a "possible" peroneal nerve irritation and that palpation at the calcaneal level was indicative of plantar fasciitis. (Resp. Ex. 3, pp. 10-11). She testified the December 18, 2018 lumbar MRI revealed degenerative changes within the realm of normal for a 50 year old male but no stenosis, normal post-operative changes with fixation devices at L5-S1 and some minor degenerative changes at other levels that were clearly not significant and not indicative of the subjective pain complaints Petitioner was having. (Resp. Ex. 3, pp. 11-12). She found no evidence of nerve root compression. (Resp. Ex. 3, pp. 12-13).

She believed based upon the mechanism of injury, her exam findings, and the MRI, that Petitioner would have suffered a lumbar strain. (Resp. Ex. 3, p. 13). She defined adjacent level disc disease but did not find it to exist in Petitioner's case. Instead, the MRI findings at L4-5 were minor, completely consistent with a 50 year old male, not indicative of adjacent level disc disease and have nothing to do with his previous fusion at L5-S1. (Resp. Ex. 3, pp. 14-15).

Regarding treatment to date, only a course of therapy was required and neither injections nor the proposed surgery were appropriate. (Resp. Ex. 3, pp. 15-16). She opined that Petitioner was "medically capable" of returning to work after his December 3, 2018 lumbar strain and was at MMI at that time. (Resp. Ex. 3, p. 16). She testified to receiving and reviewing additional medical records and prepare a subsequent report. (Resp. Ex. 3, pp. 16-17). Her review of the additional records did not change her opinions. Those records indicated Petitioner did well following his previous fusion surgery but had some recurrence of leg pain in 2006 to 2007, but that a repeat MRI on April 2, 2007 showed no adjacent level problems or any nerve compromise, that he was merely given pain medication and otherwise told that he could be at "full duty". (Resp. Ex. 3, pp. 17-18).

Dr. Wehner opined that the July 25, 2019 EMG is consistent with peroneal neuropathy. She testified "it did show a left sided L4 chronic radiculopathy which there is no way to tell how long that has been present. It could be related to the previous fusion surgery." (Resp. Ex. 3, p. 19). She stated

the MRI showed no acute finding that would be the reason for his back or leg pain. (Resp. Ex. 3, p. 20). She testified that the L4-5 "usually" affects the L5 nerve root not the L4 nerve root. She stated that there is another pain generator that could be causing his leg pain but that the tinels was not related to the accident. (Resp. Ex. 3, p. 20).

On cross-examination she acknowledged leaving Loyola Medical Center after having been instructed she either had to work full-time or leave. (Resp. Ex. 3, pp. 21-22). She still performs surgery, five to six in the last six months versus performing two to ten independent medical examinations per week, (Resp. Ex. 3, p. 22), almost all at the request of the defense. (Resp. Ex. 3, p. 23). She acknowledges prior expert work for defense counsel in this case and for other members of his firm. She acknowledges speaking privately with defense counsel prior to her deposition and receiving correspondence from him including his own medical summary of Petitioner's medical history. (Resp. Ex. 3, pp. 23-25 and Ex. 4 to the deposition transcript). She acknowledged being paid a total of $3,400.00 for her expert work in this case. (Resp. Ex. 3, p. 26).

MEDICAL RECORDS

Petitioner was evaluated by Dr. Goldberg on April 11, 2007. He had been working full duty but reported some left leg radicular pain. He had a negative physical examination. An MRI showed no adjacent level problem or ongoing nerve compression. He was felt to have radiculitis, was allowed to continue working full duty and was prescribed anti-inflammatory medication on an as needed basis. He was deemed to be at maximum medical improvement. (Pet. Group Ex. 3, p. 159). In a follow up phone call on April 23, 2007, Petitioner reported that his back and radicular symptoms had improved. He was encouraged to call if his symptoms persisted or worsened. (Pet. Ex. 3, p. 162).

Petitioner began treating with Dr. Parreno as a primary care physician on November 7, 2015 for a general checkup. His documented subjective complaints at that time included neck pain, epigastric pain, forearm pain and knee pain but no low back or radicular pain. (Pet. Group Ex. 1, p.

3). On November 27, 2015, Petitioner reported to DR. Parreno that he had improvement with his neck and knee pain but was still having epigastric pain with no indication of any low back pain or radiculat pain. (Pet. Ex. 1, p. 6). Petitioner was next seen on December 24, 2015 by Dr. Parreno for a follow up of epigastric pain. He also reported that he had "no problems with working out." An evaluation of his back at that time revealed "no tenderness". (Pet. Ex. 1, p. 8). During subsequent visits on January 4, 2016, April 21, 2017, May 6, 2017, June 16, 2017, July 29, 2017, August 26, 2017, December 2, 2017 and November 3, 2017, the Petitioner returned for monitoring of his hypertension and repeatedly reported that he was doing well with "no new complaints". (Resp. Ex. 1, pp. 10-26).

The Petitioner next appeared in Dr. Parreno's office on December 4, 2018. He reported that the previous day on December 3, 2018, he pushed and pulled 1,850 pound metal pallet jack at work, developed low back pain and reported the incident. (Pet. Ex. 1, p. 26). He was advised to rest, obtain an MRI and stay off work. (Resp. Ex. 1, p. 27).

Petitioner underwent an EMG examination previous to his 2005 fusion surgery on June 1, 2004 which revealed "denervation L5-S1. Left leg. HNP, radiculopathy". (Pet. Ex. 3, p. 245). On July 12, 2019, Petitioner underwent a subsequent EMG. The impression is "this is an abnormal EMG of the lower extremities. There is electrophysiological evidence of left sided L4 chronic radiculopathy. The lower response of applitude of the left superficial peroneal is likely technical." (Resp. Ex. 4, p. 5).

VIDEO SURVEILLANCE

Petitioner was observed on September 29, 2019 carrying what appears to be a 2.5' x 4' piece of plywood close to his body while exiting a store and sliding the piece of wood into the backseat of his small sedan.

On October 1, 2019, Petitioner is shown walking towards a piece of flexible drain pipe. Petitioner reaches to touch his lumbar area with his left hand before bending and picking up the end

of the flexible drain pipe with both hands and moving it a short distance. The video does not depict Petitioner pushing the lawn mower which is present in the yard. The video depicts Petitioner leaning against a vehicle in the driveway while observing his wife perform gardening activities, before he bends and picks up what appears to be a drink cup and bottle of water.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "C" (ACCIDENT), THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner's description of the accident at arbitration is consistent with the histories he provided to his medical providers as well as to Respondent's examining physician. The Arbitrator also notes that Petitioner did not shop for a new spine surgeon following this injury. Instead he returned to the care of Dr. Goldberg who had successfully returned him to work following work injuries in 2002 and 2004. Although the accident was unwitnessed, Respondent does not dispute that it received notice from the Petitioner of the accident. The Arbitrator therefore does find that Petitioner suffered an accident arising out of and in the course of his employment with Respondent in the manner described on December 3, 2018.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "F" (CAUSAL CONNECTION), THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Dr. Goldberg states that as a result of his December 3, 2018 accident, Petitioner suffered an aggravation of a pre-existing degenerated, fused lumbar spine and that this aggravation, not having responded to conservative care, warrants surgery in the form of a laminectomy and extension of his previous lumbar fusion. Dr. Wehner states that Petitioner suffered nothing more than a lumbar strain, that he was immediately at MMI and capable of returning to work full duty. The Arbitrator notes Dr. Wehner's extensive work as a workers' compensation defense medical expert, which includes two to ten Section 12 exams per week, her prior expert work for defense counsel in this case and others in his firm. She was well paid in this case ($3,400.00). The Arbitrator notes that Petitioner was first evaluated by Dr. Goldberg in the setting of a Section 12 exam in 2005. Presumably, Dr. Goldberg

found Petitioner's description of his injury and complaints to be credible at that time whereby he accepted Petitioner as his patient. Of particular note, Petitioner did return to work full duty following his previous surgery in 2006. His last contact with Dr. Goldberg's office on April 27, 2007 via telephone call and confirms that his residual back pain and leg pain and improved with anti-inflammatory medication.

In the ensuing 12 years there is very little, if any, evidence whatsoever of any significant or disabling back problems. On the contrary, it is undisputed that Petitioner has worked as a truck driver with substantial physical demands of loading and unloading his truck for the past seven years with Respondent previous to the work accident at issue. Petitioner reasonably returned to the care of Dr. Goldberg who had successfully treated him in the past, enabling him to return to work full duty. In all, the Arbitrator finds that Petitioner's description of his change in level of pain and functioning to be credible.

The Arbitrator finds the opinions of Dr. Goldberg to be more persuasive and therefore finds by preponderance of the evidence that Petitioner's current condition of illbeing is causally connected to the December 3, 2018 accident.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "J" (MEDICAL SERVICES), THE ARBITRATOR FINDS THE FOLLOWING FACTS:

In evidence are charges for Dr. Parreno in the amount of $314.13 (Pet. Ex. 1, p. 2); Dr. Bansal in the amount of $6,286.00 (Resp. Ex. 4, p. 3); and Midwest Orthopedics/Dr. Goldberg in the amount of $245.00 (Pet. Ex. 3, p. 496). The Arbitrator also notes that in her initial report of May 22, 2019, following her examination of the Petitioner on that date, Dr. Wehner stated "based on the records I have reviewed, yes, the previous medical treatment has all been appropriate and related to the injury." She also stated that an EMG might be able to discern Petitioner's leg symptoms better. (Resp. Ex. 1). The Arbitrator reiterates his findings above regarding causal connection and his belief that the

opinions of Dr. Goldberg are more persuasive overall, and therefore finds that the medical expenses itemized above were reasonable and necessary.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "K" (PERSPECTIVE MEDICAL CARE), THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The Arbitrator reiterates his finding that the opinions of Dr. Goldberg are more persuasive than those of Respondent's examining physician. The Arbitrator again notes there is a substantial change in the level of Petitioner's work abilities. The Arbitrator has taken into consideration the surveillance submitted into evidence. The Petitioner appears to carry a single 2.5' X 4' piece of plywood close to his body before sliding the same into the back of his small sedan and otherwise lift what appears to be a relatively light piece of flexible drain hose. Neither the piece of wood nor the drain hose appeared to weigh substantially in excess of even 10 pounds. The surveillance fails to show Petitioner engaging in physical activities inconsistent with the description of his pain or his prescribed limitations. There is no evidence that Petitioner is not motivated to return to his proper employment. If his past history is any indication, it reveals on the contrary that Petitioner to be a motivated person. He did return to work including, most recently, his seven year continuous employment with Respondent, all following a significant back injury and lumbar fusion in 2005. The Arbitrator therefore finds that Petitioner should be afforded the opportunity to pursue the surgical recommendation made by Dr. Goldberg who successfully returned him to work previously. The Arbitrator therefore finds that Dr. Goldberg's proposed surgery and medical care attendant thereto, to be reasonable and necessary.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING "L" (TEMPORARY BENEFITS"), THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner testified to the periods that he was restricted from working, either full or light duty, as per the dates indicated on Arbitrator's Exhibit 1. The parties have also stipulated to Respondent's payment of TTD, TPD, non-occupational disability, and PPD advance payments. Respondent does

not dispute Petitioner's treating physicians restricted his work activities during the timeframes alleged but rather than Petitioner's condition of illbeing did not warrant those restrictions. The Arbitrator reiterates his findings regarding causal connection and need for prospective medical care above and therefore does find that Petitioner is entitled to benefits for the period of TTD and TPD as alleged (Non-Arbitrator's Ex. 1). Given the Petitioner's on the record stipulation, the Arbitrator also finds that Respondent shall be entitled to a credit for all payments hereinafter proven to have been made to or on behalf of Petitioner for TTD, TPD, non-occupational indemnity disability payments, PPD advances, as well as medical bill payments.

Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OFCOOK)

☒ 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

RANDALL WURST,

Petitioner,

vs.

NOS: 17 WC 30842
17 WC 32707

TMR/MIDWEST TRANSPORTATION LLC,

Respondent.

20IWCC0729

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, notice, causal connection, temporary total disability, medical expenses and prospective medical, penalties under §19(k) and §19(l) and attorney's fees under §16, 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 27, 2020 is hereby affirmed and adopted.

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

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

The bond requirement in Section 19(f)(2) 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.

DEC 1 1 2020

DATED:
KAD/bsd
O11/10/20
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WURST, RANDALL
Employee/Petitioner

Case# **17WC030842**
17WC032707

TOTAL MIDWEST TRANSPRTATION
Employer/Respondent

20IWCC0729

On 3/27/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

5263 YOUNG HARRIS DOWELL FISHER
J BRADLEY YOUNG
15400 S OUTER 40 SUITE 202
CHESTERFIELD, MO 63017

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

Randall Wurst
Employee/Petitioner

v.

Totall Midwest Transportation
Employer/Respondent

Case # 17 WC 30842

Consolidated cases: 17-WC-32707

20IWCC0729

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville, IL**, on **01/28/2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

20IWCC0729

FINDINGS

On **08/30/2017 and 09/25/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$3,034.00**; the average weekly wage was **$614.50**.

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0.00** for maintenance, and **$0.00 for PPD**.

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

ORDER

Petitioner failed to prove that he is entitled to additional TTD and/or Maintenance benefits under the Act.

Therefore, Petitioner is not entitled to any further or additional benefits under Section 19(b) of the Act.

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

RULES REGARDING APPEALS Unless a party 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.

Carl Lee — Signature of Arbitrator

3/20/20 — Date

MAR 27 2020

Randall Wurst v. Totall Midwest Transportation

17-WC-30842
and
17-WC-32707

20IWCC0729

Addendum to the Arbitration Decision
Findings of Fact:

Petitioner started working as a yard spot truck driver for Respondent on August 29, 2017. He testified that on August 30, 2017 while he was backing Spotter Truck 101 up to a loading dock the clutch slipped causing the truck to unexpectedly back up and strike the loading dock so hard that Petitioner injured his neck (T. 146-147).

Petitioner testified he immediately reported his neck injury and the clutch problem in his spotter truck to his supervisor Mike Reininger (T. 148). Transportation supervisor Mike Reininger denied that Petitioner reported any neck injury or clutch problem with Spotter Truck 101 on August 30 (T. 79-80). Human Resources Manager Jamie Case and Mike Reininger both testified the Petitioner did not report any neck injury before September 25 (T. 46; 109).

Petitioner testified he turned in the Driver Vehicle Inspection Report (DVIR) (P exhibit 3) to the dispatcher Heather at the end of his shift on August 30 (T. 149). The DVIR indicated Petitioner injured his neck due to a problem with the clutch and that he reported the injury and the clutch problem to supervisor Mike Reininger who said he would get the clutch problem fixed that evening (P. exhibit 1). Supervisor Mike Reininger testified he conducted a search at TMR and could not find a copy of the August 30 DVIR (P. exhibit 1). Reininger denied that Petitioner turned in any DVIR on August 30 (T. 99). Reininger testified that Petitioner never turned in or filed a DVIR for August 30 (T. 101). Human Resources Director Jamie Case testified TMR did not receive the DVIR dated August 30 (P. exhibit 1) until attorney Korein sent it by email to the Respondent's insurer on October 23 (T. 46; R. exhibit 2).

Petitioner testified that he properly filled out the mileage for Spotter Truck 101 on the Drivers Daily Log (P. exhibit 3) but he made a mistake and entered wrong numbers for the mileage on the DVIR (P. exhibit 1) due to headaches he was having (T. 152). The mileage on the DVIR (P. exhibit 1) did not match the mileage on the Drivers Daily Log (P. exhibit 3). Mike Reininger testified that the mileage totals on the DVIR (P. exhibit 1) and the Drivers Daily Log (P. exhibit 3) should match as these readings should have been taken off of the same odometer at the end of the day on August 30 (T. 103-104). Reininger testified the DVIR (P. exhibit 1) with the faulty mileage totals *"Did not make any sense."* (T. 104).

Mike Reininger testified the clutch was not checked as to whether it needed any maintenance or repairs the night of August 30 as Petitioner did not report any problem with the clutch to Mike Reininger on August 30 and that Petitioner did not turn in a DVIR on August 30 indicating there was any alleged clutch problem (T. 101-102).

Petitioner admitted the clutch in Spotter Truck 101 was satisfactory on August 31, September 1 and September 5 (T. 183), the days immediately after he maintained he reported to Mike Reininger his neck injury due to a clutch problem. Petitioner filed DVIRs on August 31, September 1, and September 5 indicating the condition of the spotter truck was satisfactory (R. exhibit 4). Petitioner testified *"The clutch has a life of its own, sometimes good, sometimes bad,"* (T. 150). The clutch as part of a spotter truck weekly maintenance checkup was examined on September 6 and found to be satisfactory (R. exhibit 1, deposition Mark Metzger, page 12).

Petitioner admitted he did not get any medical treatment from his August 30 alleged neck injury before his second alleged injury of September 25 (T. 184). Petitioner testified he went home from work early on September 6 because of headaches (T. 184). Jamie Case testified the Petitioner never complained of headaches (T. 47). Jamie Case (T. 48, R. exhibit 6) and Mike Reininger (T. 113, R. exhibit 5) testified that Petitioner left work early at 8:45 am on September 6 because he was upset with warehouse manager Don and Anita about pulling up on a scale. Petitioner denied any problem with Don or Anita on September 6 before he left work early without approval at 8:45 am (T. 184).

Petitioner testified he also left work early on September 15 because of neck pain and headaches (T. 185). Jamie Case (T. 49-50) testified Petitioner left work early on Friday, September 15 *"because he was frustrated with something in the yard and said he was going to the Lake of the Ozarks for the weekend,"* (T. 49). Mike Reininger testified the Petitioner left work early at 1:30 pm on September 15 because he was having problems with how the drivers were leaving equipment in the yard (T. 114, R. exhibit 5).

Jamie Case testified the Petitioner was scheduled to be off work on Monday, September 18 because it was his birthday and he was going to be at the Lake of the Ozarks (T. 50, 64). Jamie Case testified Petitioner was scheduled to work on September 19 and 20 (T. 64). Petitioner did not show up for work on September 19 and September 20 and was charged two unexcused absences (R. exhibit 7). Petitioner testified that Mike Reininger called him at 8:00 am on his day off (September 18) and said *"Where in the hell are you?"* Petitioner testified he told Mike Reininger it was his birthday and Mike Reininger told him *"If you think you have your birthday off you can just have the next two days off,"* (T. 155). Mike Reininger testified by a memo he sent to Jamie Case indicating that Petitioner sent texts on September 19 and September 20 that he would be in to work on those days but failed to report to work and was charged two unexcused absences (T. 114, R. exhibit 5).

Petitioner testified he was attacked in the yard on September 25, 2017 by TMR employee/driver David Harris (T. 155). Petitioner testified Harris backed a tractor trailer unit into the parked trailer lot in the yard where other trailers were located. Petitioner testified he drove his spotter truck in front of Harris's parked tractor trailer unit and got out of his spotter truck and walked over to the side of the trailer where Harris was cranking down the landing gear on the trailer (T. 159). Petitioner and Harris were between two tractor trailers.

Petitioner testified he asked Harris to move his trailer out and park it in the middle of the yard (T. 157, 159). Petitioner testified Harris *"went ballistic on him and started cursing and hollering at him,"* (T. 159). Petitioner testified that he started backing up from Harris and walking away and when he was back between the front bumper and driver's door of his spotter truck facing away from Harris he was grabbed by his neck from behind by Harris and knocked to the ground (T. 162).

Petitioner testified he then went into the office crying and reported the assault to Mike Reininger while other dispatchers were present (T. 164). Petitioner testified he then called the police and went up to the Human Resources office (T. 165).

David Harris testified he was at the side of his trailer which he had just parked when the Petitioner came up to him and told him to move his tractor trailer over by the scale in the middle of the yard (T. 139-140). Harris testified he was not supposed to park his trailer by the scale in the middle of the yard (T. 140). Harris testified he backed his tractor trailer into a parking spot where he had always been told to park it (T. 139). Mike Reininger testified Harris had parked his tractor trailer in an appropriate spot (T. 111). Reininger testified that Petitioner did not have authority to tell Harris where to move his tractor trailer or where to park it (T. 110).

Harris testified that Petitioner initiated physical contact after approaching Harris on the side of Harris's tractor trailer and began repeatedly pushing Harris with his belly up against the side of Harris's tractor trailer unit (T. 137-138). Harris testified he put his right hand up and out in front of Petitioner's chest to stop the Petitioner from continually knocking into him with his belly. Harris then went around the Petitioner and went into his dispatcher's office (T. 138). Harris testified he never choked the Petitioner or made any contact with the Petitioner's neck (Harris deposition, P. 14-15).

Mike Reininger spoke separately to Petitioner outside of Reininger's office and then immediately to David Harris out in the yard about what happened in the altercation. Reininger told both Petitioner and David Harris to go up to the Human Resources office to see Jamie Case.

The Granite City Police officer following Petitioner's call immediately arrived at the HR office and with Jamie Case and Mike Reininger spoke separately to both Petitioner and David Harris about what allegedly happened in the altercation. The videos from the three cameras in the yard did not show the altercation. Jamie Case testified the altercation between the two tractor trailers units would have been obstructed by the two tractor trailer units from the three video cameras that were positioned around the yard (T. 33). The police officer viewed the video of the yard for the time when the altercation occurred. Jamie Case testified that *"They pull the video off the computer real quick and then put it on a flash drive and I showed it to him,"* (T. 71). The police officer told the Petitioner and Harris that if they both pressed charges he would have to arrest them both. Petitioner and Harris decided both not to press charges and shook hands (T. 55).

Jamie Case testified that Petitioner physically looked fine and did not complain of neck pain (T. 56). Petitioner later asked to see a doctor and Jamie Case sent him to Dr. Christopher Knapp at Gateway Medical.

On September 26, 2017 the Petitioner brought a doctor's note from Dr. Knapp to Jamie Case and asked for an incident report which she gave him (T. 56-57). Petitioner left for the day to fill out the incident report (T. 58). Jamie Case testified she called Petitioner and asked him to be in the Human Resources office at 8:00 am on September 27, 2017 for a meeting with her and Mike Reininger (T. 58).

Jamie Case testified that Petitioner showed up early at 6:30 am on September 27, 2017. He turned in the incident report. Jamie Case testified she asked him to return at 8:00 am for the scheduled meeting with her and Mike Reininger (T. 59). Case testified the Petitioner refused to leave and said, "we will meet now," (T. 60). Case testified she then told Petitioner he was terminated (T. 60).

Jamie Case testified that Petitioner was terminated for poor attendance, walking off the job early without permission on several days, discontent with the work schedule and not being a team player as he had disagreements with almost every driver and his overall poor performance (T. 62). Mike Reininger testified that Petitioner was not a dedicated employee and he was very opinionated, boisterous and did not get along with co-employees (T. 114).

Mike Reininger testified that Petitioner had had a number of altercations with other employees before September 25, 2017. Reininger testified with Petitioner *"It was basically his way or the highway,"* (R. exhibit 10, p 25).

Jamie Case identified a memo dated September 27, 2017 (R. exhibit 6) and a response she filed on behalf of TMR to the Missouri Division of Employment Security (R. exhibit 8) as documenting the reasons why Petitioner was terminated (T. 67).

Jamie Case testified that David Harris had been a very good employee for TMR and had not had any problems with other employees before September 25, 2017 (T. 51). Mike Reininger who was supervisor for David Harris testified that Harris was an excellent employee with no prior problems with other employees (R. exhibit 10, p 27).

MEDICAL EVIDENCE

Petitioner was in a motor vehicle accident on January 2, 2018 after he left the employment of TMR and went to Mercy Hospital (P. exhibit 13).

Petitioner presented with complaints of cervical/neck pain he alleges are related to his workers' compensation claims of August 30, 2017 and September 25, 2017 commenced treating with Dr. Matthew Gornet on October 4, 2018 after treating with several other medical providers.

Dr. Gornet recommended that Petitioner undergo a cervical procedure for cervical disc replacements at C4-5, C5-6 and C6-7 (P. exhibit 19, page 2, 4 and 15). Dr. Gornet opines that the three incidents of the August 30, 2017 and September 25, 2017 alleged workers' compensation injuries and the January 2, 2018 motor vehicle accident each played a role in Petitioner's current symptoms (P. exhibit 19, page 15).

Dr. Donald deGrange performed an independent medical examination of Petitioner at the request of the employer on July 18, 2019 (R. exhibit 9). Dr. deGrange was of the opinion the Petitioner needed an anterior cervical discectomy and fusion at C5-6 and C6-7 (R. exhibit 9).

Dr. deGrange was subsequently provided deposition transcripts of TMR employees Metzger, Reininger, Harris and Case regarding the facts of Petitioner's alleged workers' compensation injuries of August 30, 2017 and September 25, 2017. The deposition transcripts of these TMR employees disputed Petitioner's version of the two incidents (R. exhibit 1, 10, 11 and P. exhibit 11). Dr. deGrange issued a supplemental report dated October 10, 2019 wherein he reviewed the deposition testimony of the TMR employees which contradicted Petitioner's version of the alleged August 30, 2017 and September 25, 2017 workers' compensation injuries.

Dr. deGrange in his October 10, 2019 report revisited the issue of causation between the two alleged work injuries and the claimant's present medical condition and need for surgery and states as to the August 30, 2017 injury claim:

> *"If Mr. Wurst is correct that there were clutch problems in the operation of his spotter truck on August 30, 2017 which caused it to repeatedly strike the docks while he was operating the trucks, they may have caused or contributed to the patient's current complaints at the cervical spine level. If I assume, however, that the employer is correct in that the spotter truck did not have a problem with the clutch causing it to repeatedly strike the loading docks, that scenario would neither have caused nor contributed to the patient's current complaints at the cervical spine level."*

As to the altercation involving Petitioner and Mr. Harris on September 25, 2017, Dr. deGrange states in part:

> *"If the patient is correct as to being choked in his neck and throat when he was assaulted by Mr. Harris, that may have caused or contributed to the patient's current complaints at his cervical spine level. However, if I assume that the employer is correct, and based upon my review of the multiple depositions reviewed today indicating that Mr. Wurst was the aggressor and the action of Mr. Harris who raised his right arm and*

placed his right hand onto the patients upper chest in a protective manner at no time choking or even placing his hands on Mr. Wurst's neck, these actions by Mr. Harris would not have caused or contributed to the patient's claim of cervical spine level injury as of September 25, 2017."

The Arbitrator makes the following conclusions on the issues in dispute:

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

CLAIMED ACCIDENT OF 08/30/17
17-WC-032707

In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. O'Dette v. Industrial Comm'n, 79 Ill. 2d 249, 253 (1980). One such element is the occurrence of a work-related accident. Elliott v. Industrial Comm'n, 303 Ill. App. 3d 185, 188 (1999).

In deciding questions of fact, it is the function of the trier of fact to resolve conflicting medical evidence, judge the credibility of the witnesses, and assign weight to the witnesses' testimony. Hosteny v. Workers' Compensation Comm.'n, 397 I11. App. 3d 665, 674 (2009).

Although a claimant's testimony, standing alone, may support an award where all the facts and circumstances do not preponderate in favor of the opposite conclusion (Seibel v. Industrial Commission, 82 I11.2d 87, 411 N.E.2d 249 (1980), when the claimant's testimony is virtually the only evidence favoring an award, and that testimony is repeatedly contradicted, then it is our duty to disallow the claim. Caterpillar v. Industrial Commission, 73 I11.2d 311, 383 N.E.2d 220 (1978).

In the present case, Petitioner's credibility is lacking as to whether an accident did occur on August 30, 2017; to the contrary, the credible testimonial and documentary evidence establishes that no accident occurred on August 30 and the claim should be denied.

Petitioner testified he reported a neck injury as a result of a clutch problem on the spotter truck to Mike Reininger on August 30. However, Reininger testified that Petitioner did not report any neck injury or clutch problem on August 30 (T. 79-80).

Petitioner maintained that he filed a DVIR dated August 30 on August 30 wherein he recited a clutch problem causing a neck injury. Mike Reininger testified that Petitioner did not file a DVIR dated August 30 on August 30 and never filed a DVIR dated August 30 (T. 99). The Respondent did not receive a copy of the August 30 DVIR until Petitioner's attorney sent it under cover email of October 23, 2017 to the Respondent's insurer (T. 46; R ex. 2).

Petitioner filed a Driver's Daily Log on August 30 at the end of his shift that properly reflected the mileage on the spotter truck as 523,828 miles at the beginning of the shift and 523,860 at the end of the shift. Mark Metzger the maintenance supervisor at the Respondent and Mike Reininger testified that that the mileage readings recorded for both the DVIR's and the Driver's Daily Logs come off the same odometer on the spotter truck and thus should match if they are prepared by the spotter truck driver on the same date (T. 103). The 523,726 mileage reading on the DVIR was in error by more than 100 miles when compared to the Driver Daily Log the Petitioner filed on August 30 and when reviewed with the DVIR and Driver Daily Log Petitioner filed on August 31 (T. 104; R ex. 3 and 4).

Petitioner admitted the mileage on the August 30 DVIR was in error, but he blamed it on a headache (T. 152). The alleged headache did not preclude him from properly filing out the mileage reading on the Driver Daily Log. The mileage reading in the DVIR was in error because Petitioner did not fill it out on August 30 and did not turn it in on August 30.

Reininger indicated that had Petitioner reported a clutch problem on August 30 the spotter truck would have been inspected that night. Reininger said the spotter truck was not inspected on the night of August 30 because Petitioner never reported a problem with the clutch or a neck injury on August 30 (T. 101-102). Petitioner filed DVIR's on August 31, September 1, and September 5 with correct mileage recordings and noted the spotter truck including the clutch underwent a weekly inspection report on September 6 and was rated to be in satisfactory condition. (R ex. 1; p. 17-18; ex. 4).

Petitioner seeks to explain away the erroneous mileage readings on the August 30 DVIR due to a headache, and the proper functioning of the clutch in the spotter truck without repairs on the three subsequent days of August 31, September 1 and September 5 by stating, *"the clutch has a life of its own, sometimes good, sometimes bad."* Mike Reininger properly testified that Petitioner's testimony regarding the August 30 erroneous mileage readings and the alleged reporting of a clutch problem and neck injury on August 30, *"doesn't make sense,"* (T. 104).

Petitioner admitted the clutch in Spotter Truck 101 was satisfactory on August 31, September 1 and September 5 (T. 183), the days immediately after he maintained he reported to Mike Reininger his neck injury due to a clutch problem. The mileage readings are a microcosm of the credibility issues with Petitioner.

Petitioner did not know what the mileage was on the August 30 DVIR he subsequently filled out at a later date and gave to his attorney so he could include a nonexistent clutch problem on the document to serve as a basis for alleging a neck injury. The mileage was an erroneous guess; the clutch problem and alleged neck injury were falsehoods. Dr. deGrange (R ex. 9) opines that *"if the spotter truck did not have a problem with the clutch causing it to repeatedly strike the loading docket, that scenario would neither have caused nor contributed to the patient's current complaints at the cervical spine level."*

The credible evidence establishes that Petitioner did not injure his neck on August 30 due to an alleged clutch problem.

The mere existence of testimony does not require its acceptance. Smith v. Industrial Commission, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue otherwise would require an award be affirmed whenever the claimant testified to an injury no matter how much his testimony may be contradicted by the record, or how evident it may be that his story is a fabricated afterthought. U.S. Steel v. Industrial Commission, 8 Ill.2d 407, 134 N.E.2d 307 (1956).

Accordingly, the Arbitrator finds that Petitioner has failed to satisfy his burden of proof on the issue of accident and causal connection and this claim is denied.

Additionally, the credibility of Petitioner in terms of the August 30 and September 25 claims needs to be assessed in part by several employment incidents that arose between Petitioner and Respondent between August 30 and September 25.

Petitioner on September 6, 2017 walked off the job without approval at 8:45 am and testified his unauthorized early departure was because of headaches. However, both Jamie Case (T. 48, R ex.6) and Mike Reininger (T. 113; R ex. 5) testified that Petitioner had a dispute with the warehouse

manager Don and scale operator Anita, then he got upset and just walked off the job without getting approval, leaving the Respondent without a spot truck driver for the remainder of the shift. Mike Reininger in his September 26, 2017 email to Jamie Case documented the dispute and not alleged headaches as the reason for Petitioner's unauthorized early departure from work (R ex. 5).

On September 15 Petitioner again walked off the job early at 1:30 pm. He again testified he was having headaches; however, both Jamie Case (T. 49-50) and Mike Reininger (T. 114) testified that Petitioner left work early on September 15 because he had gotten upset with how the drivers were leaving equipment in the yard and wanted to go out to the Lake of the Ozarks. Reininger again confirmed that Petitioner left work early on September 15 due to a dispute in the yard with Petitioner's fellow employees and drivers (R ex. 5).

Petitioner failed to show up for work without approval on September 19 and September 20. Mike Reininger (T. 114) and Jamie Case (T. 64) testified that Petitioner was not scheduled to be off work on both September 19 and September 20 but failed to appear and was charged with two unexcused absences (R ex. 7). Reininger by his September 25 memo to Jamie Case indicated that Petitioner by text exchanges failed to appear for work on both days even though he was scheduled to work and said he would report for work those days (R ex. 5).

Petitioner testified that Mike Reininger, unaware that the claimant was given September 18 off work, called Petitioner on the phone early on September 18 and said *"where the hell are you?"* and when Petitioner replied he was off on an authorized day off because it was his birthday, Mike Reininger then allegedly replied, *"well, you can just have your next two days off too,"* (T. 155). Petitioner's nonsensical testimony as to Mike Reininger giving Petitioner an additional two days off renders Petitioner's testimony as to the unexcused absences of September 19 and September 20 and, more importantly, his overall testimony as to both the August 30 and September 25 claims - - not worthy of belief.

"When the claimant's testimony is virtually the only evidence favoring an award, and that testimony is repeatedly contradicted, then it is our duty to disallow the claim." Caterpillar v. Industrial Commission, 73 Ill.2d 311, 383 N.E.2d 220 (1978).

CLAIMED ACCIDENT OF 09/25/2017
17WC30842

When a fight at work arises out of a purely personal dispute, resulting injuries do not arise out of the employment. Castaneda v. Industrial Comm'n, 97 Ill.2d 338, 342, 73 Ill.Dec. 535, 454 N.E.2d 632 (1983). On the other hand, fights arising out of disputes concerning the employer's work are risks incidental to the employment, and resulting injuries are compensable. Fischer v. Industrial Comm'n, 408 Ill. 115, 119, 96 N.E.2d 478 (1951). However, injuries to the aggressor in such a fight are not compensable. Container Corp. of America v. Industrial Comm'n, 401 Ill. 129, 133, 81 N.E.2d 571 (1948). Appellate courts refer to the rule that an aggressor's injuries are not compensable as the "aggressor defense."

The Court of Appeals first announced the aggressor defense in Triangle Auto Painting & Trimming Co. v. Industrial Comm'n, 346 Ill. 609, 178 N.E. 886 (1931). In Triangle Auto Painting, the claimant was injured in a fight at work over the use of a paint spray gun. After reviewing precedents holding that injuries in fights arising out of work-related disputes are injuries arising out of the employment, the Court of Appeals held the aggressor's injuries in such a fight nevertheless do not arise out of the employment. Triangle Auto Painting, 346 Ill. at 618, 178 N.E. 886. The Court reasoned that the aggression negates all causal connection between the work and the injury, so that the work is neither *"the proximate nor a contributing cause of the injury."* Triangle Auto Painting, 346

Ill. at 617, 178 N.E. 886. Instead, the cause of the injury is the aggressor's *"own rashness."* Triangle Auto Painting, 346 Ill. at 618, 178 N.E. 886.

Subsequent opinions have applied the rule of Triangle Auto Painting without repeating its reasoning. See, e.g., Ford Motor Co. v. Industrial Comm'n, 78 Ill.2d 260, 35 Ill.Dec. 752, 399 N.E.2d 1280 (1980). However, the aggressor defense continues to be based on the statutory requirement that injuries are not compensable unless they arise out of the employment. See 820 ILCS 305/2 (West 2000).

The credible evidence establishes that Petitioner was the aggressor in the September 25, 2017 altercation and thus the claim should be denied.

David Harris backed his tractor trailer into an appropriate location in the yard (T. 139). Supervisor Mike Reininger testified the location was appropriate. Petitioner admitted he pulled his spotter truck in front of where Harris has parked his unit and blocked Harris's unit in (T. 159).

Harris was on the side of his tractor trailer cranking down his landing gear when Petitioner approached him and told him to move his tractor trailer unit over by the scale in the middle of the yard (T. 139-140). Harris testified he was not supposed to park his tractor trailer unit where Petitioner wanted it moved to as the tractor trailer unit would have then been too close to the scale and would have blocked the view of the office into the yard (T. 140). Mike Reininger agreed with Harris. Reininger said that Petitioner, as a spot truck driver, did not have the authority to tell Harris where to park his unit (T. 110).

There were no witnesses to the altercation. Jamie Case testified that as the altercation took place between two parked tractor trailer units the three video cameras set up in various locations of the yard would not have been able to depict the altercation as the two tractor trailer units would have blocked the view of the three video cameras (T. 33). The video footage was subsequently viewed by Jamie Case, Mike Reininger and the Granite City Police officer in the HR unit and the videos did not depict what occurred between the two tractor trailer units involving the altercation of Petitioner with Harris (T. 71).

Harris testified that Petitioner initiated physical contact with him while they were between the two units by repeatedly bumping with his belly into Harris and pushing Harris up toward the side of his tractor trailer unit (T. 137-138). Harris testified he put his right hand up in front of Petitioner's chest to stop Petitioner from continually pushing him into the side of his tractor trailer unit (T. 138). Harris testified he never choked the Petitioner or made any contact with Petitioner's neck (R ex. 11, p. 14-15). Harris testified he stepped around Petitioner and went into the dispatcher's office.

Dr. deGrange (R ex. 9) opines that *"if Mr. Wurst was the aggressor and the action of Mr. Harris who raised his right arm and placed his right hand onto the patient's upper chest at no time choking or even placing his hands on Wurst's neck, these actions by Mr. Harris would not have been caused or contributed to the patient's claim of cervical spine level injury as of September 25, 2017,"* (R ex. 11, p. 14-15).

While Petitioner disputes Harris's testimony and alleges he was grabbed by the neck and knocked to the ground from behind by Harris, the employment histories of these two employee with co-employees at the Respondent make Harris appear a much more credible witness as to whom the aggressor actually was.

Both Jamie Case (T. 51) and Mike Reininger (R ex. 10, p. 27) testified that Harris was an excellent employee who had never had problems with any co-employees. Both Case (T. 62) and

Reininger (R. ex. 10, p. 25) testified that Petitioner, during his short term of employment, had numerous problems with co-employees and other drivers including his September 6 disagreement with the warehouse manager and his September 15 problem with drivers in the yard that was the reason he left work early.

The evidence establishes that Petitioner and Harris following a meeting with Jamie Case, Mike Reininger and a Granite City policeman shook hands in the office agreeing not to press charges against each other to conclude the dispute.

Petitioner was terminated on September 27, 2017. The credible evidence through the testimony of Jamie Case and Mike Reininger and the documentary evidence including the Respondent's written response to the Missouri Division of Employment Security (R ex. 8) indicates that Petitioner was terminated for poor attendance, walking off the job without permission on several days, discontent with the work schedule, and not being a team player as *"the Petitioner had disagreements with almost every single driver."* (T. 62).

Accordingly, the Arbitrator finds that Petitioner was the aggressor in the September 25 altercation with David Harris and thus the claim is denied.

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

The Arbitrator finds that notice is a moot issue as Petitioner has failed to satisfy his burden of proof on the issue of accident.

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

The Arbitrator finds that causal connection is a moot issue as Petitioner has failed to satisfy his burden of proof on the issue of 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?

The Arbitrator finds that medical bills is a moot issue as Petitioner has failed to satisfy his burden of proof on the issue of accident and causal connection.

K. What temporary benefits are in dispute?

The Arbitrator finds that the dispute regarding temporary benefits is a moot issue as Petitioner has failed to satisfy his burden of proof on the issue of accident.

M. Should penalties or fees be imposed upon Respondent?

Additionally, Pursuant to Section 19(l), penalties are only warranted if benefits are withheld or refused without just and good cause. Specifically, 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, 279 Ill.Dec. 531, 800 N.E.2d 819, 828 (2003).

Also, the assessment of a penalty under section 19(l) is ONLY 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, 234 Ill.Dec. 205, 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, 279 Ill.Dec. 531, 800 N.E.2d at 829.

Pursuant to Section 19(k), penalties are warranted if there is an unreasonable or vexatious delay of payment, or intentional underpayment of compensation, and also when proceedings have been instituted or carried on, which do not present a real controversy, but are merely frivolous or for a delay.

Specifically, the standard for awarding penalties under section 19(k) is higher than the standard under 19(l). Section 19(k) of the Act provides, in pertinent part, as follows: *"In case where there has been any **unreasonable** or vexatious delay of payment or intentional underpayment of compensation...then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award."* (Emphasis added). 820 ILCS 305/19(k)(2006).

Pursuant to Section 16, which addresses an award of attorney's fees, an award of fees is proper when the Commission finds the employer or its agent has been guilty of unreasonable or vexatious delay, intentional underpayment of compensation and benefits, or has engaged in frivolous defenses, which does not present a real controversy.

Specifically, Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16 (West 2006). *"The amount of [attorney] fees to be assessed is a matter committed to the discretion of the Commission."* Williams v. Industrial Comm'n, 336 Ill.App.3d 513, 516, 271 Ill.Dec. 178, 784 N.E.2d 396, 399 (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, 336 Ill.App.3d at 516, 271 Ill.Dec. 178, 784 N.E.2d at 399.

The penalties under Section 19(k), however, are NOT to be awarded against a Respondent with legitimate motives. See Jacobo v. Illinois Workers' Compensation Comm'n, IL App (3d) 100807WC, 959 N.E.2d 772, 355 Ill.Dec. 358 (2011).

In the present matter, Respondent has asserted a good-faith denial of benefits to both of the pending claims based on the evidence obtained to-date that demonstrates that neither of Petitioner's claims are compensable under the Illinois Workers Compensation Act. At no time has Respondent delayed payments or failed to make payments:

- For any unreasonable or vexatious reason.
- For any inadequate or unjustified reason.
- For any reason arising out of illegitimate motives.

Because Respondent has asserted a good-faith basis for denying benefits, and based on the statutes and case law cited herein that demonstrate that there is no legal basis upon which to award penalties and/or attorneys' fees under the Illinois Workers Compensation Act, penalties and attorney's fees should not be awarded to the Petitioner.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KENNETH WOODS,

Petitioner,

vs. NO: 15 WC 17336

GLOBAL BRASS,

Respondent.

20IWCC0730

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and temporary total disability (TTD) benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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 reverses the Arbitrator's Decision on the issue of causal connection, and finds instead that Petitioner's condition of ill-being with respect to L2-3, specifically the Schmorl's node and infection, is not causally related to the April 23, 2015 work accident.

The evidence revealed no notes or other indication that there was any issue or problem at L2-3 in the initial medical records. There were no complaints of pain or symptoms as it related to the L2-3 level. The first time any concern with respect to the L2-3 disc and the enlarging Schmorl's node was mentioned was November 28, 2018 – more than three and a half years after the claimed work accident. The office visit note for that date indicated that Dr. Donald deGrange, Petitioner's treating physician, was concerned about an endplate fracture/Schmorl's node at L3 that had enlarged to a significant degree. Dr. deGrange explained that a Schmorl's node was a vertical herniation of the disc through the endplate.

The November 28, 2018 MRI of the lumbar spine without contrast indicated an L3 upper endplate Schmorl's node protrusion; the radiologist believed it was likely chronic. Otherwise, the findings were similar to that found in the May 20, 2015 MRI: normal at L1-2, desiccation at L2-3 without significant disc bulge or protrusion peripherally and no central canal or foraminal stenosis. The May 20, 2015 MRI of the lumbar spine was the earliest MRI in the record following the April 23, 2015 work accident. Specifically, the MRI report indicated that there was mild disc space narrowing and desiccation at L2-3, but no significant disc bulge or herniation; L1-2 was normal and L3-4 had mild disc space narrowing and desiccation, a small disc bulge, and mild foraminal encroachment without definite root impingement. The findings worsened at L4-5 and L5-S1. Petitioner thus underwent numerous surgical procedures to his lumbar spine related to these levels: (1) a microdiscectomy at L5-S1 on December 1, 2015; (2) a laminectomy posteriorly from Petitioner's backside at L5-S1 on June 27, 2016; (3) an L4 and L5 laminectomy with decompression, an L5-S1 posterolateral fusion, and L5-S1 posterior segmental instrumentation with pedicle screws on June 5, 2017; (4) on May 3, 2018, Petitioner proceeded with the removal of the screws at L5-S1; and, (5) Petitioner underwent fusion exploration and hardware removal at L5-S1 on May 29, 2018. By the record, any issue related to the Schmorl's node protrusion and infection at L2-3 did not appear until six months after the last operation.

Dr. deGrange testified that the Schmorl's node had been present on the initial MRIs and that a very slowly evolving infection had caused the node to enlarge.

> I think when we first saw the Schmorl's node enlarge, I think it was the 2016 MRI because from 2015 to 2016 – and I still have them on my computer in the back room there – there's a noticeable difference. There's a significant difference from 2015 to 2018, but I could see right in the middle at 2016, yes, it had enlarged, and the only thing that makes sense given that is a very indolent infection. (PX5, pg. 29).

The Commission finds no MRIs from 2016 in the record. There were also many references to certain diagnostic images in the arbitration record, but the only ones offered and admitted into evidence were the May 20, 2015, November 28, 2018, and September 25, 2019

MRIs of the lumbar spine. No MRI prior to the November 28, 2018 MRI indicated a Schmorl's node issue.

Dr. deGrange believed that the suspected infection that was causing the L2-3 disc pathology was connected or related to the April 23, 2015 work accident. On that date, Petitioner testified that he had injured his low back while cleaning a 33,000 pound furnace that held liquid metal. "[T]here was about 8,000, 9,000 pounds of metal in the bottom of it. Metal level is about 4 or 5 feet below my feet, and I had to skim the troughs and slag off the top of the furnace." (T.18-19).

Dr. deGrange opined that Petitioner sustained a vertical disc herniation or Schmorl's node at L2-3 on April 23, 2015. He testified that this pathological finding was consistent with Petitioner's mechanism of injury because the disc was exposed to maximal compressive load while Petitioner was bending forward. Dr. deGrange further opined that the node was now enlarging due to an infection; blood work performed on August 21, 2019 indicated a higher than normal white blood cell count suggesting an infection, and a biopsy performed on November 22, 2019 indicated an ongoing, active infection in the bone at L3. Dr. deGrange did not believe Petitioner's Schmorl's node was degenerative in nature.

Respondent's Section 12 examiner, Dr. Daniel Kitchens, agreed that a Schmorl's node was the result of trauma. However, Dr. Kitchens found no evidence connecting the April 23, 2015 work accident to any pathology at L2-3. With respect to the theory that an infection was now causing the Schmorl's node to enlarge, Dr. Kitchens testified that an infection of the disc is a condition called discitis, and a common cause of discitis was surgery. Dr. Kitchens explained that the infection was not due to any of Petitioner's surgeries because Petitioner did not undergo any procedure at L2-3. Dr. deGrange conceded on this point that it was less likely that the infection was the result of any surgery at L5-S1, and he also conceded that it was highly unlikely that the infection would bypass the L4-5 and L3-4 disc and "just jump up at L2-3." (PX5, pg. 33). The Arbitrator acknowledged Dr. deGrange's testimony, but similar to Dr. deGrange, found no other explanation for the infection.

There was also some indication that Petitioner had a history of a significant nickel allergy with the screws in his back, but neither Drs. deGrange nor Kitchens opined specifically with respect to the nickel allergy and Petitioner's infection.

Respondent herein makes a similar argument to the employer in *Dunteman v. Ill. Workers' Comp. Comm'n*, 2016 IL App (4th) 150543WC, claiming that the work-related injury to the lumbar spine was not causally related to the subsequent infection. The Appellate Court in *Dunteman* instructed:

> 'Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury.' [Citation omitted] 'Under an independent intervening cause analysis,

> compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred 'but for' the original injury.'
>
> 'For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition.' [Citation omitted] A work-related 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). [Citation omitted]
>
> As long as there is a 'but-for' relationship between the work-related injury and subsequent condition of ill-being, the employer remains liable. 2016 IL App (4th) 150543WC, ¶¶ 42-44.

The test or standard outlined in *Dunteman* follows a long history of cases that found causation for subsequent injuries that clearly flowed from the original work-related injury. For example, in *Dunteman*, the Appellate Court found that the claimant's lancing of the work-related blister that resulted in his infection did not break the causal link, because "the infection would not have occurred 'but for' the existence of the work-related blister." *Id.* at 45. In *Vogel v. Ill. Workers' Comp. Comm'n*, 354 Ill. App. 3d 780, 786 (2005), the claimant had sustained a work-related cervical injury that necessitated a cervical fusion. While claimant was still recovering from that surgery, he was involved in three subsequent collisions which resulted in psuedoarthrosis or a failed fusion. *Id.* at 782-784. The Court stated:

> Here, claimant's first auto accident clearly aggravated his condition resulting from his work-related injury. There is no dispute that, when claimant was involved in the first auto accident, he had not fully recovered from his surgery. Just before the first auto accident, Dr. Boury reported that the fusion was progressing nicely but was not complete. Claimant had not yet been released to full-duty work. Even if the accident was responsible for the failed fusion, such a condition could not have developed but for the surgery, which everyone agreed was necessary as a result of claimant's work injury. *Id.* at 788.

The Appellate Court held that the claimant's current condition of ill-being was causally related to the original work injury; indicating that the subsequent collisions did not break causation but considered them to be contributing causes, or a continuing condition, and that the claimant's condition would not have progressed to the point it did but for his original work-related accident. *Id.* at 787-789.

In other cases involving subsequent injuries that appeared remote from the original work injury, the "but for" link was more generally applied and causation was still found in those cases. For example, in *International Harvester Co. v. Indus. Comm'n*, 46 Ill. 2d 238, 247 (1970), our

Supreme Court found that the claimant was suffering from a continuing condition of traumatic neurosis that resulted from a work-related head injury and that the existence of the condition was a causative factor in the total and permanent disability that occurred four years later when claimant's wife struck him in the eye and head area. In *Harper v. Indus. Comm'n*, a worker suffered a serious back injury at work, and he required an operation. Following the injury, the worker's "jolly disposition" changed, and he complained of pain. After returning to work about nine months later, the worker left a note stating that he had a good wife and child, but he was just in pain. Thereafter the worker committed suicide. 24 Ill. 2d 103, 104 (1962). The Court explained that,

> While (the act of suicide) may be an independent intervening cause in some cases, it is certainly not so in those cases where the incontrovertible evidence shows that, without the injury, there would have been no suicide; that the suicide was merely an act intervening between the injury and the death, and part of an unbroken chain of events from the injury to the death, and not a cause intervening between the injury and the death. *Id.* at 109.

The Commission acknowledges the broad parameters of the law on subsequent injuries, but the preponderance of the evidence in the case at bar does not support Petitioner's claim that the infection and condition at L2-3 was a natural consequence of the April 23, 2015 work accident. The Commission finds the link between the April 23, 2015 work injury and Petitioner's subsequent condition at L2-3 tenuous.

Dr. deGrange's opinion that the April 23, 2015 work accident caused the L2-3 Schmorl's node or vertical herniation is weak given the lack of complaints, lack of symptoms, and lack of subjective or objective findings. Dr. deGrange further opined that the node was now enlarging due to an infection – this was not a staph or strep infection, common infections following surgeries, but a rare infection. Dr. Kitchens agreed that a common cause of an infection of the disc, or discitis, was surgery, but Petitioner did not undergo any procedure at L2-3. Most significant is Dr. deGrange conceded on this point that it was less likely that the infection was the result of any surgery at L5-S1, and he also conceded that it was highly unlikely that the infection would bypass the L4-5 and L3-4 disc and "just jump up at L2-3." (PX5, pg. 33).

Given the record in its totality, the Commission reverses the Arbitrator's Decision and finds that Petitioner's condition of ill-being with respect to L2-3, specifically the Schmorl's node and infection, is not causally related to the April 23, 2015 work accident.

With respect to temporary total disability benefits (TTD), the parties stipulated that TTD benefits were paid in full through April 30, 2019. The Arbitrator awarded additional TTD from May 1, 2019 through January 17, 2020, the arbitration date. Respondent did not dispute the claimed TTD period, but disputed its liability for the awarded TTD based on its argument against causal connection. Having determined that Petitioner's condition of ill-being at L2-3, the Schmorl's node and infection, is not causally related to the April 23, 2015 work accident, the Commission finds that Petitioner is not entitled to the awarded TTD benefits, namely from May

1, 2019 through January 17, 2020. The Commission therefore strikes the Arbitrator's award of additional TTD benefits from May 1, 2019 through January 17, 2020.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed March 4, 2020, is hereby modified, as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's condition of ill-being with respect to L2-3, specifically the Schmorl's node and infection, is not causally related to the April 23, 2015 work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that by the parties' stipulation, Petitioner was entitled to and received temporary total disability benefits (TTD) through April 30, 2019 pursuant to Section 8(b) of the Act. Petitioner is not entitled to any further TTD benefits. The Arbitrator's award of TTD benefits from May 1, 2019 through January 17, 2020 is hereby stricken.

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.

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: DEC 11 2020

D. Douglas McCarthy

Stephen J. Mathis

L. Elizabeth Coppoletti

DDM/pm
O: 11/10/2020
052

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

WOODS, KENNETH
Employee/Petitioner

Case# **15WC017336**

GLOBAL BRASS
Employer/Respondent

20IWCC0730

On 3/4/2020, 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 1.01% 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:

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0299 KEEFE & DePAULI PC
MIKE KEEFE
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STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Kenneth Woods
Employee/Petitioner

v.

Global Brass
Employer/Respondent

Case # 15 WC 17336

Consolidated cases: n/a

20IWCC0730

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 17, 2020. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, April 23, 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 $86,795.98; the average weekly wage was $1,476.89.

On the date of accident, Petitioner was 42 years of age, married with 0 dependent child(ren).

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00. The parties stipulated TTD benefits were paid in full through April 30, 2019. The parties stipulated Respondent has paid $41,691.45 for an advance of permanency, but said will not be claimed at this time.

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

ORDER

Respondent shall pay Petitioner additional temporary total disability benefits of $984.59 per week for 37 3/7 weeks commencing May 1, 2019, through January 17, 2020, as provided in Sections 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)

February 29, 2020
Date

MAR 4 - 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on April 23, 2015. According to the Application, Petitioner "Hurt low back ladling refractory" and sustained an injury to the "MAW" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding in which Petitioner sought an order for additional payment of temporary total disability benefits of 37 3/7 weeks, commencing May 1, 2019, through January 17, 2020 (the date of trial). Petitioner and Respondent stipulated Petitioner was entitled to payment of temporary total disability benefits from December 1, 2015, through April 30, 2019. Respondent stipulated Petitioner sustained a work-related accident on April 23, 2015, but disputed liability on the basis of causal relationship in regard to an infection sustained by Petitioner (Arbitrator's Exhibit 1).

At trial, Petitioner and Respondent also entered into a number of stipulations in regard to this case. Petitioner and Respondent stipulated that various medical bills would not be tendered into evidence in order to expedite the trial of this case in regard to the causality of Petitioner's infection and Respondent's liability for the additional period of temporary total disability benefits being claimed. Petitioner and Respondent also stipulated no evidence would be presented as to whether Petitioner's back condition caused him to sustain a leg injury and this issue would be reserved for a determination at a later time. Petitioner and Respondent also stipulated Respondent was entitled to a credit of $41,691.45 for advance payment of permanency, but Respondent would defer claiming the credit until the case was finalized, and not against any additional temporary total disability benefits that might be awarded by the Arbitrator.

Petitioner has been employed by Respondent for approximately 20 years. On April 23, 2015, Petitioner was using a metal ladle to skim slag off the top of a furnace. The ladle had a head which was 12 to 14 inches wide and had an eight foot handle. The slag Petitioner had to skim was approximately four to five feet below his feet. Petitioner performed this task for most of his shift. By the end of his shift, Petitioner was experiencing pain in his low back.

Petitioner initially sought medical treatment from Dr. Mark Eavenson, a chiropractor, on May 20, 2015. Petitioner advised of the accident of April 23, 2015, and that he had experienced low back and leg pain since then. Dr. Eavenson ordered an MRI scan (Respondent's Exhibit 1).

The MRI was performed on May 20, 2015. According to the radiologist, the MRI revealed a small central disc herniation at L4-L5 and L5-S1 (Respondent's Exhibit 1).

Dr. Eavenson reviewed the MRI and prescribed some conservative treatment. Petitioner's condition did not improve and he was referred to Dr. Matthew Gornet, an orthopedic surgeon (Respondent's Exhibit 1).

Dr. Gornet evaluated Petitioner on June 1, 2015, and reviewed the MRI. At that time, Petitioner complained of low back pain on the left side as well as left buttock, hip and knee pain. Dr. Gornet opined that MRI revealed a central disc herniation/annular tear at L5-S1 and a left sided annular tear at L4-L5, both of which correlated with Petitioner's symptoms. Dr. Gornet

authorized Petitioner to return to work full duty, but to see him again in six to eight weeks (Respondent's Exhibit 1).

Dr. Gornet subsequently referred Petitioner to Dr. Kaylea Boutwell, a pain management physician. Dr. Boutwell saw Petitioner on September 17, 2015, and administered an epidural injection on the left at L4-L5 (Respondent's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. Donald deGrange, an orthopedic surgeon, on June 18, 2015. In connection with his examination of Petitioner, Dr. deGrange reviewed medical records and the MRI which were provided to him by Respondent. Dr. deGrange opined the MRI revealed a disc bulge at L4-L5 and a disc herniation at L5-S1. He opined Petitioner's low back condition was related to the accident of April 23, 2015. In regard to further treatment, he recommended Petitioner undergo an epidural steroid injection, but if it failed, Petitioner should undergo a decompression and discectomy at L5-S1 (Petitioner's Exhibit 1).

Petitioner subsequently chose to treat with Dr. deGrange. On December 1, 2015, Dr. deGrange performed back surgery. The procedure consisted of a microdiscectomy at L5-S1 (Petitioner's Exhibit 2).

Petitioner continued to have low back and left leg/hip symptoms following surgery. When Dr. deGrange saw Petitioner on March 8, 2017, he initially noted Petitioner had recovered from right carpal and cubital tunnel decompression surgeries. However, Petitioner continued to complain of left SI joint pain (Petitioner's Exhibit 1).

Dr. deGrange performed back surgery on June 5, 2017. The procedure consisted of posterolateral fusion with metal hardware at L5-S1 as well as decompression of the nerve roots at L4 and L5 (Petitioner's Exhibit 2).

Petitioner continued to have symptoms following the second back surgery. Dr. deGrange again performed back surgery on May 29, 2018. The procedure consisted of exploration of the L5-S1 fusion and removal of metal hardware (Petitioner's Exhibit 2).

When Dr. deGrange saw Petitioner on September 19, 2018, Petitioner's primary complaint was right leg pain which he stated began approximately three or four weeks prior. On examination, straight leg raising on the right was positive at 75°. Dr. deGrange noted Petitioner had a prior MRI which revealed a disc bulge at L4-L5 and he opined it was possible it had evolved into a herniation. He ordered a new MRI scan (Petitioner's Exhibit 1).

The MRI was performed on November 28, 2018. According to the radiologist, the MRI revealed the fusion at L5-S1 and circumferential disc bulges at L3-L4 and L4-L5 (Petitioner's Exhibit 3).

Dr. deGrange reviewed the MRI and compared it to the prior MRIs of February 17, 2016, and May 20, 2015. He specifically noted a Schmorl's node (which he defined as a fracture through the L3 end plate) had enlarged significantly over the preceding three years. He also noted the L4-L5 disc had remained stable (Petitioner's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. Daniel Kitchens, a neurosurgeon, on February 22, 2019. In connection with his examination of Petitioner, Dr. Kitchens reviewed medical records and diagnostic tests provided to him by Respondent. Dr. Kitchens opined Petitioner had degenerative disc disease, in particular, at the L2-L3 level with worsening of the Schmorl's node. He opined the work incident did not cause the degenerative condition in Petitioner's low back (Respondent's Exhibit 2; Deposition Exhibit 2).

Dr. deGrange was deposed on June 18, 2019, and his deposition testimony was received into evidence at trial. In regard to his diagnosis and treatment of Petitioner's back condition, Dr. deGrange's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Dr. deGrange testified that when he compared the MRIs of November 28, 2018, the prior MRIs of February 17, 2016, and May 20, 2015, the size of the Schmorl's node at the end plate of L3 had "enlarged significantly", but the disc at L4-L5 had remained stable (Petitioner's Exhibit 5; pp 18-20).

Dr. deGrange was asked if he had any explanation for the progression over time of the size of the Schmorl's node and the only explanation he had, as a spine surgeon, was that there was an "indolent infection" which he described as "...a very, very slowly evolving infection." Dr. deGrange further explained that two things happen when there is an infection, something is happening to the bone and the bone responds. He stated radiologists do a better job in recognizing that process. Dr. deGrange testified if you see a Schmorl's node on one MRI, it may be considered "no big deal", but if it enlarges on three subsequent MRIs, then, to him, it "does raise a red flag." He stated the infection was likely an exotic one like Propionibacterium. Dr. deGrange noted the infection had remained isolated in the bone which he opined was probably because of a very rare more exotic bacteria (Petitioner's Exhibit 5; pp 20-22).

Dr. deGrange testified he was going to treat Petitioner with antibiotics. He also stated he was going to order a CT guided biopsy into the area to confirm he was dealing with an infection (Petitioner's Exhibit 5; pp 22-23).

When questioned about how the suspected infection occurred, Dr. deGrange testified that "More likely than not as a consequence of this injury. That's probably how it got its toehold." (Petitioner's Exhibit 5, pp 23-24).

On cross-examination, Dr. deGrange agreed it was possible the infection was present at L2-L3 prior to the accident and surgeries. He also agreed it was "highly unlikely" that the infection would bypass the L4-L5 and L3-L4 disc spaces and go to L2-L3 (Petitioner's Exhibit 5; pp 32-33).

At the request of Respondent's counsel, Dr. Kitchens prepared a supplemental report dated July 24, 2019. He noted he had reviewed Dr. deGrange's deposition testimony and he disagreed with his opinion that there was an infection at L2-L3, based upon his review of the MRI scan (Respondent's Exhibit 2; Deposition Exhibit 4).

Dr. Kitchens was deposed on July 31, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Kitchens' testimony was consistent with his medical

report and he reaffirmed the opinions contained therein. In regard to the infection diagnosed by Dr. deGrange, Dr. Kitchens testified there was no evidence of discitis (an infection of the disk) based upon his review of the MRI of November 28, 2018. He stated the most common cause of discitis was IV drug abuse. Further, he testified that if someone developed discitis as a result of surgery, it would be at the space where the surgery was performed (Respondent's Exhibit 2; pp 12-14).

On cross-examination, Dr. Kitchens testified and indolent infection was a very slow growing or not a very aggressive infection. However, he stated he had never seen such an infection in the lumbar spine (Respondent's Exhibit 2; pp 23-24).

The biopsy ordered by Dr. deGrange was performed on November 22, 2019. According to the pathologist, the biopsy revealed reactive changes. It was also noted Petitioner had a moderate increase in his white blood cell count (Petitioner's Exhibit 6).

In a report dated December 4, 2019, Dr. deGrange noted that the pathology report of November 22, 2019, indicated there was active production of white blood cells along with two other blood cell types. He opined that active production of white blood cells indicated an ongoing infection. He explained the term "reactive changes" as the bone reacting to an ongoing pathology. While the culture with gram stain noted there were "No organisms observed", Dr. deGrange opined this was further evidence of an ongoing infection and the fact no organisms were observed was because of the Augmentin he had previously prescribed for Petitioner. Dr. deGrange noted he was going to continue Petitioner on antibiotics (Petitioner's Exhibit 1).

At trial, Petitioner testified he had been taking Augmentin and his pain symptoms had improved for a period of time. However, his pain symptoms have returned to what they were previously and he was going to start a new course of treatment which included an IV of Vancomycin.

Dr. Kitchens was again deposed on January 15, 2020, and his deposition testimony was received into evidence at trial. He testified he reviewed Dr. deGrange's report of December 4, 2019. Dr. Kitchens testified the Augmentin would not have had any effect on Petitioner's infection because it was not a recognized drug for osteomyelitis (Respondent's Exhibit 3; pp 7-8).

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 April 23, 2015.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on April 23, 2015. At trial, the dispute regarding causal relationship was limited to whether the infection diagnosed and treated by Dr. deGrange was related to the accident.

Dr. deGrange initially examined Petitioner at the direction of Respondent, but subsequently became Petitioner's treating physician.

When Dr. deGrange compared the MRIs of November 28, 2018, February 17, 2016, and May 20, 2015, he noted the size of the Schmorl's node had grown progressively larger during that time. The only explanation he had was that there was an "indolent infection" which he described as "...a very, very slowly evolving infection." Dr. deGrange explained that two things happen when there is an infection, something is happening to the bone and the bone responds. He stated radiologists do a better job in recognizing that process. Dr. deGrange testified if you see a Schmorl's node on one MRI, it may be considered "no big deal", but if it enlarges on subsequent MRIs, then, to him, it "does raise a red flag." Dr. deGrange testified the infection was likely an exotic one like Propionibacterium. Dr. deGrange noted the infection had remained isolated in the bone which he opined was probably because of a very rare more exotic bacteria which was probably because of a very rare/exotic bacteria.

Dr. deGrange conceded that the infection was at L2-L3 and not at the surgical site of L5-S1 and it was highly unlikely the infection would bypass L4-L5 and L3-L4.

The biopsy performed on November 22, 2019, confirmed the presence of an infection at L2-L3. Dr. deGrange explained this in detail in his report December 4, 2019.

Respondent's Section 12 examiner, Dr. Kitchens, opined there was no infection whatsoever, based upon his review of the MRI of November 28, 2018. However, he offered no explanation as to why the Schmorl's node continued to get progressively larger. Further, Dr. Kitchens' opinion was contrary to the opinions of both Dr. deGrange and the pathologist.

The Arbitrator acknowledges Dr. deGrange's opinion it was "highly unlikely" for the infection to be present only at L2-L3, but there was no other explanation for its presence.

Based upon the preceding, the Arbitrator finds the opinion of Dr. deGrange to be more persuasive than that of Dr. Kitchens in regard to causality.

In regard to disputed issue (L) 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 an additional period of temporary total disability benefits commencing May 1, 2019, through January 17, 2020.

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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONNELL GARDNER,

Petitioner,

20IWCC0731

vs.

NO: 19 WC 11780

STATE OF ILLINOIS –
MENARD CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §§ 19(b) and 8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, and temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the changes made 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).

While affirming and adopting the Decision of the Arbitrator, the Commission writes additionally on the issue of temporary total disability. The Arbitrator awarded Petitioner temporary total disability benefits for the period from March 28, 2019 through January 11, 2020, per Petitioner's Request for Hearing (and as clarified during the hearing itself). The Commission agrees with Respondent that the starting date for temporary total disability should be March 29, 2019 because Petitioner did work on the accident date and was not off work until the following day. The March 29, 2019 starting date also comports with the Decision of the Arbitrator, which awarded 41 and 2/7ths weeks of temporary total disability benefits.

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

20IWCC0731

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner established a causal connection between his injuries and his current condition of ill-being.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay for Petitioner's reasonable and necessary services set forth in Petitioner's Group Exhibit 1, pursuant to the fee schedule as provided in §§ 8(a) and 8.2 of the Act, with the exception of $275.00 due and owing Dr. Khaja Moshin, for which no bill was submitted by Petitioner. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent claims this credit, pursuant to §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the treatment recommended by Dr. Gornet and Dr. Paletta.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $956.87 per week for the periods from March 29, 2019 through January 11, 2020, a period of 41 and 2/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent is awarded a credit of $38,686.89 for temporary total disability benefits already paid, as well as credits for five service-connected days off and two regular days off.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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: DEC 14 2020
d: 12/3/20
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

20IWCC0731

GARDNER, DONNELL
Employee/Petitioner

Case# **19WC011780**

STATE OF IL/MENARD CORR CTR
Employer/Respondent

On 3/4/2020, 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 1.01% 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
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0558 ASSISTANT ATTORNEY GENERAL
KENTON OWENS
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
SPRINGFIELD, IL 62704

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

MAR 04 2020

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

20IWCC0731

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DONNELL GARDNER
Employee/Petitioner

v.

STATE OF ILLINOIS/MENARD CORR. CTR.
Employer/Respondent

Case # **19** WC **11780**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda Jean Cantrell**, Arbitrator of the Commission, in the city of **Herrin,** on **February 11, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 28, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$74,635.66**; the average weekly wage was **$1,435.30**.

On the date of accident, Petitioner was **45** 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 **$38,686.89** for TTD, **$0** for TPD, **$0** for maintenance, and **$5 service-connected days and 2 regular days off** for other benefits, for a total credit of **$38,686.89, plus 5 service-connected days and 2 regular days off**.

Respondent is entitled to a credit of **any benefits paid** under Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibit 1, as provided in §8(a) and § 8.2 of the Act, with the exception of $275.00 due and owing Dr. Khaja Mohsin, MD which Petitioner listed on the medical bills summary but did not submit the actual bill into evidence.

Respondent shall have credit for any amounts previously paid and shall indemnify and hold Petitioner harmless from claims made by any health providers arising from the expenses for which it claims credit. Respondent shall authorize and pay for the treatment recommended by Dr. Gornet and Dr. Paletta.

Respondent shall pay Petitioner temporary total disability benefits of **$956.87**/week for **41-2/7th** weeks, as provided in Section 8(b) of the Act.

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

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

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

Signature of Arbitrator

3/1/20
Date

MAR 4 - 2020

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

20IWCC0731

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DONNELL GARDNER,)
)
Employee/Petitioner,)
)
v.) Case No.: 19 WC 11780
)
STATE OF ILLINOIS/MENARD C.C.,)
)
Employer/Respondent.)

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on February 11, 2020, pursuant to Section 9(b) of the Act. The parties agree that on March 28, 2019, Petitioner was employed as a Correctional Sergeant for Respondent. The issues in dispute are accident (Neck only), causal connection, medical expenses, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

MEDICAL HISTORY

Petitioner was seen at Memorial Hospital East the day of the accident and reported right shoulder pain with limited range of motion. X-rays were negative, and he was discharged in a sling with instructions to take over-the-counter pain medication and follow up with a physician.

On April 2, 2019, Petitioner followed up with his primary care physician at First Care Express Care LLC where he provided a consistent history of the accident and reported right shoulder pain. Petitioner reported he had an appointment with Dr. Paletta who had performed surgery on his right shoulder a little over one year ago. The Review of Symptoms section of the office note states no neck symptoms. Petitioner was prescribed Toradol and ordered to follow up after he is evaluated by Dr. Paletta.

On April 5, 2019, Petitioner was evaluated by Dr. George Paletta, who took the history of the injury and Petitioner's shoulder symptoms. He also noted Petitioner's prior shoulder injury and treatment, after which Petitioner returned to full duty work. Petitioner reported that his pain was radicular and traveled all the way down his arm, with numbness and tingling in his fourth and fifth fingers. Dr. Paletta's physical examination showed limited range of motion of Petitioner's neck with painful extension along with a positive Spurling's test on the right. It also showed significant

right shoulder pain with orthopedic testing, markedly reduced range of shoulder motion with significant crepitus, and decreased sensation in the right ulnar nerve distribution. His assessment was end stage right shoulder osteoarthritis and "possible cervical component". He kept Petitioner off work and advised him that his radicular pain, paresthesias, and positive clinical findings on his neck exam were indicative of cervical spine component for which he recommended an MRI and evaluation with Dr. Matthew Gornet.

An MRI of Petitioner's neck was completed on April 8, 2019, and showed circumferential disc bulges with superimposed left lateral recess-foraminal protrusions at both C5-6 and C6-7 resulting in ventral cord flattening at both levels, C5-6 and C6-7 central canal stenosis and severe left greater than right foraminal stenosis, focal right paracentral protrusion at C3-4 resulting in ventral cord indentation, central canal stenosis, and bilateral foraminal stenosis. Based upon these results, Dr. Paletta believed that Petitioner's neck was a substantial source of Petitioner's complaints. He believed Petitioner would eventually require total shoulder replacement, but felt that this would not be appropriate until Petitioner had exhausted non-surgical management of his shoulder and received adequate treatment of his cervical spine. He kept him off work and deferred primary care to Dr. Gornet. Based on the history of Petitioner's injury, Dr. Paletta stated that the work accident was an aggravating factor in Petitioner's shoulder condition.

Dr. Gornet evaluated Petitioner on May 9, 2019, took a consistent history of the injury, and noted that Petitioner had "some neck pain", but he observed that "it is really his right shoulder and arm that bother him". After reviewing Petitioner's MRI and eliciting positive examination findings of decreased biceps and reproduction of Petitioner's symptoms, Dr. Gornet agreed that Petitioner's symptoms were consistent with cervical spine injury. He stated, "I have discussed with Mr. Gardner that he has obvious objective weakness, which would go beyond a simple shoulder problem. He understands there is an overlap in the shoulder region[,] and the shoulder region could easily develop symptoms emanating from the cervical spine as well as from the shoulder itself. In Mr. Gardner's case, I believe it is this diagnosis." Dr. Gornet also kept Petitioner off work and prescribed a steroid injection at C5-6 and stated that Petitioner's current symptoms were causally connected to his work injury on May 28, 2019.

Petitioner received the recommended injection from Dr. Helen Blake on May 28, 2019, but it did not provide significant relief. Dr. Gornet noted that it was difficult to examine Petitioner on account of his pain, but his examination remained positive for radiculopathy and decreased sensation in his C6 and C7 dermatomes. Since Petitioner's MRI scan was somewhat obscured, he ordered a plain CT and a new high resolution MRI, and he sought preoperative clearance for disc replacement at C5-6 and C6-7, though he indicated that Petitioner may also require treatment at C3-4. Petitioner remained temporarily and totally disabled.

On August 28, 2019, Dr. Gornet performed C5-6 and C6-7 disc replacement. Objective intraoperative findings noted a central disc herniation and a left-sided disc herniation at C6-7 with a "larger piece of disc" on the right side at C6-7, a central disc herniation and right and left sided

herniations at C5-6, and triceps activity consistent with the intraoperative EMG studies and Petitioner's clinical examination.

Petitioner reported significant improvement in his symptoms, particularly his neck pain and right arm numbness, tingling, and weakness, though he continued to have some shoulder symptoms for which he remained under the care of Dr. Paletta. Petitioner remained off work during his post-operative recovery and participated in physical therapy until his work release on January 11, 2020.

Respondent had Petitioner examined by Dr. Michael Nogalski on July 22, 2019. Dr. Nogalski noted that Petitioner suffered injury while pulling on a jammed cell door, and that he "felt excruciating pain in the front and back of his shoulder" and noted numbness that "went from his neck down into his pinkie and ring finger" as a result thereof. He also noted that although Petitioner had a preexisting right shoulder condition that required surgical intervention, Petitioner was working full duty at the time of his injury.

Dr. Nogalski's physical examination was positive for reduced range of motion, residual limitation in neck motion, and reproduction of some pain in the right paraspinous and trapezial area with Spurling's testing. After reviewing Petitioner's records, his assessment was right shoulder osteoarthritis and cervical spondylosis. He believed Petitioner suffered a strain injury to his right shoulder and agreed that Petitioner's current condition of ill-being was causally related to his accidental work injury; however, he did not believe Petitioner suffered a neck injury as a result of the accident. Although he stated that he found no contemporaneous report of any neck injury, he believed that "some physical therapy may benefit Mr. Gardner for both his shoulder and neck". He also acknowledged that there is a "significant issue with respect to the right shoulder" which would likely require further treatment. Despite this conclusion, he stated, "Mr. Gardner appears to reasonably have reached a level of maximum medical improvement with respect to the right shoulder.

Dr. Nogalski subsequently reviewed additional records and authored an addendum report on September 13, 2019. Although the cover letter indicated that he examined Petitioner for a second time, the body of the report did not include any physical examination findings and indicated that just records were reviewed following the previous examination in July of 2019 As of the September report, Dr. Nogalski did not believe that there was any causal relationship between Petitioner's current objective findings and the March 2019 work injury based on Petitioner's preexisting shoulder condition. He concluded that Petitioner previously suffered from severe osteoarthritis, there was no causal link between Petitioner's reported symptoms and the accident. He stated, "The mere existence of symptoms related to that osteoarthritis on 03/28/2019 does not reasonably validate that he has a causal relationship between that single event and his osteoarthritic condition". He continued to believe that there was no connection between the accident and Petitioner's cervical spine condition." He further opined that Petitioner's need for physical therapy and work restrictions were not related to the injury, but to his osteoarthritic shoulder condition.

He concluded, "In sum total, after review of the records, I do not believe that the 03/28/20 19 event caused or contributed to his condition of ill-being. It reasonably temporarily aggravated his osteoarthritic condition, but this condition existed well before the claimed 03/28/2019 event". He placed Petitioner at maximum medical improvement within four (4) to six (6) months from the date of the accident.

Respondent also offered Petitioner's original Application for Adjustment of Claim, which claimed injury to the "right shoulder, body as a whole" to support its dispute of liability for any injury to Petitioner's cervical spine. Petitioner's Amended Application for Adjustment of Claim was filed on August 6, 2019, and was entered into evidence as Arbitrator's Exhibit 2.

Dr. Gornet testified by way of deposition on October 10, 2019. He is an orthopedic surgeon whose practice is devoted to treatment of the spine. Dr. Gornet testified that he works "very often on neck/shoulder issues" with Dr. Paletta. He stated:

A. . . . The shoulder region is an area that's often overlapping as far as the source that causes the pain in the shoulder. It can emanate from the cervical spine as well as the shoulder itself, and we will on any given clinical day see in conjunction together probably five to seven patients.

Q. What do you mean when you say that the areas of the shoulder and the neck can overlap? Can you describe that for us?

A. Well, patients can have pain in their trapezius, shoulder, shoulder blade, upper arm, and that initially obviously could be felt to be a shoulder problem, and often the injuries that cause shoulder problems also cause neck problems.

So patients present with pain, but that pain actually may emanate either exclusively from the cervical spine as referred pain because of nerve irritation, or it could be a combination of a[n] underlying shoulder problem, an intrinsic problem in the shoulder, coupled with a cervical spine problem.

Q. And is that something that you and Dr. Paletta will oftentimes try to sort out together?

A. Yes, as I stated, we probably see five to seven patients on any clinic day together because of this overlap, which is fairly common, and at Washington University, they run their cervical spine and shoulder clinic together for the exact same reason.

Dr. Gornet testified that Petitioner's mechanism of injury was entirely consistent with cervical spine injury He stated that pulling places a mechanical load on the arm, and that same force is transmitted through to the cervical spine. He acknowledged that Petitioner had prior issues in the shoulder, but there was no pathology or issues noted in Petitioner's neck in the past.

Dr. Gornet testified that Petitioner's accident on May 28, 2019, caused Petitioner's disc injuries at C3-4, C5-6, and C6-7. The basis for his opinion was:

> ... [T]he objective MRI data, his clinical examination, the fact that he had nerve dysfunction that was quite distal to his shoulder and therefore it cannot be overlapping. His wrist dorsiflexion and volar flexion and numbness are all signs of nerve irritation, not of a shoulder problem. Finally, I defer to my colleague, Dr. Paletta, who, again, is a nationally-known shoulder specialist. The fact that he felt that the patient had additional problems and referred him over speaks volumes.

Dr. Gornet marked the identified herniations visualized on the MRI images, which were submitted as exhibits to his deposition. He further testified that the objective intraoperative EMG studies and findings of triceps activity confirmed nerve irritation at the C7 distribution all the way down his arm into his triceps. He testified that this was "clear, objective proof that his nerve is hot, it's irritated, and unequivocal that there's a problem going on, and it fit with what we found intraoperatively."

Dr. Gornet testified that he is familiar with Dr. Nogalski as a sports medicine and shoulder/lower extremity physician. He testified that he did not believe that Dr. Nogalski had done any spine surgery in the last two decades When asked to comment on Dr. Nogalski's opinion that Petitioner's records did not support an injury to the neck, Dr. Gornet stated:

> Well, my response for that is one, I wouldn't comment on a body part that I don't ever take care of, and for him to make those statements is inconsistent with clinical practice. It's inconsistent with the literature. It's inconsistent with treating any of these patients.
>
> Finally, we know de facto that this patient had herniations objectively seen on MRI scan, and the inflammatory component of a disc herniation takes time to develop, and so it's not surprising that some of his symptoms down his arm developed some time later.
>
> And then finally, remember, we objectively saw these things intraop and we even measured spontaneous nerve activity on the right side only in his triceps. So all of those things put together, again, would indicate that, I guess, Dr. Nogalski's comments regarding his cervical spine are probably not well-informed.

Dr. Gornet testified that specialists recognize that patients don't have to have neck pain to have a cervical spine problem. He testified that Dr. Paletta himself felt that there was a problem emanating from Petitioner's cervical spine, even though Petitioner's primary complaints were located in his shoulder, arm, and hand. He testified that even when Petitioner presented to his office, he had more symptoms in his shoulder than his neck. Dr. Gornet testified that the care and treatment he recommended for Petitioner's neck were causally related to the March 2019 accident. He deferred to Dr. Paletta on any diagnosis or prospective treatment with respect to the right shoulder.

On cross-examination, Dr. Gornet gave weight to the mechanism of injury and Petitioner's early presentation of symptoms. He noted that he sought treatment shortly after his injury and presented with symptoms that Dr. Paletta immediately suspected to be partly cervical in origin. He stated, "A lot of times early on in an injury, the water's a little muddy". He again confirmed, however, that the mechanism of injury and Petitioner's immediate symptoms were consistent with

a cervical spine problem, and stated that Petitioner suffered disc injury and aggravation of his underlying foraminal narrowing as a result of the accident. Dr. Gornet also testified that he evaluated Petitioner back in 2011, and there was no clinical indication that he had cervical nerve irritation in the past.

TESTIMONY

Petitioner was 45 years old at the time of accident. Petitioner testified he is employed as a Correctional Sergeant for Respondent. He has worked for the Department of Corrections for 21 years. He suffered injury on March 28, 2019, when he tried to forcibly open a jammed prison door in Respondent's segregation unit, which is the older part of Respondent's facility, and heard a loud pop in his right shoulder followed by instant pain throughout his neck and shoulder, with tingling in his fingers. An Employer's First Report of Injury was prepared by Respondent on 3/29/19 that indicated Petitioner injured his right shoulder. A Notice of Injury was completed on 3/28/19 that was not prepared by Petitioner and he testified he was not able to sign the form due to his right arm injury. Petitioner testified he is right-handed. The Notice of Injury indicates Petitioner had right shoulder pain with radiating pain in his fingers. Co-worker, Officer Erika Bryan, filled out a witness statement on 3/28/19, stating Petitioner attempted to secure a cell door that did not shut and injured his right shoulder.

Petitioner acknowledged he hurt his right shoulder in the past, but he was working full duty without restrictions and was not receiving medical care at the time of this accident. When asked how his neck fared prior to the accident, he testified, "Well, it just seemed like it was fine. I didn't have no issues, no nothing, you know, I was great with my neck". After the accident, however, he testified he experienced pain radiating down into his hand and fingers.

Petitioner testified at Arbitration that he continues to do well with respect to his neck following Dr. Gornet's treatment, which greatly improved his symptoms of numbness and tingling in his right arm. Petitioner testified he has a follow up appointment with Dr. Gornet in March, 2010 and he is not scheduled to see Dr. Paletta. Petitioner testified he was released by Dr. Gornet to return to full-duty work, without restrictions, on January 11, 2020. He testified that he continues, however, to have symptoms localized to his right shoulder.

CONCLUSIONS

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

To obtain compensation under the Act, an injury must "arise out of" and "in the course of" employment. 820 ILCS 305/1(d). An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the accidental injury. *Orsini v. Indus. Comm'n*, 509 N.E.2d 1005 (1987). In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work ***or*** that he

or she is exposed to the risk of injury to a greater degree than the general public. *Id.* "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Lee v. Indus. Comm'n*, 656 N.E.2d 1084 (1995); *Scheffler Greenhouses, Inc. v. Indus. Comm'n*, 362 N.E.2d 325 (1977). That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 671 (2003).

The Arbitrator finds no support in the records for Respondent's dispute of accident. Respondent stipulated that Petitioner sustained an accident with regard to his right shoulder, but not to his cervical spine. There is no question that an accident occurred on March 28, 2019, when Petitioner sustained injury as a result of pulling on a jammed cell door. Petitioner was clearly in the course of his employment when the incident occurred, and this was clearly a task peculiar to his employment in a correctional facility. While Respondent believes that no injury occurred to Petitioner's cervical spine as a result of this incident, the Arbitrator finds that this is an issue of causal connection and addresses it as such in the appropriate section. The Arbitrator therefore finds that Petitioner has met his burden of proof on the issue of accident.

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

When a preexisting is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition". *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007). Accidental injury need only be a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003) (emphasis added). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665 (Ill. 2003).

Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). The law is clear that if a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

With respect to Petitioner's right shoulder, the Arbitrator notes that Dr. Nogalski originally concluded that Petitioner had suffered a work-related injury to his shoulder. His opinion changed when he became aware of Petitioner's prior shoulder condition, even though Petitioner was working full duty at the time of his accident. The Arbitrator finds his opinion unsupported by the law espoused above. Although the record is clear that Petitioner has preexisting pathology in his

right shoulder and may have required surgery at some point, the evidence shows that Petitioner was not receiving medical care at the time of this accident while working full duty. Dr. Paletta also noted in his treatment records that despite the extent of Petitioner's shoulder condition, he reported he was able to return to full duty work. Accordingly, the Arbitrator is unpersuaded by Dr. Nogalski's opinion.

Notwithstanding, the above law does not bar compensation simply because an employee may have been a surgical candidate prior to a work injury. Even assuming Petitioner was a surgical candidate prior to March 2019, when a claimant's need for surgery is accelerated, it can be said that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition" pursuant to *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007). *See Wheaton v. State of Illinois/Choate Mental Health Ctr.*, 13 I.W.C.C. 0467; *Bowman v. Gateway Reg'l Med. Ctr.*, 14 I.W.C.C. 1022; *Clutterbuck v. UPS*, 15 I.W.C.C. 0046; *Howard v. St. Clair Hwy. Dept.*, 16 I.W.C.C. 0187, modified 16 MR 106.

Dr. Paletta's opinion is consistent with the aforementioned law, as he concluded that Petitioner's work injury was an "aggravating factor" in Petitioner's underlying condition of ill-being. The Arbitrator therefore concludes that Petitioner's condition of ill-being in his right shoulder is causally related to the March 2019 work injury.

With respect to the cervical spine, the Arbitrator concludes that the evidence also supports that Petitioner suffered a compensable injury to his neck at the time of the accident. In addition to or aside from expert medical testimony, circumstantial evidence may also be used to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n*, 442 N.E.2d 908 (1982). Although Respondent disputes same based on the opinion of Dr. Nogalski, the Arbitrator notes that the objective medical evidence, the opinions of both Dr. Gornet and Dr. Paletta, and the chain of events support a finding that Petitioner's condition of ill-being in his cervical spine is causally related to his work injury. The record demonstrates that Petitioner had no prior symptoms or complaints with respect to his cervical spine prior to the March 2019 accident.

The record further demonstrates that Petitioner had symptoms and complaints consistent with a neck injury immediately after the accident, as noted by his immediate complaint of numbness and tingling down his right arm into his fingers. Given Petitioner's history of right shoulder symptoms and feeling/hearing a loud pop in his shoulder upon injury, it is logical that Petitioner would have reported his injury as to the shoulder and not his neck. Dr. Gornet credibly testified that Petitioner's complaints of shoulder pain and radiculopathy were indicative of a cervical spine injury, even though Petitioner's symptoms manifested predominantly in his right shoulder and arm. Dr. Gornet's opinion is supported by Dr. Paletta, who immediately suspected Petitioner

suffered a neck injury and referred him for a cervical spine MRI with primary complaints of right shoulder pain and right upper extremity paresthesias. Petitioner's symptoms of right upper extremity paresthesias manifested shortly following the injury and improved following Petitioner's cervical disc replacement surgery. Significantly, objective intraoperative findings confirmed C7 nerve root irritation along with the disc herniations identified on the MRI of Petitioner's cervical spine.

The Arbitrator also gives weight to the difference in expertise between Dr. Nogalski and Dr. Gornet. Dr. Gornet's testimony that Dr. Nogalski is not versed in treatment of spinal injuries is substantiated by Respondent's Exhibit 4, the curriculum vitae of Dr. Nogalski. As such, the Arbitrator affords more weight to the opinion of Dr. Gornet, whose opinion is corroborated by Dr. Paletta. The Arbitrator also notes that the Commission has acknowledged that there is overlap between shoulder injuries and cervical spine conditions. *See Tiffany Molton v. Red Bud Reg'l Care*, 18 I.W.C.C. 0381. Respondent offered Petitioner's original Application for Adjustment of Claim to support its position; however, the Arbitrator does not find this argument persuasive, as doing so would essentially be relying on "'expert' medical testimony from a layperson" and depriving Petitioner of the right to correct pleadings to conform to the evidence. *Durand v. Indus. Comm'n*, 224 Ill. 2d 53, 73, 862 N.E.2d 918, 929 (2006). Based upon the foregoing, the Arbitrator finds that Petitioner met his burden of proof and established that his current condition of ill-being in his right shoulder and his cervical spine is causally related to the accidental injury of March 28, 2019.

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

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001). Based upon the above findings as to causal connection, the Arbitrator finds that Petitioner is entitled to recovery for the medical expenses thus far and is entitled to prospective care since he has not reached maximum medical improvement. Respondent shall therefore pay the expenses contained in Petitioner's group exhibit 1, with the exception of $275.00 due and owing Dr. Khaja Mohsin, MD which Petitioner listed on the medical bills summary but did not submit the actual bill into evidence. Respondent shall authorize and pay for the necessary treatment recommended by Dr. Gornet and Dr. Paletta. Respondent shall have credit for any expenses paid provided that it agrees to indemnify and hold Petitioner harmless from any claims made by any providers arising from the expenses for which it claims credit.

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

To be entitled to TTD benefits, it is a claimant's burden to prove not only that he did not work, but also that he was unable to work. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1, 13. The record establishes that Petitioner could not and did not work from the date of the accident through his release on January 11, 2020. Respondent shall therefore pay temporary total disability benefits of $956.87/per week for the disputed 41-2/7th weeks of disability from March 28, 2019 through January 11, 2020. Respondent shall have credit for $38,686.89 pain in TTD benefits, as well as five (5) service-connected days and 2 regular days off.

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

Linda J. Cantrell

Arbitrator Linda J. Cantrell

3/1/20

DATE

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Douglas Smith,
Petitioner,

vs.

American Coal Company,
Respondent.

20IWCC0732

NO: 16 WC 30531

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 disease, permanent disability and Sections 1(d) through 1(f) of the Occupational Diseases Act 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 12, 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.

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

DATED: DEC 14 2020
o12/3/20
DLS/rm
046

Deborah L. Simpson
Deborah L. Simpson

Barbara N. Flores

Marc Parker
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0732

SMITH, DOUGLAS
Employee/Petitioner

Case# **16WC030531**

AMERICAN COAL COMPANY
Employer/Respondent

On 5/12/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% 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:

5236 CULLEY FEIST KUPPART & JORDAN
ROMAN P KUPPART
3 S MAIN ST SUITE 2
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

20IWCC0732

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Douglas Smith
Employee/Petitioner

v.

American Coal Company
Employer/Respondent

Case # **16** WC **30531**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Dennis S. O'Brien**, Arbitrator of the Commission, in the city of **Herrin**, on **March 11, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Disease and Sections 1(d)-(f) of the Occupational Diseases Act**

FINDINGS

On **August 31, 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 **$94,215.16**; the average weekly wage was **$1,811.83**.

On the date of accident, Petitioner was **63** 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 **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

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

ORDER

Petitioner has failed to prove by a preponderance of the evidence that he has an occupational disease arising out of and in the course of his employment and has failed to prove by a preponderance of the evidence that he suffered a timely disablement as defined in Section 1(e) and Section 1(f) of the Occupational Diseases Act.

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.

Dennis O'Brien

Signature of Arbitrator

May 5, 2020
Date

ICArbDec p. 2

MAY 12 2020

Findings of Fact

Testimony at Arbitration

Petitioner testified that as of the date of arbitration he was 68 years old. He noted that after high school he had attended classes at Henderson Community College but did not finish an associates\'s degree. He said he had worked in the coal mines for forty-two years, with all of that work being underground. He said that doing that work he was regularly exposed to coal and rock dust, that all of the dust underground would get stirred up and would bother his breathing.

Petitioner said his last date of employment with Respondent American Coal at its New future mine in Galatia was August 31, 2015. He was nearly 64 years old at that time. At that time he was working as an assistant to the general foreman, doing a little bit of everything, but the mine was downsizing and he was laid off that day. He said that was the last day he was exposed to coal dust. Petitioner noted he had not been employed by anyone since August 31, 2015.

Petitioner said he graduated high school in 1968, went to Henderson Community College, worked for his father for a short period of time in 1971, and then spent approximately two years in the Army. In November of 1973 he began working for Peabody Coal in Kentucky and worked for that company as well as Warrior Coal, Alliance Coal, and Brushy Creek Coal, until about January of 2005 when he began working for Respondent from 2005 through 2008. He then worked for Advent Mine in Kentucky for a year prior to returning to Respondent, where he worked until 2015 when he was laid off. During those years of mining for the various companies he worked several different job classifications.

Petitioner said he worked as a roof bolter, putting in support where coal had been extracted, which was a dusty job as it was done where coal extraction was taking place. He also worked operating a cutting machine, which he said was also a dusty job. He performed several different jobs while working in the coal mines, including miner operator, assistant mine foreman, face boss, general inside laborer, belt examiner/mechanic, continuous miner production supervisor, mine foreman, supply coordinator, face boss belt examiner and mine foreman, the job he had when he retired. He said most jobs in the mine involve heavy exertion, it is a strenuous job, even as a supervisor, as when another worker is not present he would fill in on that job to make sure it was performed. He said there was a lot of walking involved in the jobs he performed in the mines as he would have to inspect several different things to see if something needed to be corrected, if additional rock dust was needed or if extra support needed to be built to prevent areas from falling in. He said that many of the areas he worked in were dusty and that the walking conditions varied and could be very rough and could be wet or dry.

Petitioner said that as of the date of arbitration he had breathing problems, that they started in the latter portion of his career, that it was gradual and had become noticeable in the last four or five years, and that he could not breathe well. He felt he was more susceptible to respiratory infections and shortness of breath. He said he did not have the stamina he formerly had. He said he would notice shortness of breath when he would exert himself or walk a lot having to stop more to catch his breath. He said he had to wear a tool belt weighing 15 to 20 pounds which included a respirator. He sometimes would carry a bag of tools with him to save himself from having to go back and get them. Whether he could stand upright or had to bend over in places varied, with some

areas so low he would almost be crawling. With some jobs he had to shovel coal, and he said the harder you shovel, the more air was required, and it got harder, and he would have to stop.

Petitioner testified that as of the day of the arbitration if he were to walk outside at a regular pace on level ground he could probably walk a couple hundred yards before he would notice a change in his breathing, depending on how fast he walked. He said climbing stairs required more oxygen and he was not very good at climbing stairs. He said his home had stairs and he was okay on them if he went slow, but would pant for breath if he tried to speed up. He said in the past four or five years his breathing has gotten worse. He was not taking any breathing medications as of the date of arbitration. He said his daily activities were affected as he could not chase his grandchildren and he did not play sports, could no longer play ball, and while he previously would run, he no longer did. He said he stopped running and jogging probably 20 years earlier. He said the last time he played ball was probably 20 years earlier as well. He said he did play ball with his grandchildren, but at his pace. He said he could help his wife with the groceries but could not pack anything very heavy.

Petitioner said his current treating physician is Dr. Jackson and his prior physician was Dr. Alexander. He said he had gone to both for respiratory infections, which he tended to get a lot, but that neither had examined him for black lung. He said he did tell them that one doctor had told him he had it. He said he had never smoked or chewed tobacco. He said he was unaware of having any other health problems.

Petitioner said that while working for Respondent he completed his job every day but towards the end of his career it was getting harder to do. He said that as of the date of arbitration he did not believe he could perform his last job at the coal mine as he does not breathe as well and he just can't do what he used to do. He said he did have hobbies, that while he did not hunt any longer he did fish while sitting on the bank with his grandchildren and he did shoot pool. He said if he hunted he would ride a 4-wheeler down to a deer stand, sit there, shoot the deer and load it up in the 4-wheeler and take it out of the woods.

On cross-examination Petitioner said that if the company had not closed the mine on September 1 and laid him off he would have gone to work the next day. He said he received a 401K with Respondent and after being laid off signed up for Social Security and, eventually, Medicare.

Petitioner said Dr. Alexander practiced with HMC Clinic and he treated there until January 3, 2018, when he was seen for a sinus infection. After that he saw Dr. Jackson who had done blood work on him every six months for the past two years. The only medication he takes is a statin for cholesterol. He said he believed he had always been honest with the physicians at Harris Burke Medical Center in regard to his symptoms or lack of symptoms.

Petitioner testified that he saw Dr. Istanbouly at the request of his attorney on February 28, 2017. He said he saw him on one occasion only. He said in April of 2017 he underwent some testing at Methodist Hospital in Henderson at the request of Respondent. He said with the exception of the one visit with Dr. Istanbouly and the testing at Methodist Hospital he had not seen anyone else in regard to this claim.

Petitioner said that over the years he had undergone NIOSH chest x-ray screenings for black lung and that he had received written reports advising him what the films revealed, the last being perhaps as long as 20 years prior to arbitration. He said he did not bring any of those letters with him to the hearing. He said he thought Respondent had offered such x-rays to him, however.

Petitioner said he had not gone hunting this year. He said he played pool in a league, but really had no other hobbies. He tried to stay in shape by riding his stationary bike a couple of times a week for 15 to 20 minutes and walking his dog, a Pit Bull, around his big block in Shawneetown. He said he has a two and a half lots for his

house and cuts the grass with a riding mower, though most of the lot is house and concrete. When he hunts he goes to his wife's farm, which is 88 acres of pasture field. It is not really a farm, as they don't do any kind of farming, but it has woods and a lake, and with a landowner's permit they can hunt on it, though he said he had not hunted in years.

He said Dr. Istanbouly had asked him questions about his health and he thought he had answered them honestly.

He said he did travel, vacationing in Florida and sitting on the beach.

Medical Evidence

Medical records of Dr. Alexander from August 27, 2012 reflect that as of that date Petitioner was not complaining of chest pain or discomfort, was not suffering from dyspnea (shortness of breath), had no cough and was not wheezing. The physical examination of his lungs showed his chest to be normal to percussion with normal breath sounds, no wheezing, and no rhonchi (rattling, continuous, low pitched breath sounds), rales (rattling sounds) or crackles (clicking or crackling sounds on inhalation) being heard. No indication of complaints or abnormal physical examination of the lungs and no disease or abnormalities for the lungs is indicated in those records. RX 4

Petitioner was seen by Dr. Hudson in the Emergency Care Clinic of HMC Clinic on December 28, 2015. His chief complaint at that time was of congestion of the sinuses of four days duration. He noted that he had not been feeling poorly (malaise) though he had sinus pain, nasal discharge and had been sneezing. It was noted that he again was not suffering from shortness of breath, was not coughing up sputum, and was not wheezing. He advised the doctor that he walked three to four times a week and that while he would occasionally cough, he did not have shortness of breath or wheezing. His oxygen saturation was 98% and the physical examination of his lungs on that date showed they were clear to ausculatation (listening via stethoscope), and no wheezing, rhonchi, rales or crackles were heard. No indication of complaints or abnormal physical examination of the lungs and no disease or abnormalities for the lungs is indicated in those records. RX 4

A black lung screening was performed at Methodist Hospital on April 27, 2017, and it included spirometry, lung volume and diffusion testing. That test's interpretation was normal diffusion capacity. RX 3

Petitioner was seen by Nurse Practitioner Eversmann at HMC Clinic on January 3, 2018. The chief complaint at that time was sinus pressure. He denied malaise or dyspnea and said he had not been coughing up sputum or wheezing. He said his coughing was minimal and non-productive. Oxygen saturation was found to be 98%. The assessment made on that date was of sinusitis. On his registration form for that visit he did not answer the question, "Are you currently in a Black Lung Program." No indication of complaints or abnormal physical examination of the lungs and no disease or abnormalities for the lungs is indicated in those records. RX 4

Those were the only medical records introduced into evidence. All other medical evidence was admitted via deposition testimony.

Dr. Suhail Istanbouly testified on behalf of Petitioner. He noted that he examined Petitioner on February 28, 2017, at the request of Petitioner's counsel. Dr. Istanbouly stated he is a physician specializing in pulmonary medicine and critical care medicine, with approximately 30% of his practice dealing with the care and treatment of coal miners. He noted he has conducted black lung examinations for the U.S. Department of Labor. He said he has been the medical director of the pulmonary department at Herrin Hospital since approximately 2005. Dr.

Istanbouly performs five to seven examinations such as that performed on Petitioner per month. and all of those examinations have been at the request of a claimant attorney. PX 1, p. 5-7,18.

Dr. Istanbouly stated that the history he received from Petitioner was that he had been an underground coal miner for 43 years, last working in coal mine employment in August 2015. At that time he last worked as a coal miner he was an assistant mine supervisor which he described as basically a physical job. Petitioner advised him that he had never smoked. Petitioner told Dr. Istanbouly he had a chronic daily cough for the prior two to three years, describing it as being mild in intensity. Petitioner also told him of having mild exertional dyspnea, but of being able to walk up to one mile before he started having breathing problems. Dr. Istanbouly testified that when a person has simple coal workers' pneumoconiosis radiographically, he would expect symptoms of chronic cough, sputum production, wheezing and shortness of breath. PX 1, p. 8

Dr. Istanbouly testified that Petitioner's spirometry test was within normal range per ATS Guidelines. He said that a person with a positive chest x-ray for coal workers' pneumoconiosis can be asymptomatic if it is in early stage. Dr. Istanbouly state that his physical examination of Petitioner's chest was within normal limits. He testified that a person does not have to have abnormalities on physical examination of the chest in order to have coal workers' pneumoconiosis. Dr. Istanbouly testified that in his report he indicated that Petitioner's FEV1/FVC ratio was 74%, and that, pursuant to the American Thoracic Society Guidelines, a FEV1/FVC ratio of 74% would be considered normal. He testified that having pulmonary function studies within the range of normal does not necessarily mean that the lungs have not been damaged, but that the damage is not bad enough to be revealed on the pulmonary function testing. He said he had reviewed the chest x-ray of Petitioner taken on August 12, 2016, that the chest x-ray was of diagnostic quality, and that it revealed mild bilateral interstitial fibrosis consistent with coal workers' pneumoconiosis. Dr. Istanbouly testified that in his opinion Petitioner had coal workers' pneumoconiosis which had been caused by his long term coal dust inhalation. PX 1, p. 8-10,12-14

Dr. Istanbouly described coal workers' pneumoconiosis as fine particles being inhaled into the deep parts of the airways ending in the alveoli creating a local irritation or inflammation that ends up with tiny scars which are seen as small, round opacities on x-rays. He said the tiny scars replace the normal lung tissue and affect the gas exchange to the vascular parenchymal barrier. The scarring and fibrosis of coal workers' pneumoconiosis are permanent. Dr. Istanbouly said not every coal miner who is exposed to coal dust gets coal workers' pneumoconiosis. By definition, if a person has coal worker's pneumoconiosis, he would have impairment of the function of his lungs at least at the site of the scar or fibrosis. He said in his opinion Petitioner had clinical symptoms representing pulmonary impairment. PX 1, p. 14-16

Dr. Istanbouly testified that Petitioner had clinical symptoms representing pulmonary impairment in the form of chronic daily cough and mild exertional dyspnea. Dr. Istanbouly testified that it was medically advisable for Petitioner to avoid any further coal dust inhalation to prevent the progression of his pulmonary disease. He testified that Petitioner could not have additional exposure to coal dust without endangering his health. He further testified that Petitioner had damage to his lungs as a result of his occupational exposure which was revealed on the chest x-ray and reflected by his chronic respiratory symptoms. PX 1, p. 16,17

Petitioner told Dr. Istanbouly that his cough was triggered by certain positions in bed. He did not relate any other triggers. Petitioner had no significant sputum with his cough. Petitioner advised the doctor that he would have runny nose and post nasal drip. Dr. Istanbouly testified that those two conditions can cause cough. Dr. Istanbouly testified that Petitioner was not taking any breathing medications at the time of his examination and he did not relate to Dr. Istanbouly ever having taken breathing medications. He testified that Petitioner's spirometry was normal. Given his FEV1 of 86%, there was no indication of restriction. Petitioner did not have an obstruction. Dr. Istanbouly testified that his physical examination of Petitioner's chest did not reveal any sign

of pulmonary disease. He noted that Petitioner's O2 saturation was 97 percent, which was normal. Petitioner did not tell Dr. Istanbouly that he left the mine at the time he did due to respiratory disease or symptoms. PX 1, p. 18-20

Dr. Istanbouly was provided with Dr. Smith's interpretation of the August 12, 2016, chest x-ray, but he was not provided with any other interpretations of Petitioner's chest imaging. Dr. Istanbouly did not review any treatment records. He testified that he does not use the standard ILO films in his interpretation of chest x-rays for black lung, nor does he provide profusion ratings on the films he interprets for black lung. Dr. Istanbouly is not an A-reader or B-reader of films, but said when he interprets a film for black lung, he determines whether it is positive or negative. If it is positive, he then classifies the film as early, moderate or severe. In Petitioner's case, he classified the film as early. Dr. Istanbouly could not say whether Petitioner's film revealed 1/0 or 0/1 profusion. PX 1, p. 13,21-22

Dr. Henry K. Smith testified on behalf of Petitioner. He testified that he was a diagnostic radiologist and has been board certified in radiology since 1973. He said he took his first B-reader exam in 1987 and has been continually certified as a B-reader since that time. Dr. Smith testified that he failed the B-reading recertification exam twice in approximately 1999, as he was overreading the films, having gotten new glasses prior to the exams. He failed as he was finding more disease than was present on the standard film. Dr. Smith received his Doctorate of Osteopathic Medicine in 1968 from Kirksville College of Osteopathic Medicine. He then did a rotating general internship at Carson City Hospital in Carson City, Michigan and a radiology residency at Memorial Osteopathic Hospital in York, Pennsylvania. Dr. Smith worked in several hospitals before operating his own radiology practice from 1988 to 2016. Since closing that practice he has been performing consultant work in the field of radiology including B-readings. PX 2, p. 4,7,8,10,11,47

Dr. Smith testified that in performing a B-reading, he starts with determining the quality of the film. The next step is to determine if there are any small opacities present. If opacities are present, he determines if there are enough to be called pneumoconiosis. If so, then he determines whether they are round or linear opacities and categorizes them by size. Dr. Smith testified that with coal workers' pneumoconiosis, the preponderance of small opacities are round. He testified that with other kinds of pneumoconiosis, such as asbestos related, they are linear or irregular opacities. In coal workers' pneumoconiosis opacities occur primarily in the upper to mid lung zones. With asbestosis, it predominantly occurs in the mid to lower lung zones. The next thing the B-reader considers is the profusion which is the concentration or density of the findings in the lungs. Dr. Smith testified that the profusion tells the reader what degree of involvement is present. Dr. Smith testified that the last thing he includes in completing the B-reading form is the obligatory findings which are things that need to be recorded other than the findings of black lung. Dr. Smith described an opacity as a small abnormal density that one would not see on a normal chest x-ray. It is often seen with people that have occupational lung disease or pneumoconiosis. PX 2, p. 19-23,25,28-29

Dr. Smith testified that at the request of Petitioner's counsel he reviewed a chest x-ray of Petitioner dated August 12, 2016. He testified that the film was of diagnostic quality, that he graded the film as quality 1. Dr. Smith's impression was that of simple coal workers' pneumoconiosis with P/P opacities in the mid and lower lung zones bilaterally, profusion 1/0. Dr. Smith said that readings of either 0/1 or 1/0 are the most controversial readings, and that similarly qualified physicians could read that same film either way. Dr. Smith testified that Petitioner had damage to his lungs as a result of the coal workers' pneumoconiosis. He testified that he did not record in his report any edge enhancement on the film that he reviewed, that he did not record poor contrast on the film. PX 2, p. 35-37

From 1988 to 2016, Smith Radiology was a freestanding diagnostic. walk-in medical facility. Dr. Smith testified that Smith Radiology was netting $1.25 million in annual income after expenses. He testified that of that income maybe 5% was for medical legal exams or interpretations. Dr. Smith testified that over time he interpreted chest x-rays for black lung for over 20 different law firms, and that over 80% of those firms represented claimants. Dr. Smith testified that presently he is reviewing films for black lung for five firms that represent claimants. Dr. Smith testified that one of those firms is Petitioner's counsel. He has also reviewed films for Culley & Wissore. He testified that he has read more than 345 films for Culley & Wissore or Petitioner's counsel. Dr. Smith testified that when he received films from Culley & Wissore, he would get two or three films at a time on a frequency of twice a month. He might receive a tiny bit more than that from Petitioner's counsel. The medical/legal interpretations he is performing at this time are primarily for claimants. Dr. Smith testified that at his peak he was interpreting 2,000 films a year for law firms. Presently he is interpreting about 1,500 films a year. PX 2, p. 50-58

Dr. Smith has never sat on any committee with NIOSH, has not held any office in any capacity with the College of Osteopathic Medicine or with the Osteopathic Board of Radiology. Dr. Smith testified that the syllabus he uses to study for the B-reading exam he pretty much takes as gospel. He testified that the panel that puts that together are the peers that he aspires to be, that the leaders in the field have been chosen to put that syllabus together. Dr. Smith testified that a new syllabus has been authored by NIOSH and that Dr. Cris Meyer was one of the authors of that syllabus. Dr. Smith testified that he agrees with the current B-reading syllabus that small opacities associated with the exposure to silica and coal dust are usually rounded. He further agreed that the syllabus states that the small, rounded opacities usually involve the upper lung zones first, but as the dust exposure continues, all lung zones may become involved, and he agrees with the syllabus in that regard as that has been his experience. He testified that profusion ratings were adopted to avoid such imprecise descriptive terms of what was seen on the films, such as early, moderate or severe pneumoconiosis. PX. 2, p. 60-62,65,68

Dr. Smith testified that simple pneumoconiosis is unlikely to progress once the exposure ceases. He testified that pulmonary impairment is determined by appropriate pulmonary function testing and not by chest x-ray. If one wants to know whether there is any functional impairment, and if present, the degree of same, he would want to have valid pulmonary testing. PX 2, p. 65,66

Dr. Smith said the profusion rating he gave Petitioner's film was the lowest which could be given while allowing the film to remain positive for pneumoconiosis. PX 2 p.69,70

Dr. Cristopher Meyer testified on behalf of Respondent. He said he reviewed a PA chest radiograph from Ferrell Hospital dated August 12, 2016 and the film was quality 2 with some edge enhancement associated with the exam. He described edge enhancement as one of many different algorithms that digital images can be processed with. With edge enhancement when one passes from an area of a darker portion of the examination to a lighter portion of the examination, that interface or that edge is accentuated. If it is done with enough severity, it can cause the image to have an appearance as if it has small irregular opacities. Dr. Meyer testified that there were no small opacities or large opacities and no findings of coal workers' pneumoconiosis on the film. Dr. Meyer testified that if Dr. Castle found the film to be quality 2 because of poor contrast, Dr. Meyer suspected that they were describing the same limitations on the film with slightly different terminology. Dr. Meyer interpreted that film as showing the lungs to be clear with no small opacities or large opacities and no findings of coal workers' pneumoconiosis. Since he found no nodules or opacities he recorded his findings as a 0/0. He said that if these films had been reviewed on a regular clinical workday he would have read them as having no acute cardiopulmonary disease. RX 1, p. 40-42,46,53

Dr. Meyer testified that if a physician who was not a B-reader or an A-reader or a radiologist made of diagnosis of pneumoconiosis, it is absolutely not possible to know if it met the criteria the ILO had established for that diagnosis. RX 1 p.66

Dr. Meyer has been board certified in radiology since 1992, and has been a B-reader since 1999. Dr. Meyer has held several academic positions at universities in Maryland, Ohio, Indiana and, as of the date of his deposition, Wisconsin. He has also served as a journal reviewer on several radiology related medical journals. Dr. Meyer has recently been asked to have a more academic role in the B-reader program. Dr. Meyer is on the American College of Radiology Pneumoconiosis Task Force which is engaged in redesigning the course and submitting cases for the B-reader training module and exam. Dr. Meyer testified that one of the most important parts of the B-reader training and examination is making the distinction between a 0/1 and 1/0 film. RX 1, p. 7,9-14,19,32,34

Dr. Meyer testified that to become a B-reader one takes the weekend course which includes a series of lectures describing the B-reading classification system. The teachers of the course go through standard examples of the various components of the B-reading system, and then the course participants review a series of practice examples with mentors overseeing the practice examples. Dr. Meyer testified that the faculty is typically experienced senior level B-readers. After taking the course, a candidate then takes the B-reading exam. Dr. Meyer testified that the certifying exam is six hours long with 120 chest x-rays to be characterized. The pass rate of the examination runs roughly 60%. Dr. Meyer has been involved in writing the B-reader examination and in writing questions for the American Board of Radiology. RX 1, p. 32-34,37

Dr. Meyer testified that the B-reader looks at the lungs to decide whether there are any small nodular opacities or linear opacities and based on the size and appearance of those small opacities they are given a letter score. He testified that specific occupational lung diseases are described by specific opacity types. Coal workers' pneumoconiosis is usually described by small round opacities. Diseases that cause pulmonary fibrosis, like asbestosis, will be described by small linear opacities. The distribution of the opacities is also described because different pneumoconioses are seen in different regions of the lung. Coal workers' pneumoconiosis is typically an upper zone predominant process while idiopathic pulmonary fibrosis or asbestosis is a basilar or linear process. The last component of the interpretation is the extent of lung involvement or the so-called profusion. Dr. Meyer testified that the profusion is basically trying to define the density of the small opacities in the lung. RX 1, p. 22,23,28,30

Dr. James R. Castle testified on behalf of Respondent, having reviewed medical records and a chest x-ray regarding Petitioner. Dr. Castle is a pulmonologist and is board certified in internal medicine and in the subspecialty of pulmonary disease. Dr. Castle practiced in Roanoke, Virginia for 30 years. His practice was limited to pulmonary disease and chest disease which encompassed critical care medicine. Dr. Castle's practice included treating patients with occupational lung disease. He had some patients in his practice who had coal workers' pneumoconiosis. Dr. Castle was continuously certified as a B-reader from 1985 through June 30, 2017. RX 2, p. 3,6,7,11-12,18

Dr. Castle reviewed a chest x-ray of Petitioner taken at Ferrell Hospital on August 12, 2016 and testified that the film was quality 2 because of poor contrast. He testified that the film showed no parenchymal abnormalities consistent with pneumoconiosis. He noted calcified granulomas. Dr. Castle testified that for a proper reading of a chest x-ray, the reader first notes the quality of the film. Then the reader goes on to see if there are any abnormalities consistent with pneumoconiosis. If there are no abnormalities consistent with pneumoconiosis, that is the end of the review. If there are abnormalities consistent with pneumoconiosis, then the reader determines the size and shape and what areas of the lung are affected. Dr. Castle testified that the important

part is determining the profusion which is done by comparing the subject film to the standard films that are utilized for the ILO classification. RX 2, p. 23

Dr. Castle testified that when he is looking at a film to determine whether someone has pneumoconiosis or not, he presumes that there was sufficient exposure to an offending agent to cause pneumoconiosis. Dr. Castle testified that the important distinction between the film with a profusion of 1/0 and a film with a profusion of 0/1 is that the 1/0 film is the most minimally positive film one can have for pneumoconiosis. The 0/1 is technically negative for pneumoconiosis. Dr. Castle testified that chest imaging is not a proper diagnostic tool to use to determine whether pulmonary function is normal or abnormal. He testified that in the *AMA Guides for the Evaluation of Permanent Impairment, Sixth Edition* chest imaging is not a factor, let alone a key factor, in determining impairment under the *Guides*. RX 2, p. 25-27

Dr. Castle testified that it is not very likely for simple pneumoconiosis to progress once the exposure ceases. Dr. Castle said he agreed with the position of the American Thoracic Society that an older worker with mild pneumoconiosis may be at low risk for working in currently permissible dust levels in the mine until he reaches retirement age. Dr. Castle testified that there really isn't any clinical significance to subradiographic pneumoconiosis. He testified that he has never seen a patient that had just pathologic lesions have any impairment. Dr. Castle testified that the impairment that would occur with those lesions occurs at the alveolar-capillary membrane which is the interstitium. He testified that pneumoconiosis is an interstitial disease process. An individual's diffusion capacity speaks to whether the interstitium is intact or not. He said that in Petitioner's case, Petitioner's diffusion capacity before adjustment for alveolar volume was 86%, which is normal. He testified that means that Petitioner's alveolar capillary membrane was intact as best it could be measured. RX 2, p. 27-29

Dr. Castle testified that given the results from spirometry performed by Dr. Istanbouly there was no indication of restriction or obstruction in Petitioner. Given the results of the diffusion capacity testing, Petitioner had normal gas exchange. From a respiratory standpoint Petitioner was capable of heavy manual labor. If the results from the pulmonary function testing performed on Petitioner were applied to Table 5-4 of the *AMA Guides*, Petitioner would fall in Class 0 impairment. Dr. Castle testified that the lower limit of normal for Petitioner's FEV1/FVC ratio from the testing performed by Dr. Istanbouly was 64.9 or so. His FEV1/FVC in that testing by Dr. Istanbouly was 74% so it was above the lower limit of normal which rules out any obstruction. RX 2, p. 30

Dr. Castle testified that based upon a thorough review of all the data available to him, Petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust. He testified that Petitioner worked in or around the underground mining industry for a sufficient enough time to have possibly developed coal workers' pneumoconiosis if he were a susceptible host. Dr. Castle testified that when Dr. Smith found evidence of very minimal changes consistent with pneumoconiosis he classified it as 1/0, which meant that he also considered that the film may be negative. RX 2, p. 31,32

Dr. Castle testified that poor contrast and edge enhancement are not exactly the same thing, but "the road ends at the same place." Poor contrast means the reader is dealing with black and white and there is too much of one or the other, not enough gray. Dr. Castle testified that his understanding of edge enhancement is essentially the same thing but is done electronically after the image has been obtained. He testified that edge enhancement has to do with the edges of the structures in the lung. He testified that if edge enhancement is done on the blood vessels, it sharpens those and in sharpening those it would indeed change the contrast. Dr. Castle testified that it was true that if one has pathologic evidence of pneumoconiosis, then he could have coal workers' pneumoconiosis and have a negative chest x-ray. Dr. Castle testified that a negative reading of Petitioner's

chest x-ray did not rule out that he could have coal workers' pneumoconiosis. He could have subradiographic or pathologic evidence of it. RX 2, p. 34,39

Conclusions of Law

In regards to whether an occupational disease occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator makes the following findings:

Dr. Istanbouly testified that based on his review of Petitioner's chest x-ray, he had coal workers' pneumoconiosis. Dr. Istanbouly's sole diagnosis for Petitioner was coal workers' pneumoconiosis. Dr. Istanbouly could not say whether the x-ray he interpreted had a profusion of 1/0 or 0/1. Dr. Istanbouly classified Petitioner's chest x-ray as showing early pneumoconiosis. Dr. Smith interpreted the chest x-ray of August 12, 2016, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in the bilateral middle and lower lung zones. Dr. Smith testified that profusion ratings are assigned to a chest x-ray that is found to be positive for pneumoconiosis to avoid imprecise descriptive terms such as early pneumoconiosis. Dr. Smith testified that his assigned profusion of the film could not have been lower and the film remain positive for pneumoconiosis. Dr. Smith testified that he agrees with the current syllabus from NIOSH which states that small, rounded opacities of coal workers' pneumoconiosis usually involve the upper lung zones first, but as the dust exposure continues, all zones may become involved. He found no opacities in the upper lung zones. Dr. Meyer also testified that coal workers' pneumoconiosis is an upper lung zone predominant process. Dr. Smith's interpretation of Petitioner's chest x-ray was not consistent with the typical progression of coal workers' pneumoconiosis.

Dr. Meyer, a highly qualified B-reader radiologist and Dr. Castle, a highly qualified B-reader pulmonologist, both reviewed the chest x-ray of August 12, 2016, and interpreted same as negative for pneumoconiosis.

Dr. Meyer testified to the training and examination required to become a B-reader. Dr. Istanbouly has not had that training or passed the examination and is not an A-reader or B-reader. Dr. Smith testified that on the two occasions where he did not pass the B-reading certification exam, he was overreading films, meaning that he was finding more disease than was present on a standard film.

Dr. Istanbouly testified that an individual could have coal workers' pneumoconiosis and still be asymptomatic in its early stage, Certainly if an individual had definitive radiographic proof of the disease but was asymptomatic such a diagnosis would be valid. That is not the case here, where the x-rays were felt by multiple B-readers to show no proof of the disease and his symptoms were all historical and not consistent with the medical records of the HMC Clinic and Methodist Hospital. Similarly, Dr. Istanbouly said a person did not need to have abnormalities on physical examination of the chest to have coal workers' pneumoconiosis. But again, in such a case the diagnosis would be made by definitive x-rays consistent with the disease. Here the few, questionable abnormalities, if any, were in the lower lobes of the lungs, in a disease which typically begins in the upper lobes and progresses downward into the lower lobes. The Methodist Hospital testing of April 27, 2017, the results from spirometry performed by Dr. Istanbouly showing there was no indication of restriction or obstruction in Petitioner, the physical examination performed on Petitioner at HMC Clinic on January 3, 2018, and the history of no chronic coughing or cough up of sputum indicative of the disease all indicate a lack of disease. Petitioner's history of symptoms to Dr. Istanbouly and at arbitration are also not consistent with the medical records introduced by Respondent.

The Arbitrator finds the x-ray interpretations by Drs. Meyer and Castle to be more credible and persuasive than the interpretations by Drs. Istanbouly and Smith.

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.

In regards to whether Petitioner proved timely disablement pursuant to Sections 1(e) and (f) of the Occupational Diseases Act the Arbitrator makes the following findings:

The findings of fact and conclusions of law in regard to whether an occupational disease occurred that arose out of and in the course of Petitioner's employment by Respondent are incorporated herein by reference.

To prove disablement under the Act, Petitioner must show that he suffered an impairment in the function of the body or the event of becoming disabled from earning full wages as a coal miner as a result of an occupational disease. Dr. Castle testified that if the results from the pulmonary function testing performed on Petitioner were applied to Table 5-4 of the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*, Petitioner would fall in Class 0 impairment. Dr. Castle testified that from a respiratory standpoint, Petitioner is capable of heavy manual labor. To meet the second prong of the definition of disablement, Petition must prove that but for his occupational lung disease, he would have continued his coal mining employment. Dawson v. Workers' Compensation Commission, 382 Ill. App. 3d 581 (5th Dist. 2008). Petitioner testified that he worked for Respondent until he was laid off on August 31, 2015. Petitioner testified that but for the layoff, he would have returned to work for his next shift. There was no evidence in the record that any physician took Petitioner off work as a result of an occupational disease. The pulmonary function study performed as part of Dr. Istanbouly's examination was normal. Petitioner had no evidence of any obstruction, restriction or other pulmonary impairment.

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffered a timely disablement as defined in Section 1(e) and Section 1(f) of the Occupational Diseases Act.

Given the Arbitrator's findings on the issues above, the remaining issues in dispute are moot.

Petitioner's claim for compensation is denied.

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

Christin Wright,
Petitioner,

vs.

J D Streett & Company, Inc,
Respondent.

20IWCC0733

NO: 15 WC 38308

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical, prospective medical, rates, 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 January 15, 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 14 2020
o12/3/20
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0733

WRIGHT, CHRISTIN
Employee/Petitioner

Case# **15WC038308**

J D STREETT & COMPANY INC
Employer/Respondent

On 1/15/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5341 BROWN & BROWN
JEFFREY T REEL
5440 N ILLINOIS SUITE 101
FAIRVIEW HEIGHT, IL 62208

2795 HENNESSY & ROACH PC
RICHARD A DAY
415 N 10TH ST SUITE 200
ST LOUIS, MO 63101

20IWCC0733

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

Christin Wright
Employee/Petitioner

v.

J D Streett & Company Inc.
Employer/Respondent

Case # 15 WC 38308

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on November 18, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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 4, 2015, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $15,587.00; the average weekly wage was $299.75.

On the date of accident, Petitioner was 37 years of age, single with 2 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $24,548.63 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $24,548.63. The parties stipulated TTD benefits were paid in full.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibits 3, 4, 6, 8, 10, 12 and 14 (excluding all of Dr. Solman's charges from August 4, 2017, and thereafter), as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. All other medical bills are denied.

Respondent shall pay Petitioner permanent partial disability benefits of $299.75 per week for 16.125 weeks because the injuries sustained caused the seven and one-half percent (7 1/2%) loss of use of the right leg, as provided in Section 8(e) of the Act.

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

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

William R. Gallagher, Arbitrator

January 11, 2020
Date

ICArbDec p. 2

JAN 15 2020

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 November 4, 2015. According to the Application, Petitioner "Tripped over soda crate" and sustained an injury to her "Right leg and knee" (Arbitrator's Exhibit 2). Respondent stipulated Petitioner sustained a work-related injury, but disputed liability on the basis of causal relationship, primarily because of a subsequent non work-related accident sustained by Petitioner in July, 2017, when she was in Florida. Petitioner and Respondent stipulated temporary total disability benefits had been paid in full (Arbitrator's Exhibit 1).

Petitioner worked for Respondent, a gas station/convenience store, as a cashier/clerk. On November 4, 2015, Petitioner tripped on a soda crate and fell landing on her right knee.

Petitioner initially sought medical treatment on November 11, 2015 (one week post accident) at the ER of Belleville Memorial Hospital. X-rays were obtained a Petitioner's right knee and lower right leg which were negative for fractures. Petitioner was diagnosed with a knee contusion/strain and discharged (Petitioner's Exhibit 2).

On November 11, 2015, Petitioner also sought medical treatment from Dr. Stephen Woods, a chiropractor. Petitioner complained of severe pain in the right knee. Dr. Woods ordered an MRI scan (Petitioner's Exhibit 5).

The MRI was performed on November 16, 2015. According the radiologist, the MRI was negative for a meniscal/ligamentous tear, but revealed a Grade 1 sprain of the distal illotibial (IT) band and mild propatellar bursitis (Petitioner's Exhibit 7).

Dr. Woods diagnosed Petitioner with patellofemoral pain. Dr. Woods' treatment consisted primarily of therapy, strengthening exercises, etc. He referred Petitioner to Dr. Nathan Mall, an orthopedic surgeon, but continued to treat Petitioner through February 15, 2016 (Petitioner's Exhibit 5).

Dr. Mall initially evaluated Petitioner on November 25, 2015. He reviewed the MRI scan and his reading of it was consistent with the radiologist. He opined Petitioner sustained a patellar contusion with resultant patellofemoral pain and quadriceps weakness. He ordered physical therapy (Petitioner's Exhibit 9).

Dr. Mall saw Petitioner on December 23, 2015, and January 22, 2016. Petitioner continued to complain of right knee pain and Dr. Mall directed Petitioner to continue physical therapy (Petitioner's Exhibit 9).

When Dr. Mall saw Petitioner on February 16, 2016, Petitioner advised that she had sustained a fall the preceding Monday when her right knee locked up which caused her to fall landing on both knees. On examination, Dr. Mall noted both knees were stable, but there was bilateral quadriceps weakness. He ordered continued physical therapy (Petitioner's Exhibit 9).

Dr. Mall saw Petitioner on March 30, and May 11, 2016. On those occasions, Dr. Mall opined Petitioner had IT band tendinitis and patellofemoral pain. He ordered continued physical therapy (Petitioner's Exhibit 9).

At the direction of Respondent, Petitioner was examined by Dr. Jason Rabenold, an orthopedic surgeon, on May 25, 2016. In connection with his examination of Petitioner, Dr. Rabenold reviewed medical records and the MRI scan which were provided to him by Respondent. Petitioner complained of bilateral knee pain, right more than left. Dr. Rabenold opined Petitioner had a patellar contusion and IT band syndrome of the right knee, and further physical therapy was indicated (Respondent's Exhibit 1; Deposition Exhibit 2).

When Dr. Mall saw Petitioner on July 6, 2016, he noted Petitioner continued to have patellofemoral pain, right much greater than left. He noted Petitioner had tenderness over the IT band in the right knee, but not in the left knee. He recommended Petitioner be seen by another orthopedic surgeon for a second opinion (Petitioner's Exhibit 9).

At the direction of her attorney, Petitioner was evaluated by Dr. Corey Solman, an orthopedic surgeon, on August 24, 2016. Dr. Solman reviewed medical records and the MRI of November 16, 2015. Petitioner complained of worsening bilateral knee pain. Dr. Solman opined the MRI revealed some lateral tilt of the patella and possibly a small amount of chondromalacia of the central portion of the patella. Dr. Solman diagnosed Petitioner with bilateral patellofemoral pain, right worse than left, and compensatory left peroneal tendinitis. He recommended Petitioner undergo injections in both knees (Petitioner's Exhibit 13).

Dr. Mall again saw Petitioner on December 14, 2016. At that time, Petitioner continued to complain of right greater than left patellofemoral pain as well as left ankle pain/swelling. Dr. Mall ordered an MRI of Petitioner's right knee and an EMG/nerve conduction study of the femoral nerve on the right side (Petitioner's Exhibit 9).

The MRI was performed on April 27, 2017. According to the radiologist, the MRI revealed a minimal distal patellar tendon enthesopathy without evidence of tear (Petitioner's Exhibit 7).

The EMG/nerve conduction study on Petitioner's right lower extremity was performed on April 27, 2017. It did not reveal any abnormalities (Petitioner's Exhibit 9).

Petitioner last saw Dr. Mall on May 10, 2017. At that time, Dr. Mall reviewed the MRI and EMG/nerve conduction study that were performed on April 27, 2017. Dr. Mall did not see any evidence of an intraarticular problem and noted he could not see anything in the MRI to explain Petitioner's continued knee symptoms. He suggested Petitioner follow up with Dr. Solman (Petitioner's Exhibit 9).

At the direction of Respondent, Dr. Rabenold reviewed medical records and prepared supplemental reports dated February 2, and February 23, 2017. Dr. Rabenold recommended Petitioner continue with physical therapy and that an EMG/nerve conduction study was appropriate. However, he opined an additional MRI of the right knee was not indicated because

Petitioner had not sustained a new injury since the last MRI (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Solman saw Petitioner on June 14, 2017, and Petitioner continued to complain of bilateral knee pain. Dr. Solman again opined Petitioner had bilateral knee patellofemoral pain. He recommended further physical therapy and Petitioner undergoing a series of diagnostic injections (Petitioner's Exhibit 13).

At trial, Petitioner testified she moved to Florida in July, 2017, and obtained a job with a plumbing company as an accountant. Shortly after Petitioner relocated to Florida, she sustained another accident. Petitioner stated she was walking into a nightclub and tripped over a small ledge at the top of some stairs which caused her to fall directly on her left knee.

Following the accident in Florida, Petitioner sought treatment at Bayfront Medical Center in St. Petersburg on July 21, 2017. Petitioner gave a history of tripping on a step at a restaurant which caused her to fall on both knees. Petitioner complained of bilateral knee pain. X-rays of both knees were obtained which were negative for fractures. Petitioner was diagnosed with a left knee contusion and bilateral knee abrasions (Petitioner's Exhibit 15).

Petitioner was again seen by Dr. Solman on August 4, 2017. At that time, Petitioner advised Dr. Solman she sustained an injury in Florida while walking into a nightclub when she tripped over a small ledge which caused her to fall on her left knee. Dr. Solman again opined Petitioner had bilateral patellofemoral pain and continued to recommend physical therapy for Petitioner's right knee. In regard to Petitioner's left knee, he noted Petitioner "...has had a new injury which is now the prevailing factor in the development of her more severe and current pain with inability to bend the knee." He also noted Petitioner was pursuing legal action against the facility where she had sustained the accident (Petitioner's Exhibit 13).

Again, at the direction of Respondent, Dr. Rabenold reviewed additional medical records and prepared another medical report dated March 23, 2018. He opined Petitioner had reached MMI in regard to both her right and left knees in regard to the injury she sustained on November 4, 2015 (Respondent's Exhibit 1; Deposition Exhibit 2).

Petitioner was evaluated by Dr. David Watson, an orthopedic surgeon, in Florida, on May 31, 2018. In his medical report of that date, he referenced the accident of November, 2015, but not the accident of July, 2017. At that time, Petitioner complained of right knee pain with radiation down the leg. On examination, the range of motion of the right knee was full and there was no instability. X-rays of the right knee revealed some degenerative changes in the medial compartment. Dr. Watson opined Petitioner had degenerative changes in the medial compartment of the illotibial band. He prescribed medication and ordered physical therapy (Petitioner's Exhibit 22).

Dr. Watson again saw Petitioner on June 27, 2018. At that time, he reviewed the MRIs of 2015 and 2017, and noted they did not reveal any internal derangement. He recommended additional physical therapy (Petitioner's Exhibit 22).

Petitioner was subsequently evaluated by Stephanie Cooke, a Nurse Practitioner, associated with Dr. Watson, on August 15, 2018. Cooke's examination of Petitioner's right knee was benign and she advised Petitioner there were no abnormalities noted in her MRIs. She prescribed medication (Petitioner's Exhibit 22).

Petitioner was subsequently seen by Dr. Solman on January 2, 2019. Petitioner continued to complain of pain/swelling in her right knee. On examination, Dr. Solman noted some mild crepitus of the patellofemoral joint, but no instability. He recommended Petitioner undergo another MRI scan to determine if there was any advancement of her patellofemoral disease. He also recommended Petitioner receive additional physical therapy as well as some injections into the right knee (Petitioner's Exhibit 13).

Jason Gay, a Physician Assistant associated with Dr. Solman, saw Petitioner on July 31, 2019. At that time, PA Gay reviewed an MRI scan which was recently performed (the radiologist's report was not tendered into evidence). PA Gay reviewed the MRI and opined it revealed some mild degeneration and mild chondromalacia of the patella, but no internal derangement. He recommended injections or a possible referral to Dr. Hurford (Petitioner's Exhibit 13).

Dr. Solman was deposed on August 6, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Solman's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Dr. Solman testified his primary diagnosis was chondromalacia of the right patella. In regard to Petitioner's left knee complaints, Dr. Solman testified it was probably compensatory as a result of protection of the right knee (Petitioner's Exhibit 1; pp 12-15).

In regard to his examination of August 4, 2017, Dr. Solman testified that when Petitioner was in Florida, she had sustained an injury to her left knee when she fell directly on it, but that it did not cause any increase or change in her right knee pain (Petitioner's Exhibit 1; pp 19-21).

On cross-examination, Dr. Solman agreed the report of the MRI of November 16, 2015, did not make any reference to Petitioner having chondromalacia of the right knee. He also agreed that, based on his examination of the MRI scans, Petitioner's right knee was stable and there was no meniscal or ligamentous pathology. He also agreed this was noted in the records of both Dr. Mall and Dr. Woods (Petitioner's Exhibit 1; pp 37-41).

In regard to Petitioner's left knee condition, Dr. Solman agreed the accident in Florida that occurred in July, 2017, was an intervening event which caused additional problems in Petitioner's left knee. Further, he agreed Petitioner had informed him that she had not injured her right knee as a result of the fall, but that this was inconsistent with the history Petitioner provided in the ER shortly after she sustained the accident (Petitioner's Exhibit 1; pp 54-55).

Dr. Rabenold was deposed on August 7, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Rabenold's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. In regard to his report of March 23, 2018, Dr. Rabenold stated he reviewed medical records of Dr. Solman and Dr. Mall as well as the diagnostic studies. He stated Petitioner had received all of the reasonable treatment

for the injury she sustained in November, 2015, and was at MMI (Respondent's Exhibit 1: pp 24-27).

At trial, Petitioner testified she still has complaints referable to both knees. While she works as an accountant, she does have to go up/down stairs which causes her difficulties. Petitioner agreed she makes more money than she did while employed by Respondent, but did not testify as to how much she currently earns.

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 in regard to her right knee is, in part, causally related to the accident of November 4, 2015.

The Arbitrator concludes Petitioner's current condition of ill-being in regard to her left knee is not causally related to the accident of November 4, 2015.

In support of these conclusions the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on November 4, 2015, when she slipped and fell on her right knee.

There was no question Petitioner was diagnosed with patellofemoral pain, and sustained a contusion and an IT band strain to her right knee as a result of the accident of November 4, 2015.

Petitioner has received an extensive amount of medical treatment and undergone three MRI scans as well as an EMG/nerve conduction study. In spite of Petitioner's ongoing complaints/symptoms, there was no medical evidence of any meniscal or ligamentous pathology and Petitioner's right knee has been determined to be stable.

Dr. Solman opined Petitioner had chondromalacia of the patella, but this was not indicated in the MRI scans and was not diagnosed by Dr. Mall.

Petitioner advised Dr. Solman that when she sustained the fall in Florida in July, 2017, she only injured her left knee, but this was inconsistent with the ER record for treatment Petitioner received shortly thereafter. It appears as though Petitioner may have aggravated her right knee condition as a result of the fall.

In regard to Petitioner's left knee, Petitioner initially experienced left knee symptoms after her right knee gave out on her in February, 2016. Subsequent to that incident, Petitioner continued to have the right and left knee pain, but primarily right knee pain.

Dr. Solman, a physician selected by Petitioner's counsel, opined the accident in Florida was a new injury and the "prevailing factor" in the development of her left knee symptoms.

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

The Arbitrator concludes the medical treatment provided to Petitioner from November 11, 2015, to July 20, 2017 (the day prior to when Petitioner sustained the fall in Florida) 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 Exhibits 3, 4, 6, 8, 10, 12 and 14 (excluding all of Dr. Solman's charges from August 4, 2017, and thereafter), as provided by Sections 8(a) and 8.2 of the Act, subject to the fee schedule. All other medical bills are denied.

In support of this conclusion the Arbitrator notes the following:

As noted herein, Petitioner sustained a non-work-related accident in Florida on July 21, 2017, which was an intervening cause which aggravated Petitioner's right knee condition and was the prevailing cause of Petitioner's left knee condition.

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

The Arbitrator concludes Petitioner had sustained permanent partial disability to the extent of seven and one-half percent (7 1/2%) loss of use of the right leg.

Based upon the foregoing, the Arbitrator concludes Petitioner is not entitled to an award of permanent partial disability regard to the left leg.

In support of these conclusions Arbitrator notes the following:

In regard to Petitioner's left leg, the Arbitrator concluded Petitioner's current condition of ill-being in regard to her left leg was related to the intervening accident that occurred on July 21, 2017. Accordingly, Petitioner is not entitled to an award of permanent partial disability in regard to the left leg.

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner worked as a cashier/clerk at the time of the accident, but presently works as an accountant. The Arbitrator gives this factor minimal weight.

Petitioner was 37 years old at the time of the accident and 41 years old at the time of trial. Petitioner 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 of Petitioner's future earning capacity. At the time of trial, Petitioner was employed as an accountant and testified she makes more income than what she made when employed by Respondent. The Arbitrator gives this factor no weight.

As noted herein, Petitioner received a significant amount of treatment and underwent numerous diagnostic tests subsequent to the accident of November 4, 2015. Petitioner continues to have ongoing right knee symptoms/complaints which are not completely corroborated by the medical treatment records. Petitioner was diagnosed with patellofemoral pain, a right knee contusion and IT band syndrome, but there was no evidence of meniscal or ligamentous pathology and Petitioner's right knee has been determined to be stable. Further, Petitioner sustained a subsequent accident in July, 2017, which aggravated the right knee condition. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Diana Lewis Craig,
Petitioner,

vs.

State of Illinois-Illinois Youth Center, St Charles,
Respondent.

20IWCC0734

NO: 18 WC 19444

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, permanent disability, temporary disability and 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 12, 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.

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: DEC 14 2020
o12/3/20
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0734

LEWIS CRAIG, DIANA
Employee/Petitioner

Case# **17WC021445**
18WC019444

SOI-ILLINOIS YOUTH CENTER ST CHARLES
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:

0139 CORNFIELD AND FELDMAN LLP
JIM M VAINIKOS
25 E WASHINGTON ST SUITE 1400
CHICAGO, IL 60602

6212 ASSISTANT ATTORNEY GENERAL
DREW DIERKES
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

MAY 15 2019

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

20IWCC0734

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

Diana Lewis Craig
Employee/Petitioner

v.

State of Illinois-Illinois Youth Center, St. Charles
Employer/Respondent

Case # **17** WC **21445**

Consolidated cases: **18 WC 19444**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Geneva**, on **April 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 **October 23, 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 **$79,116.00**; the average weekly wage was **$1,521.46**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$9,853.30** for other benefits, for a total credit of **$9,853.30**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1014.31/week for 33 1/7 weeks, commencing October 24, 2016 through June 12, 2017, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $9,853.30 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary treatment for her conditions of ill-being in the left foot and right shoulder through June 12, 2017. Medical charges for this treatment have been paid by her group carrier. 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 $775.18/week for 4.175 weeks, because the injuries sustained caused the 2.5% loss of the Left Foot, as provided in Section 8(e) of the Act, and an additional 5 weeks, because the injuries sustained caused the 1% loss of the person as a whole fir the injury to 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.

Signature of Arbitrator

May 15, 2019
Date

MAY 15 2019

Statement of Facts

This matter was tried in conjunction with consolidated case 18 WC 19444 (DOA: May 14, 2018). A single transcript was prepared although the Arbitrator is entering separate decisions.

Petitioner Diana Craig Lewis testified that she was employed by Respondent State of Illinois, IYC St. Charles as a Juvenile Justice Security Specialist. She was hired in June 2014. Petitioner's shift was from 6:00 a.m. until 2:00 p.m. Petitioner was issued equipment such as a radio, handcuffs, knife, first aid, and keys. Petitioner would be assigned to a post to which she had to report. Petitioner's duties included providing security and escorting 13 to 20 year-old youth around the facility.

On October 23, 2016, Petitioner was assigned to Lincoln Cottage. Petitioner and one other employee were to escort the youth inmates to dietary for breakfast. Petitioner would unlock the doors and have inmates step out, one-by-one, and then line up. A fight between two inmates broke out and a third inmate jumped in. Petitioner radioed a "10-10" for a fight in progress. Petitioner attempted to secure one of the inmates by wrapping her arms around the inmate from behind. The inmate swung out. Petitioner lost her balance, and the inmate stepped on Petitioner's left foot. Other officers arrived and restrained the inmates. Petitioner felt pain in her left foot and right shoulder. Petitioner also experienced swelling in her foot and was limping. Petitioner went to the nurse on site, was given an ice pack, and sent home for the day.

Prior to this incident, Petitioner had a bunionectomy to her left foot in January 2016. Petitioner was on medical leave for approximately eight months. Petitioner had been back to work for a couple of months before the date of accident and had returned in a full duty capacity.

Petitioner presented to Access Southwest Family Health Center on October 25, 2016, complaining of left foot pain and right shoulder stiffness (PX 1). She noted that she was injured at work breaking up a fight. Petitioner was given medication and taken off work. It was noted she had an appointment with podiatry. Petitioner was limited to sedentary, administrative duty only (PX 1).

Petitioner saw Dr. Matthew Keene of the University of Illinois Hospital and Health Science Systems on October 26, 2016 (PX 2). Dr. Keene noted the previous bunion correction. Petitioner stated she was doing well, having no pain and had returned to her regular shoes and job. She is now reporting pain and discomfort to the 1st metatarsal. Petitioner is requesting that she be placed in physical therapy. Dr. Keene's examination noted no pain on palpation over the 1st metatarsal. She has proper range of motion and the correction is maintained. Dr. Keene states that he wrote the order for physical therapy "as she requested." He notes that currently, she is not clinically symptomatic. He scheduled follow up in 3 weeks (PX 2). On November 16, 2016, Petitioner reported that she is undergoing physical therapy, taking ibuprofen and icing the area. She states overall, she is doing much better with less pain but still some discomfort. Dr. Keene assessed a bone contusion, trauma related. He recommended she finish out her physical therapy (PX 2).

Petitioner had her initial physical therapy evaluation on November 16, 2016. Testing revealed a likely bone contusion at the 1st metatarsal and tendinopathy of the left ankle for compensation. The plan of treatment consisted of manual therapy and therapeutic exercise once or twice a week for six to eight weeks (PX 2). On January 6, 2017, Petitioner reported she is better but not 100%. She has completed 4 out of 5 physical therapy sessions. Examination noted no areas of erythema or ecchymosis. Neurovascular status was intact. There was no pain to palpation. Range of motion was normal without pain or crepitus. Dr. Keene diagnosed a

bone contusion. He stated Petitioner could start increasing her activity level. He noted that Petitioner wants more physical therapy which he found reasonable (PX 2).

Petitioner saw Dr. Patton at Access Southwest Family Health Center on January 13, 2017, complaining of intermittent pain in the right shoulder and foot pain. He stated she should follow up with podiatry for her foot. She would like physical therapy. He also provided medication refills for her HTN. On March 16, 2017, she noted the shoulder was improving but there was intermittent pain and decreased range of motion. She is still seeing podiatry and physical therapy. The record notes that her November to March paperwork must be backdated due to lack of coverage. The assessment was shoulder pain. She was given medication. On April 6, 2017, Petitioner returned to Dr. Patton to complete her disability paperwork. She was noted to have swelling and pain in the left foot and decreased range of motion in the right shoulder. She was taking Flexeril and ibuprofen for pain. Examination of her right shoulder noted decreased range of motion, tenderness and decreased strength (PX 1).

Petitioner returned to Dr. Keene on April 21, 2017, noting she was doing better, but had not completely resolved the pain and continued edema. Examination noted only mild pain to palpation along the 1st metatarsal dorsal shaft. Dr. Keene stated Petitioner was not ready to return to work. She should continue with physical therapy. His disability slip noted she was disabled from her regular work due to swelling and pain. He notes she has a moderate to severe physical impairment (PX 2). Petitioner saw Dr. Patton on May 30, 2017 for medication refills. He does not record any right shoulder complaints or perform any examination. Dr. Patton's CMS physician's statement notes only foot pain and weakness. He restricts Petitioner to light duty (PX 1).

On June 12, 2017, Petitioner saw Dr. Kathleen Weber for a Section 12 examination at Respondent's request with respect to the right shoulder and left foot (RX 1). Dr. Weber reviewed the medical records of Dr. Patton and Dr. Keene though May 30, 2017. On examination, there is some reduced range of motion and strength on in the right shoulder. The left foot noted tenderness and some cogwheeling with EHL testing. Dr. Weber diagnosed a left foot contusion that had resolved and a right shoulder possible mild strain of the rotator cuff that had resolved. She opined that these conditions were causally related to the accident described. Dr. Weber opined that no further medical treatment was necessary. Petitioner was at maximum medical improvement, and had full ability to participate in work activities (RX 1).

Petitioner saw Dr. Keene on July 21, 2017 complaining of an inability to weight bear fully for an extended period of time. Physical examination noted no abnormalities. Dr. Keene noted that her condition should have been much improved by that point in time. He recommended finishing physical therapy and if she was not at maximum medical improvement in the near future, he would have her attend a functional capacity evaluation or see another doctor for a second opinion (PX 2). He continued restriction of Petitioner to clerical, Administrative work (RX 3). Petitioner saw Dr. Patton on August 28, 2017, reporting swelling in her ankle. She was also seen through Access for anxiety and depression for family issues. Petitioner attended physical therapy through September 30, 2017 at which point she was discharged to a home exercise program (PX 2).

Petitioner saw Dr. Keene on October 6, 2017. She reported improvement and felt she would be able to return to work later this month. Dr. Keene found her at maximum medical improvement and released her to return to work full duty on October 30, 2017 (PX 2). Petitioner testified that she returned to work on October 30, 2017 to her regular assignment. Petitioner testified that she was never offered any type of restricted duty prior to returning to regular work.

On November 15, 2017, Petitioner requested paperwork for an accommodation to avoid double shifts every day. On February 6, 2018, while getting a return to work slip for sinusitis, Petitioner reported to Dr. Patton that she had swelling in her left ankle but no pain. She noted working long hours standing (PX 1). Petitioner followed up with Dr. Keene on March 7, 2008. She reported having no pain and no limitations since returning to work. Dr. Keene diagnosed a resolved bone contusion and released her from care to return as needed (PX 2).

Petitioner testified that she received some benefits while she was off work. She received full pay and then believes she received SERS 50%. Respondent offered a payment log as RX 6. Her medical bills were paid by her Blue Cross/Blue Shield insurance. Petitioner testified that she notices pain and swelling in her left foot. She takes ibuprofen, elevates and ices her foot. Petitioner testified that she is unable to stand for long periods of time. Petitioner testified she still has pain right shoulder.

Petitioner is claiming a subsequent injury to her neck, back and left arm and shoulder occurring on May 14, 2018 which is the subject of the consolidated case 18 WC 19444 decided in conjunction with the present case.

Conclusions of Law

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

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill.Dec. 83, 444 N.E.2d 122. The accident need not be the sole or principal cause, as long as it was a causative factor in a claimant's condition of ill-being. *Lopez v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130355WC-U, P25 (Ill. App. Ct. 3d Dist. 2014).

Although Petitioner had a prior left foot surgery in January 2016, her unrebutted testimony was that she had been back to work for a couple of months before the date of accident and had returned in a full duty capacity. After the accident, on October 26, 2016, Dr. Keene also noted Petitioner stated she was doing well, having no pain and had returned to her regular shoes and job. She is now reporting pain and discomfort to the 1st metatarsal. On November 16, 2016, Dr. Keene assessed a bone contusion, trauma related. Petitioner also reported right shoulder symptoms immediately after the injury. On October 25, 2016, she complained of right shoulder stiffness and saw Dr. Patton for follow up care. Dr. Weber diagnosed a left foot contusion and a right shoulder possible mild strain causally related to the accident described.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that her condition of ill-being in the right shoulder and left foot are causally connected to the accidental injury sustained on October 23, 2016.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's

injury. The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers ' Compensation Commission*, 409 Ill. App. 3d 258,267 (1st Dist., 2011).

Petitioner offered medical bills from Access Community Health Network (PX 3), University of Illinois Hospital & Health Sciences (PX 4), UIC Physicians Group (PX 5), and University of Illinois College of Medicine (PX 6, PX 7). Petitioner testified that her bills were submitted through her health insurance. The party's stipulation was that the amount paid by the group carrier was unknown (Arb. Ex. 1). The Exhibits also include charges for treatment related to the May 14, 2018 injury which is the subject of the consolidated case 18 WC 19444 decided in conjunction with this matter.

The Arbitrator has reviewed the bills and notes Petitioner is claiming charges through March 2018 are related to the present case based upon the medical records and orders of Dr. Patton and Dr. Keene. Respondent argues that only treatment through June 12, 2017 is reasonable and necessary based upon the report and opinions of Dr. Weber.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts.

Having reviewed the medical records and reports, the Arbitrator finds the opinions of Dr. Weber more persuasive. Dr. Weber reviewed Petitioner's treating records and performed a physical examination and opined that she was at maximum medical improvement and able to return to work. The Arbitrator notes that both Dr. Patton and Dr. Keene chose treatment in large part based upon the request of the Petitioner and her subjective complaints and personal opinions of whether she could do her job. The Arbitrator notes that the diagnosis was a contusion of the foot, yet Petitioner had a full year of therapy. Dr. Keene commented on July 21, 2017 that he expected Petitioner to be better by then. Given the lack of anything but a soft tissue diagnosis, this passive medical care including acquiescence to requests for extended physical therapy was not reasonable and necessary. The Arbitrator also takes into consideration the records documenting Petitioner's non-work-related home stressors. The Arbitrator also notes, as more fully discussed in the decision in the consolidated case 18 WC 19444, that Petitioner's presentation and inconsistent history tend to paint a more significant injury that that supported by the evidence. This makes her subjective presentation, including her medical complaints and subjective findings unpersuasive.

Based upon the review of the evidence, the Arbitrator finds that medical care for Petitioner's right shoulder and left foot through June 12, 2017 is reasonable, necessary and causally related to the accident on October 23, 2016. The Arbitrator has reviewed the medical bills submitted and finds that such bills have been paid fully by the group carrier and that there are no balances due and owing.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she is entitled to reasonable and necessary treatment for her conditions of ill-being in the left foot and right shoulder through June 12, 2017. Medical charges for this treatment have been paid by her group carrier. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation, the Arbitrator finds as follows:

Temporary compensation is provided for in Section 8(b) of the Workers' Compensation Act, which provides, weekly compensation shall be paid as long as the total temporary incapacity lasts, which has interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Petitioner is seeking temporary compensation from the date of injury though Dr. Keene's release to return to regular duty on October 30, 2017. Respondent argues that benefits should be terminated as of the date of Dr. Weber's examination and finding of maximum medical improvement at full duty on June 12, 2017.

As more fully discussed in the Arbitrator's finding with respect to Medical above, the Arbitrator finds Dr. Weber's opinions more persuasive that those of Dr. Patton and Dr. Keene. The Arbitrator notes Dr. Keene's statement on July 21, 2017 that he expected Petitioner would be better by then, but acquiesced to her request for more physical therapy. The Arbitrator also notes that despite being released from therapy by the time Dr. Keene saw Petitioner on October 6, 2017, he acquiesced to Petitioner's statement that she feels she will be ready to return to work later that month and does not release her until October 30, 2017, over three weeks after the office visit.

Respondent paid Petitioner full salary from October 31, 2016 through December 5, 2016 and from March 16, 2017 through April 16, 2017, a period of 9 5/7 weeks. Respondent would be entitled only to the temporary compensation rate of $1,014.31 for this period or a total credit of $9,853.30.

Based upon the record as a whole and the Arbitrator's findings with respect to Causal Connection and Medical, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she is entitled to temporary total compensation commencing October 24, 2016 through June 12, 2017, a period of 33 1/7 weeks. Respondent shall be given a credit of $9,853.30 for temporary total disability benefits that have been paid.

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

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a Juvenile Justice Security Specialist at the time of the accident and that she is able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that this occupation can require strenuous physical exertion, often without prior warning or opportunity to plan the encounter. Because of these facts, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 39 years old at the time of the accident. Petitioner would be expected to remain in the work force for many years. Because of this, 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 Petitioner has returned to her prior occupation and no evidence of loss of earning was offered. Because of this, 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 Petitioner was diagnosed with a contusion of the left foot and a sprain/strain of the right shoulder. The medical records note little objective evidence of disability except for her complaints of pain and some swelling in the foot. Dr. Patton and Dr. Weber did note some loss of motion and weakness in the right shoulder. Petitioner's treatment consisted of medication and extensive physical therapy. The Arbitrator notes that the medical records indicate that Petitioner requested this course of care which was acquiesced to by the treating doctors. Petitioner had virtually no treatment for the shoulder other that periodic office visits with Dr. Patton. On March 7, 2008, Petitioner advised Dr. Keene that she was having no pain and no limitations since returning to work. Dr. Keene diagnosed a resolved bone contusion. Because of these facts, 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 2.5% loss of use of Left Foot pursuant to §8(e)11 of the Act and of 1% loss of Whole Person pursuant to §8(d)2 of the Act for the injury to the right shoulder.

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)
Accident, Causal Connection, Medical, Temporary Total Disability, Permanent Disability	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

YOHANNA TABB,

Petitioner,

20IWCC0735

vs. NO: 14 WC 11506

CHICAGO TRANSIT AUTHORITY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and permanent disability, reverses the Arbitrator's finding that Petitioner's accident did not arise out of her employment with Respondent. Accordingly, the Commission vacates the Arbitrator's Decision denying benefits.

Findings of Fact:

On April 3, 2014, Petitioner was employed by Respondent as a full-time bus operator. T. 13. As part of her daily duties, Petitioner would check with a clerk; obtain her bus assignment from a service booth; perform a pre-check of the bus; and start her route at a designated time. T. 13. From there, Petitioner would pick up, drop off, and assist disabled passengers on her designated route. T. 13-14.

Drivers for Respondent plan their schedule off the "running sheet," which dictates the timeline for pre-checks, departures, and checkpoints throughout the route to the end of the line. T. 14-15. Respondent requires drivers to leave the terminal at the scheduled time, and drivers can be "written up" for leaving the terminal late unless there is a valid reason. T. 15. Drivers are advised

not to be ahead of schedule as bus routes connect. *Id.* Drivers during their route are allowed to run late as the vicissitudes of the streets cannot be predicted. T. 15. There is no write-up or penalty for being excessively behind schedule. T. 16. If the bus is more than eleven minutes behind schedule, there is a button on the bus the driver can tap to notify control regarding lateness. *Id.*

On April 3, 2014, Petitioner was driving northbound on the 82 Kimball-Homan route. T. 17. Lincolnwood Mall is located at the north end of the route. When the bus arrived at the mall, Petitioner let her passengers off the bus. As she needed to use the restroom, which was located in the mall, Petitioner secured and locked the bus, and exited down the stairs. T. 17, 19. Petitioner testified she prides herself on being punctual, so she was "kind of in a rush, because was already a little late — a couple — some minutes late." T. 18. Petitioner was not late enough that she contacted control to advise of lateness, and Petitioner testified she was not in danger of being disciplined. T. 64. As Petitioner reached the last stair, her foot went between the bus and the curb. T. 19. There was a seven- to eight-inch gap between the bus and the curb. T. 21. Petitioner's foot did not hit the ground. Petitioner grabbed the railing on the bus door, and her body turned as she fell. *Id.* Respondent presented video evidence from the bus camera which shows the bus pulling into the mall; passengers alighting from the bus; Petitioner falling; and another bus operator coming to her assistance. RX4, T. 70.

The seven- to eight-inch gap between the bus and the sidewalk is the same for all the bus passengers as well. *Id.* There was no defect regarding the bus steps, and Petitioner could not recall if there was a defect with the sidewalk or curb. T. 73.

Immediately following the fall, another bus operator came to Petitioner's aid, sat her on the ground, and called control. T. 22. Control called an ambulance, and Petitioner was transported to St. Francis Hospital. *Id.*; PX2. X-rays were negative for acute fracture or dislocation, and Petitioner was discharged with a splint and walking boot. T. 23. Petitioner filed an Injury on Duty Report (RX2) as well as a Bus Incident Report. RX3.

On April 4, 2014, Petitioner sought treatment from Dr. Sajjad Murtaza who ordered an MRI and authorized Petitioner off work. T. 24, PX4. On the same day, Petitioner presented to Concentra and provided a consistent history of injury stating, "'I was getting off the bus and stepped on the curb and twisted my ankle"; Petitioner was advised to obtain an MRI and follow-up with her orthopedic physician. RX7. Petitioner presented to Dr. Murtaza on April 18 and April 23, 2014 at which time an MRI of the left ankle evidenced mild Achilles peri tendinitis without a tear, a region of bone marrow edema within the posterolateral aspect of the calcaneus without fracture, and sequalae of partial thickness tear of the anterior talofibular ligament. PX4.

Following the MRI, Dr. Murtaza referred Petitioner to podiatrist Dr. Joel Anderson who initially evaluated Petitioner on April 30, 2014. T. 25. Dr. Anderson recommended continued use of the CAM boot, prescribed physical therapy, and authorized Petitioner off work. PX4, T. 26. Petitioner participated in a physical therapy program and continued to follow up with Dr. Anderson, who diagnosed Petitioner with insertional Achilles tendonitis, retrocalcaneal heal spur, and ankle sprain. PX4, T. 26. On May 28, 2014, Petitioner reported to Dr. Anderson that she had a burning sensation going towards her knee. PX4, T. 27.

On June 18, 2014, an MRI of Petitioner's left knee was performed. The scan evidenced a small incomplete radial tear of the free edge of the lateral meniscus anterior body with blunting of the free edge of the posterior horn and chondral degeneration in the patellofemoral compartment with moderate effusion. PX4.

Dr. Anderson recommended surgery to the left foot which he performed on June 23, 2014 consisting of an exostectomy of the calcaneus, and a secondary repair of the Achilles tendon. Dr. Anderson also administered a post-operative Decadron injection. PX4, T. 27.

Following surgery to her heel, Petitioner continued post-operative care with Dr. Anderson; the records reflect Petitioner complained of increasing knee pain. Dr. Anderson recommended an orthopedic consult for the left knee with Dr. Christopher Giannoulias. T. 29. On July 29, 2014, after reviewing the MRI of the knee, Dr. Giannoulias recommended and administered a cortisone injection. PX3, T. 27-31.

On August 4, 2014, Dr. Anderson administered a Cortisone injection to Petitioner's lateral left heel after she complained of increased burning and swelling around her Achilles' tendon. PX4, T. 31. On September 2, 2014, Petitioner returned to Dr. Giannoulias for treatment to her knee. T. 32. As Petitioner experienced no improvement following the Cortisone injection, Dr. Giannoulias recommended surgery. PX3, T. 32-33.

On September 3, 2014, Petitioner presented to Dr. Anderson complaining of the development of keloid scar tissue on her left foot as a result of the hard shoes. T. 33. Dr. Anderson casted Petitioner for an orthotic and advised her to continue therapy. T. 34. On October 1, 2014, Petitioner saw Dr. Anderson who administered a Cortisone injection to her left foot. PX4, T. 35.

On October 16, 2014, Dr. George Holmes evaluated Petitioner pursuant to Section 12 of the Act at Respondent's request. RX5. Dr. Holmes felt the surgery was unnecessary and recommended against further surgery; instead, Dr. Holmes concluded a repeat MRI was warranted. Dr. Holmes related Petitioner's current condition to the accident she sustained on April 3, 2014 and opined Petitioner could return to restricted duty. RX5.

On December 18, 2014, Dr. Brian Cole performed a Section 12 evaluation of Petitioner's left knee at Respondent's request. Dr. Cole opined the treatment Petitioner received for her knee was reasonable and appropriate. Dr. Cole stated, although he could not categorically link the need for left knee care to the work injury, it was plausible Petitioner arrived at a need for left knee care sooner than may have been necessary via compensatory overuse of the left knee in response to the ankle injury. RX6.

On December 31, 2014, Petitioner sought further treatment with Dr. Anderson due to the keloid scarring on the back her left heel. T. 39. Dr. Anderson disagreed with the need for a post-surgical MRI as recommended by Dr. Holmes but believed an MRI may be of benefit one-year post-surgery if Petitioner's pain worsened. PX4.

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Dr. Giannoulias performed injections to Petitioner's left knee on March 3, 2015 and March 31, 2015. T. 40. The second injection provided Petitioner some temporary relief. PX3. Dr. Giannoulias continued to await authorization for surgery to the knee. T. 40-41.

On July 13, 2015, Dr. Anderson administered another Cortisone injection to the back of Petitioner's heel which provided temporary relief. On July 20, 2015, Dr. Anderson released Petitioner to full duty, but on August 10, 2015, Dr. Anderson revised the release to sedentary duty given Petitioner's pain complaints. PX4, T. 43. Petitioner continued to follow up with Dr. Giannoulias and Dr. Anderson on a monthly basis. *Id.* On October 19, 2015 Dr. Anderson re-evaluated Petitioner and continued to recommend an excisional scar revision to the back of Petitioner's left foot. T. 44.

On November 19, 2015, Dr. Cole re-evaluated Petitioner pursuant to Section 12 of the Act at Respondent's request. Dr. Cole concurred with Dr. Giannoulias' recommendation for surgical intervention and related the need for such surgery to Petitioner's work accident. RX5.

On February 17, 2016, Dr. Giannoulias performed surgery consisting of a left knee partial lateral meniscectomy, multiple compartment synovectomy, and patellar chondroplasty. PX3; PX4. Petitioner attended post-surgical physical therapy and was released to full duty regarding her knee on July 12, 2016. PX3, T. 45-46.

In the interim, Petitioner continued to see Dr. Anderson on a monthly basis for her foot. Dr. Anderson continued to await authorization for the revision surgery to Petitioner's heel and administered another injection on October 26, 2016. T. 47. On January 13, 2017, Dr. Anderson performed a scar revision surgery on Petitioner's left heel. PX4, T. 47.

On January 17, 2017, Petitioner returned to Dr. Giannoulias for her knee as it was aching and swelling. Dr. Giannoulias performed injections on that date and again on February 21, 2017. Petitioner was released and advised to return as needed. PX3. Petitioner has not seen Dr. Giannoulias since. T. 48.

On March 23, 2017, Dr. Cole re-evaluated Petitioner pursuant to Section 12 of the Act. Dr. Cole found Petitioner's knee condition resolved, placed Petitioner at maximum medical improvement (MMI), and concluded Petitioner could work full duty. RX6, T. 51.

On April 20, 2017, Dr. Holmes re-evaluated Petitioner pursuant to Section 12 of the Act. Dr. Holmes felt no further treatment was needed, and Petitioner was approaching MMI for her ankle injury and most recent surgery. He did not believe Petitioner would have any disability which would impede her from full time work but felt an FCE or work conditioning program might be required. PX4; RX5. In his addendum report, Dr. Holmes explained that the keloid scar is indirectly related to the injury as it was the result of the first surgery. *Id.*

On July 5, 2017, Petitioner presented to Dr. Anderson for her final evaluation at which time Dr. Anderson recommended physical therapy and a work conditioning program. PX4. Petitioner has had no further medical treatment. T. 55.

Petitioner did not return to work and is currently receiving pension disability benefits. T. 56. Petitioner remains an employee of Respondent. T. 57. Petitioner has not applied for any employment. T. 63.

Petitioner testified she feels her left foot is "big," and she is unable to wear a hard shoe as it hurts her foot. T. 58. Petitioner complained of dark black scar tissue on her heel which she associated to her inability to obtain therapy. T. 58. Petitioner testified her left knee is swollen and painful. Additionally, Petitioner claims her knee "has formed arthritis after [her] procedure." T. 58. She is no longer able to roller skate or walk long distances. T. 59. Petitioner notices greater pain when the weather is inclement, and her left knee and foot ache and her left knee swells. T. 59.

The Arbitrator viewed Petitioner's ankle during the hearing and made a statement for the record reflecting there was "an area of darker skin running vertically from the base of the heel up approximately two and a half inches." T. 60. It was further noted for the record that the left ankle was slightly more swollen than the right. T. 61.

Conclusions of Law:

I. Accident

Petitioner was employed as a bus driver for Respondent; her job required her to operate a bus and carry passengers along a designated route on the public streets. The Commission finds Petitioner was a traveling employee as her job duties literally require her to travel the streets. The Commission further finds Petitioner sustained an accidental injury arising out of and in the course of her employment on April 3, 2014.

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that [s]he has suffered a disabling injury which arose out of and in the course of his employment. [citations omitted]." *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). "To satisfy this (arising out of) requirement it must be shown that the injury had its origins in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.* The "in the course of employment" phrase "refers to the time, place and circumstances surrounding the injury" and, to be compensable, an injury "generally must occur within the time and space boundaries of the employment." *Id.*

As the Supreme Court of Illinois noted in *Hoffman v. Industrial Commission*, 109 Ill. 2d 194, 199, 486 N.E.2d 889 (1985), courts generally treat traveling employees "differently from other employees when considering whether an injury arose out of and in the course of employment. [citations omitted]. However, a finding that a particular claimant is a traveling employee does not exempt the claimant from proving that an injury arose out and in the course of employment, and some injuries, even when incurred by traveling employees, are not compensable under the Act."

Petitioner injured her left ankle and knee while in the course of her employment. See *Nee v. Illinois Workers' Compensation Commission*, 2015 IL App (1st) 132609WC, ¶ 20. ("Injuries sustained at a place where a claimant might reasonably have been while performing [her] duties

are deemed to have been received in the course of [her] employment. [citation omitted]."). Moreover, Petitioner sustained an accident which arose out of her employment. Petitioner tripped on a curb while alighting from her assigned bus. "The risk of tripping on a curb is a risk to which the general public is exposed daily. Under the 'street risk' doctrine, however, when, as in this case, the claimant's job requires [her] to travel the streets, the risks of the street become one of the risks of [her] employment. [citations omitted]." *Nee* at ¶ 26. As the Supreme Court of Illinois held in *C.A. Dunham Co. v. Industrial Commission*, 16 Ill. 2d 102, 111, 156 N.E.2d 560 (1959), "where the street becomes the milieu of the employee's work, [s]he is exposed to all street hazards to a greater degree than the general public."

Petitioner sustained an accident on April 3, 2014 which arose out or and occurred in the course of her employment.

II. Causal Connection

The medical and testimonial evidence support that Petitioner's current condition of ill-being as it relates to her left knee and ankle is a result of the accident of April 3, 2014. Immediately following her accident, Petitioner sought treatment for her left ankle. Thereafter, Petitioner came under the care of Dr. Anderson who performed two surgical procedures: 1) repair of the Achilles' tendon (June 23, 2014); and 2) revision of scar tissue (January 13, 2017). On July 5, 2017, Dr. Anderson recommended a further course of physical therapy and work conditioning prior to Petitioner's return to work with a follow-up appointment scheduled for August 2, 2017. PX3. Petitioner underwent no further treatment.

On April 20, 2017, Dr. Holmes, Respondent's expert related Petitioner's condition regarding her left ankle/heal to her work accident but disputed the need for surgeries as neither reasonable nor necessary. Dr. Holmes felt Petitioner was approaching MMI with a possible brief period of work condition necessary prior to Petitioner's return to work. RX5.

As for the Petitioner's knee condition, Dr. Giannoulias performed surgery on February 7, 2016 consisting of a partial lateral meniscectomy, synovectomy, and chondroplasty. Following a short course of post-operative therapy, on July 12, 2016, Dr. Giannoulias released Petitioner to return to work full duty and placed her at MMI. PX4. On February 21, 2017, Dr. Giannoulias performed and injection and again released Petitioner. *Id.*

On March 23, 2017, Dr. Cole, Respondent's expert concurred regarding Petitioner's ability to return to work full duty and Petitioner's status at MMI. Dr. Cole further related Petitioner's condition regarding her left knee to her work accident. RX6.

The Commission finds the conditions of Petitioner's left foot and left knee are causally related to the work accident.

III. Medical Expenses

Section 8(a) of the Illinois Workers' Compensation Act entitles a claimant to recover medical expenses which are reasonable, necessary, and causally related to an accident. *820 ILCS*

20IWCC0735

305/8(a) (West 2010); *Zarley v. The Industrial Commission*, 84 Ill. 2d 380, 418 N.E.2d 718 (1981). Pursuant to the findings and conclusions above, the Commission finds the medical treatment Petitioner received from Dr. Anderson and Dr. Giannoulias was reasonable and necessary to treat Petitioner's condition notwithstanding the opinion of Dr. Holmes on which the Commission declines to rely. The Commission awards medical expenses as found in Petitioner's Exhibit 1 pursuant to §8(a) and subject to §8.2 of the Act.

IV. Temporary Total Disability

"To show entitlement to TTD benefits, claimant must prove not only that he did not work, but that he was unable to work. [citation omitted]." *City of Granite City v. The Industrial Commission*, 279 Ill. App. 3d 1087, 1090, 666 N.E.2d 827 (1996). Petitioner was released to full duty by Dr. Giannoulias on July 12, 2016 regarding her knee condition. Dr. Anderson continued to provide treatment to her left ankle thereafter. On July 5, 2017, Dr. Anderson prescribed physical therapy and possible work conditioning prior to Petitioner's return to work with a follow-up appointment scheduled in four weeks-time or August 2, 2017. Petitioner, though, sought no further treatment. Given the lack of treatment, it can be inferred Petitioner's condition stabilized.

The Commission finds Petitioner reached maximum medical improvement on August 2, 2017, the date upon which Petitioner was scheduled for treatment and failed to attend. The Commission awards temporary total disability benefits for April 4, 2014 through August 2, 2017 representing 173 and 6/7 weeks.

V. Permanent Disability

Pursuant to Section 8.1b of the Act, the Commission weighs 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, the Commission assigns no weight to this factor.

Section 8.1b(b)(ii) – occupation of the injured employee

At the time of the accident, Petitioner was employed as a bus driver. On July 12, 2016, Dr. Giannoulias released Petitioner to return to work without restrictions regarding her knee condition. On July 5, 2017, Dr. Anderson anticipated Petitioner returning to work following a short course of additional treatment. Petitioner's work duties require some lifting and ease of movement but mainly involve seated work while driving. The Commission finds this factor weighs in favor of a decreased permanent disability.

Section 8.1b(b)(iii) – age of the employee at the time of the injury

Petitioner was 44 years-old on the date of accident. Petitioner's younger age bodes well for a swifter recovery. The Commission finds this factor weighs in favor of a decreased permanent disability.

Section 8.1b(b)(iv) – employee's future earning capacity

Petitioner provided no testimony regarding her future earning capacity. The Commission affords no weight to this factor.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

Petitioner testified at trial she is unable to wear hard shoes due to discomfort. Additionally, Petitioner experiences continued pain and swelling in her left knee, particularly when the weather is bad. Petitioner is no longer able to walk long distances or roller skate. The treating records from both Dr. Anderson and Dr. Giannoulias document ongoing deficits consistent with Petitioner's testimony. The Commission finds this factor weighs in favor of an increased permanent disability.

Left Knee

Based on the above, the Commission finds Petitioner sustained permanent partial disability to the extent of 15% loss of use of the left leg pursuant to §8(e)12 of the Act as a result of the injury to her left knee.

Left Foot

Additionally, the Commission finds Petitioner sustained permanent partial disability to the extent of 20% loss of use of the left foot pursuant to §8(e)11 of the Act as a result of the injury to Petitioner's ankle.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner sustained an accidental injury arising out of and in the course of her employment on April 3, 2014.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical expenses as detailed in Petitioner's Exhibit 1, pursuant to §8(a) and subject to §8.2 of the Act. Respondent shall receive credit for payments made.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $834.93 per week for a period of 173 and 6/7 weeks, representing April 4, 2014 through August 4, 2017, that being the period of temporary total incapacity for work under §8(b). Respondent shall receive credit for $134,425.46 for TTD benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $721.66 per week for a period of 32.25 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused a 15% loss of use of the left leg.

20IWCC0735

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $721.66 per week for a period of 33.4 weeks, as provided in §8(e)11 of the Act, for the reason that the injuries sustained caused a 20% loss of use of the left foot.

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

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

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 16 2020

LEC/cak

D: 10/7//2020

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L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

Stephen J. Mathis

Stephen Mathis

D. Douglas McCarthy

D. Douglas McCarthy

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

ROBERT HOUSTON,

Petitioner,

20IWCC0736

vs. NO: 10 WC 47849

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

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

I. Temporary Disability

The parties stipulated Petitioner was temporarily and totally disabled from November 3, 2010 through September 27, 2012, and Respondent paid $107,269.44 toward its Temporary Total Disability benefit obligation. The Arbitrator's decision awarded Respondent's credit but failed to award Petitioner the associated Temporary Total Disability benefits. Therefore, the Commission corrects the decision to award the stipulated Temporary Total Disability benefits from November 3, 2010 through September 27, 2012.

II. Permanent Disability

The Commission strikes the sixth through eighth sentences in the fourth paragraph of Page 5, as there is no such testimony in the record.

Although indicating to the contrary, the Arbitrator utilized the §8.1b framework in determining Petitioner's permanent partial disability. The Commission notes Petitioner's accidental injury occurred prior to September 1, 2011 and while the analysis of the §8.1b factors

20IWCC0736

was not required, we nonetheless find the relevant evidence of Petitioner's disability was properly considered and affirm the finding Petitioner sustained 40% loss of use of the left leg.

Petitioner underwent two major left knee surgeries, with a manipulation under anesthesia in between. Following extensive post-operative physical therapy, his surgical outcome is equivocal: he has ongoing pain and notable residual deficits in strength and range of motion which have affected his day-to-day activities and limited his recreational pursuits. Petitioner is left with permanent restrictions of 50-pound maximum lift, minimal squatting, no kneeling, occasional ladders, and stairs. PX3, RX1. These capabilities limit Petitioner to Medium/Medium-Heavy Physical Demand Level, whereas electrician is a Heavy Physical Demand Level job. RX1, PX3. Petitioner has returned to work as an electrician, albeit in an assignment that does not include the usual complement of full-duty electrician's work:

> It's not quite as physically demanding of a job. There's, like I said, not as much or very little ladder work, not a lot of heavy lifting. It's more of electronic based and using a tablet and communicating with the comptroller's office, with AT&T, with Unisys, one of the companies that the City deals with, programming of the clocks themselves; so a lot less strenuous type of electrical work. T. 36.

Petitioner testified tasks occasionally exceed his capabilities, and he must request assistance: if the job requires getting underneath a trailer, "then I usually have to call for another electrician to come help me." T. 39-40.

The Commission emphasizes Petitioner has worked the biometrics electrician position for seven years, and there is no evidence to suggest this accommodated duty position will be terminated. Moreover, regarding Petitioner's likely need of a total knee arthroplasty in the future, the Commission finds the potential for future surgery is speculative and not reliable evidence of Petitioner's current disability; rather, when/if it happens, such additional surgical intervention would properly be considered in the context of a Section 8(a)/19(h) Petition. The Commission finds the evidence demonstrates Petitioner sustained 40% loss of use of the left leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 15, 2020, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,077.33 per week for a period of 99 2/7 weeks, representing November 3, 2010 through September 27, 2012, that being the stipulated period of temporary total incapacity for work under §8(b). Respondent shall have credit of $107,269.44 for payments previously made.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 86 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused the 40% loss of use of the left leg.

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

20IWCC0736

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

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 16 2020

L. Elizabeth Coppoletti

LEC/mck

O: 12/9/2020

Stephen Mathis

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DISSENT

I respectfully dissent from the Majority and instead find that the November 2, 2010 work accident and Petitioner's permanent restrictions for the left knee partially incapacitated him from pursuing the duties of his usual and customary line of employment as an electrician.

The functional capacity evaluation (FCE) of May 16, 2012 found Petitioner's job as an electrician to be within the heavy physical demand level. The FCE indicated that although Petitioner gave his full effort, he could only perform 52% of the physical demands of an electrician. Petitioner was unable to perform occasional squat lifting, occasional power lifting, occasional unilateral carrying, walking, squatting, sustained kneeling, crawling, and static balance. The FCE determined that Petitioner performed at the medium physical demand level. Respondent's Section 12 examiner, Dr. Bush-Joseph, also believed that Petitioner's work capacity was within the medium-heavy-duty range. Dr. Bush-Joseph recommended a 50-pound lifting restriction, as well as minimal squatting, no kneeling, occasional ladders, and stair restrictions. Dr. Bush-Joseph and Petitioner's treating physician, Dr. Troy, noted that Petitioner's condition was such that he was at risk for a future total knee replacement.

Notwithstanding Petitioner's significant injuries and restrictions, Petitioner returned to work for Respondent. Respondent provided Petitioner an accommodated position with the same job title, but not the same duties. At the time of Petitioner's work injury, he worked for Respondent in the Electrical, Wire and Communications department. His job duties included any and all electrical construction, maintenance, service, inside/outside wiring, and any and all electrical work for the City, police stations, firehouses, libraries, ward yards, and health centers. Petitioner testified that he was also required to install big pipe, wiring, generators, and dig. His work comprised of jobs at airport parking lots, as well as underground and big building electrical

20IWCC0736

services. Petitioner testified that his work was heavy duty. Petitioner's current position involved installing, maintaining, repairing, and replacing biometric or time clocks. His duties required occasional climbing of ladders, was not as physically demanding, and did not require a lot of heavy lifting. Petitioner testified that his new position required the use of a tablet and communicating with various company entities.

The evidence demonstrates that although Petitioner's job title did not change, his job duties had been modified and restricted significantly; Petitioner was therefore partially incapacitated from pursuing his usual and customary duties as an electrician. Accordingly, I would modify the Arbitrator's award to 25% loss of the person as a whole under Section 8(d)2 of the Act.

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOUSTON, ROBERT
Employee/Petitioner

Case# **10WC047849**

CITY OF CHICAGO
Employer/Respondent

20IWCC0736

On 6/15/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1658 SAUNDERS CONDON & KENNY
JAMES J KENNEY
111 W WASHINGTON ST SUITE 1001
CHICAGO, IL 60602

0010 CITY OF CHICAGO
DONALD CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

20IWCC0736

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

Robert Houston
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **10** WC **47849**

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 **Tiffany Kay**, Arbitrator of the Commission, in the city of **Chicago**, on **12/16/19**. By stipulation, the parties agree:

On the date of accident, **11/2/10**, 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 $**84,032.00**, and the average weekly wage was $**1,616.00**.

At the time of injury, Petitioner was **44** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**107,269.44** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**107,269.44**.

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 $**669.64**/week for a further period of **86** weeks, as provided in Section **8** of the Act, because the injuries sustained caused **40% loss of use of the left leg.**.

Respondent shall pay Petitioner compensation that has accrued from **9/19/12** through **12/16/19**, 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

05/09/2020
Date

JUN 15 2020

PROCEDURAL HISTORY

This matter was heard before Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") on December 16, 2019 in Chicago, Illinois.

The parties went to hearing with the sole issue of the nature and extent of Mr. Robert Houston's (hereinafter "Petitioner") injury while working for the City of Chicago (hereinafter "Respondent") on November 2, 2010. (Arb.x1)

The parties stipulated that on November 2, 2010 Petitioner and Respondent were operating under the Illinois Workers' Compensation Act (hereinafter "Act"), that their relationship was one of employee and employer, that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent, that Petitioner gave Respondent notice of the accident within the time limits stated in the Act, that and that Petitioner's condition of ill-being is casually connected to his injury. (Arb.x1) In addition, the parties stipulated that Petitioner earned $1,616.00 as an average weekly wage calculated pursuant to Section 10 of the Act, Petitioner was 44 years old, married and had 2 dependent children. Petitioner was entitled to TTD for the period of 11/3/10 to 9/27/2012, representing 99 2/7 weeks. (Arb.x1)

The submitted records have been examined and the decision rendered by Arbitrator Kay.

STATEMENT OF FACTS AND EVIDENCE

On 11/2/10, Petitioner was employed by Respondent as an Electrician for the Department of Fleet and Facility Management. On 11/2/10, Petitioner was 44 years of age and had been employed by Respondent since approximately 1990.

On 11/2/10, Petitioner testified that he was on duty and was working to repair parking lot lights using a bucket truck. As Petitioner was exiting the bucket, he slipped and experienced a "pop" in his left knee. Petitioner reported this incident and sought initial treatment at MercyWorks.

On 11/2/10, Petitioner presented to Dr. Harold Pye (hereinafter "Dr. Pye") of MercyWorks, who diagnosed Petitioner with a left knee strain, left knee internal derangement, and an MCL meniscus tear (Px1). Dr. Pye referred Petitioner to a course of physical therapy. Petitioner continued to follow up with Dr. Pye, and, on 11/24/10, Petitioner was referred to Dr. Gregory Primus (hereinafter "Dr. Primus") of Chicago Sports Orthopedics for a second opinion.

Dr. Primus concurred with Petitioner's diagnoses and recommended continuing conservative treatment (Px2). When Petitioner's symptoms failed to improve, Dr. Primus recommended surgical intervention for Petitioner's left knee.

On 4/17/11, Petitioner underwent surgery performed by Dr. Primus consisting of: (1) Left knee ACL reconstruction with allograft; (2) Left knee medial collateral ligament reconstruction with allograft; (3) Partial medial meniscectomy; (4) Abrasion arthroplasty with large microfracture of the trochlear groove; (5) Extensive synovectomy secondary to synovitis (Px4a).

Due to persistent complaints, Petitioner underwent a follow-up procedure on 7/11/11 performed by Dr. Primus consisting of a left knee closed manipulation under anesthesia (Px4b).

After surgery, Petitioner continued to follow up with Dr. Primus and performed an additional course of physical therapy and received a series of left knee injections (Px2).

On 12/17/11, Petitioner sought a second opinion and assumption of care by Dr. Daniel Troy ("hereinafter Dr. Troy") of Midwest Orthopaedics, who noted that Petitioner had a significant amount of patellofemoral crepitation throughout his range of motion in the left knee, consistent with his symptoms throughout the anterior aspect of his left knee. Dr. Troy recommended Petitioner undergo a diagnostic arthroscopy to readdress the left knee patellofemoral joint (Px3).

On 3/14/12, Petitioner underwent surgery performed by Dr. Troy consisting of a diagnostic left knee arthroscopy, partial lateral meniscectomy, and postoperative pain injection (Px4c). After surgery, Petitioner continued to follow up with Dr. Troy and performed an additional course of physical therapy (Px3).

In May of 2012, Petitioner was directed to participate in an FCE at US Rehabilitation Services. This study, performed on May 16, demonstrated that Petitioner gave full effort but could only perform 52% of the physical demands of an electrician. These restrictions prevented Petitioner from returning to his employment. Petitioner returned to Dr. Troy for monthly evaluations. Dr. Troy prescribed work conditioning. Petitioner participated in this protocol three times per week. While he noted improvement in his range of motion, he continued to experience pain in his left knee.

On 9/19/12, Petitioner attended an Independent Medical Examination (hereinafter "IME") with Dr. Charles Bush-Joseph of Midwest Orthopedics (Rx1). Following his examination of Petitioner and review of Petitioner's medical records, Dr. Bush-Joseph issued an IME report. In his report, Dr. Bush-Joseph found that Petitioner had reached Maximum Medical Improvement (MMI) and was capable of returning to work in a medium heavy-duty capacity with lifting, squatting and kneeling restrictions.

On 9/28/12, following issuance of the IME report, Petitioner did return to work in his usual and customary employment as an Electrician. Petitioner testified that he resumed working under the same job title he had held prior to his 11/2/10 work accident. Petitioner, likewise, testified that, upon returning to work, he resumed earning the same or higher wages as he had prior to his accident.

CONCLUSIONS OF LAW

The petitioner, Mr. Robert J. Houston, was the only witness to testify at trial regarding his injury on November 2, 2010. 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 his current subjective complaints.

With respect to issue (L), what is the Nature and Extent of 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. For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section §8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on November 2, 2010. Therefore, the Commission evaluates the physical impairment and the effect of the disability on the injured employee's life. The factors to be considered are the individual's age, skill, occupation, training, inability to engage in certain kinds of activities, pain, stiffness or limitation of motion.

Petitioner was 44 years of age on the date of his accident and, accordingly, has now entered the latter half of his working life. The Arbitrator places some weight on this factor.

Petitioner is an Electrician for the Department of Fleet and Facility Management, and he was authorized to return to work to his usual and customary employment following his 9/19/12 IME with Dr. Bush-Joseph. Petitioner's release confirmed that he is able to perform the essential duties of his position, albeit in a restricted manner, therefore the Arbitrator places great weight on this factor.

There was no evidence introduced that Petitioner's future earning capacity was affected by his 11/2/10 accident because, following his release by Dr. Bush-Joseph, Petitioner returned to work in the same position as he held prior to his accident. Petitioner testified that, following his return to work, he earned the same or higher wages as he had prior to his accidents. The Arbitrator places great weight on this factor.

The medical records introduced into evidence corroborate Petitioner's testimony regarding his injuries and course of treatment. The Arbitrator places some weight on this factor.

Petitioner testified that he continues to see Dr. Troy periodically. He testified that he is still symptomatic and will require the use of NSAIDS and periodic steroid injections and possibly hyaluronic acid replacement therapy. Dr. Troy opined in his March 18, 2019 correspondence that Petitioner is a candidate for further diagnostic knee arthroscopies and is at significant risk for a total knee replacement. Petitioner testified that he has adjusted his work and personal activities to compensate for the work injury. He has significant limitations both in strength and agility for his left leg. In addition, Petitioner testified that he walks with a limp which affects his low back pain. Additionally, he testified that he continues to be limited in walking long distances or to stand for prolonged periods of time. He has not been able to ambulate more than 1 - 2 blocks. The Arbitrator places greater weight on this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanently disability to the extent of 40% loss of use of the left leg.

Signature of Arbitrator

05/09/2020
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

WENDI SCHAFFER-DAMON,

Petitioner,

vs.

20IWCC0737

NO: 19 WC 15191

STRATAS FOODS LLC,

Respondent.

DECISION AND OPINION ON REVIEW

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

On Page 5, the Commission strikes the last paragraph in its entirety.

On Page 4 in paragraph 5, we correct the last line of the last sentence to strike the word "full" and replace with the word "fall".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 10, 2020, is hereby affirmed and adopted with the corrections noted above.

20IWCC0737

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: DEC 16 2020

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MP/se
O: 111020
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

SCHAFFER-DAMON, WENDI
Employee/Petitioner

Case# **19WC015191**

STRATAS FOODS LLC
Employer/Respondent

20IWCC0737

On 2/10/2020, 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:

0969 RICH RICH COOKSEY & CHAPPELL
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0264 HEYL ROYSTER VOELKER & ALLEN
JESSICA M BELL
PO BOX 6199
PEORIA, IL 61601-6199

20IWCC0737

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Wendi Schaffer-Damon
Employee/Petitioner

v.

Stratas Foods LLC
Employer/Respondent

Case # 19 WC 15191

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 Springfield, on December 12, 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, mAY 12, 2017, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $57,489.12; the average weekly wage was $1,105.56.

On the date of accident, Petitioner was 48 years of age, married with 0 dependent child(ren).

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00. The parties stipulated TTD benefits were paid in full.

Respondent is entitled to a credit of $37,972.74 under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, Petitioner's petition for prospective medical treatment is denied and 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)

February 7, 2020
Date

FEB 10 2020

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 May 12, 2017. According to the Application, Petitioner "Slipped and fell" and sustained an injury to her "Right shoulder/neck/body as a whole" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills as well as prospective medical treatment. Petitioner and Respondent stipulated Petitioner sustained a work-related accident and that temporary total disability benefits had been paid in full. Respondent disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as an HR Director/Manager for over 20 years. In May, 2017, Petitioner was directed to go to Nashville, Tennessee, to do training at a new facility. On May 12, 2017, Petitioner was in the process of exiting an SUV that was driven by her supervisor. At that time, Petitioner sustained a slip/fall and landed on her back on the right side. Petitioner testified that when she landed, she injured her right shoulder and right knee.

Subsequent to the accident, Petitioner was treated by Dr. George Paletta, an orthopedic surgeon, for right shoulder and right upper extremity symptoms. As noted herein, Dr. Paletta performed right shoulder surgery on March 13, 2018. Respondent disputed liability for the medical bills associated with Dr. Paletta's treatment on the basis of causal relationship.

Petitioner was also treated by Dr. Matthew Gornet, an orthopedic surgeon, for neck/cervical spine symptoms. As noted herein, Dr. Gornet has recommended Petitioner undergo disc replacement surgery at C5-C6 and C6-C7. This was the prospective medical treatment sought by Petitioner. Respondent disputed liability for the medical bills associated with Dr. Gornet's treatment and the disc replacement surgery he has recommended on the basis of causal relationship.

Prior to the accident of May 12, 2017, Petitioner was treated by Dr. Paletta for bilateral shoulder symptoms. Dr. Paletta initially evaluated Petitioner for bilateral shoulder symptoms on May 16, 2016. At that time, Petitioner had previously undergone a left rotator cuff repair. Dr. Paletta opined Petitioner had a recurrent left rotator cuff tear and a right rotator cuff tear (Respondent's Exhibit 4).

Dr. Paletta subsequently performed arthroscopic surgery on Petitioner's right shoulder on September 6, 2016. The procedure consisted of a rotator cuff repair, subacromial decompression, bursectomy and acromioplasty (Respondent's Exhibit 4).

Following surgery, Petitioner continued to be treated by Dr. Paletta who saw her from October 24, 2016, through April 12, 2017. Petitioner continued to have the right shoulder symptoms and an MRI arthrogram was performed on April 7, 2017. Dr. Paletta reviewed the MRI arthrogram and opined it revealed evidence of a recurrent tear. Dr. Paletta opined Petitioner should undergo an injection followed by physical therapy or undergo a revision rotator cuff repair (Respondent's Exhibit 4).

Petitioner deferred seeking medical treatment until June 9, 2017 (following her return from Nashville) when she was seen by Dr. Richard Noble, her family physician. Dr. Noble ordered an MRI scan of Petitioner's right shoulder (Petitioner's Exhibit 3).

The MRI was performed on June 9, 2017. According to the radiologist, the MRI revealed a full thickness tear of the supraspinatus. The radiologist also noted there was "No change from the prior exam." (Petitioner's Exhibit 3).

Petitioner was subsequently seen by Dr. Paletta on June 16, 2017. At that time, Petitioner advised she had increased right shoulder pain after sustaining a fall. Dr. Paletta reviewed the MRI scan of June 9, 2017, and compared it to the MRI scan of April 7, 2017. He noted that "...it does not appear that the fall the patient suffered in May has resulted in any further injury of the shoulder. Her treatment options remain identical to those that were outlined in the note of 4-12-17." (Petitioner's Exhibit 4).

Dr. Paletta referred Petitioner to Dr. Helen Blake, a pain management physician, who saw Petitioner on July 10, 2017. At that time, Dr. Blake administered an injection into the right glenohumeral joint (Petitioner's Exhibit 5).

Petitioner was again seen by Dr. Paletta on August 18, 2017. Dr. Paletta's record of that date noted Petitioner sustained a slip and fall while exiting a car and experienced increased/recurrent pain. He recommended Petitioner undergo a revision rotator cuff repair. In regard to causality, Dr. Paletta noted "Based on the history provided to me by the patient, it is my opinion that the fall that occurred in May is a contributing factor to and either cause or aggravated the recurrent rotator cuff tear of the right shoulder." (Petitioner's Exhibit 4).

Petitioner did not see Dr. Paletta again until January 17, 2018. At that time, Petitioner complained of right elbow pain in addition to her right shoulder pain. Dr. Paletta's findings on examination were indicative of cubital tunnel syndrome. He referred Petitioner to Dr. Daniel Phillips for EMG/nerve conduction studies of the right upper extremity. He also ordered a repeat MRI scan to determine if there was any further progression of the rotator cuff tear (Petitioner's Exhibit 4).

On January 17, 2018, Dr. Phillips saw Petitioner and performed EMG/nerve conduction studies on Petitioner's right upper extremity. Dr. Phillips opined the studies were positive for chronic median neuropathy and slight ulnar neuropathy (Petitioner's Exhibit 11).

Dr. Paletta reviewed the EMG/nerve conduction studies on January 17, 2018. He opined they confirmed his diagnosis of carpal tunnel syndrome [he actually previously diagnosed cubital tunnel syndrome]. He also opined "...these symptoms are not in any way related to her shoulder problem." (Petitioner's Exhibit 4).

An MRI arthrogram was performed on January 17, 2018. The study confirmed the presence of a recurrent full thickness tear of the supraspinatus (Petitioner's Exhibit 10).

Dr. Paletta performed arthroscopic surgery on Petitioner's right shoulder on March 13, 2018. The procedure consisted of a revision rotator cuff repair, decompression, bursectomy and acromioplasty (Petitioner's Exhibit 4).

Dr. Paletta saw Petitioner following surgery and ordered physical therapy. When he saw Petitioner on August 20, 2018, Petitioner had complaints referable to her neck/cervical spine. Dr. Paletta ordered an MRI scan of the cervical spine (Petitioner's Exhibit 4).

The MRI of Petitioner's cervical spine was performed on September 18, 2018. According to the radiologist, the MRI revealed multilevel cervical spondylosis, most significant at C6-C7 (Petitioner's Exhibits 3 and 4).

Dr. Paletta reviewed the MRI on September 21, 2018. He recommended Petitioner be evaluated by a cervical spine specialist (Petitioner's Exhibit 4).

On October 27, 2018, Petitioner was evaluated by Dr. Matthew Gornet, an orthopedic surgeon. At that time, Petitioner complained of neck pain and bilateral shoulder pain, more on the right than left. Dr. Gornet reviewed the MRI of Petitioner's cervical spine and opined it revealed disc herniations/annular tears at C5-C6 and C6-C7. He recommended Petitioner undergo a steroid injection at C6-C7, and referred Petitioner to Dr. Blake (Petitioner's Exhibit 8).

Dr. Blake saw Petitioner on November 20, 2018. At that time, Dr. Blake administered a steroid injection at C6-C7 (Petitioner's Exhibit 5).

Dr. Gornet again saw Petitioner on December 17, 2018. At that time, Petitioner advised the steroid injection only provided temporary relief. Dr. Gornet ordered a high resolution MRI scan of Petitioner's cervical spine (Petitioner's Exhibit 8).

The MRI was performed on December 17, 2018. According to the radiologist, the MRI revealed small disc protrusions at C5-C6 and C6-C7 (Petitioner's Exhibit 9).

Dr. Gornet saw Petitioner on December 17, 2018, and reviewed the MRI. He opined Petitioner should undergo disc replacement surgery at C5-C6 and C6-C7. Dr. Gornet subsequently saw Petitioner on February 21, 2019, and he renewed his surgical recommendation (Petitioner's Exhibit 8).

At the direction of Respondent, Petitioner was examined by Dr. Benjamin Crane, an orthopedic surgeon, on April 11, 2019. In connection with his examination of Petitioner, Dr. Crane reviewed medical records and diagnostic studies provided to him by Respondent. The medical records Dr. Crane reviewed in regard to Petitioner's right shoulder condition were limited to the treatment Petitioner received following the accident. Dr. Crane did not review the medical records for treatment Petitioner received for her right shoulder condition prior to the accident. In regard to Petitioner's right shoulder condition, Dr. Crane opined it was related to the accident of May 12, 2017 (Respondent's Exhibit 1).

In regard to Petitioner's cervical spine/neck condition, Dr. Crane noted Petitioner was having minimal neck pain with non-dermatomal arm symptomatology. In his review of the diagnostic studies, Dr. Crane opined there was a small disc bulge at C6-C7, but it did not correlate with Petitioner's symptoms. Dr. Crane opined the work accident did not aggravate or accelerate a pre-existing condition beyond its ordinary progression. He also opined Petitioner was at MMI, could return to work without restrictions and no further treatment was indicated (Respondent's Exhibit 1).

Petitioner was seen by Dr. Gornet on May 2, 2019, and Dr. Gornet reviewed Dr. Crane's report at that time. Dr. Gornet noted he disagreed with Dr. Crane's opinion that the work injury did not aggravate or accelerate a pre-existing condition beyond its normal progression because Petitioner did not have any previous problems of significance in regard to her neck. He again renewed his surgical recommendation (Petitioner's Exhibit 8).

At trial, Petitioner testified she had not been diagnosed with any neck condition prior to the accident nor had she been treated by a neck specialist. However, Petitioner was treated by Dr. Noble for neck pain on November 30, 2012, and again on January 23, 2015. When Dr. Noble saw Petitioner on January 23, 2015, he diagnosed her with facet syndrome with neck pain and ordered physical therapy (Respondent's Exhibit 5).

Dr. Gornet was deposed on September 23, 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. Specifically, he testified Petitioner should undergo disc replacement surgery at C5-C6 and C6-C7. In regard to causality, Dr. Gornet testified Petitioner's neck condition was related to the work-related injury and he noted Petitioner did not have any prior neck problems of any significance (Petitioner's Exhibit 12; pp 17-18).

On cross-examination, Dr. Gornet stated Petitioner denied any prior neck problems, but he also stated there may have been an overlap of Petitioner's neck and shoulder symptoms. Dr. Gornet also agreed he did not know about the details of the accident, other than the fact that Petitioner had sustained a full (Petitioner's Exhibit 12; pp 19-24).

Dr. Crane was deposed on November 13, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Crane's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. In regard to Petitioner's neck/cervical spine condition, Dr. Crane testified Petitioner's neck pain and right arm parasthesias were not related to the accident of May 12, 2017. He also stated Petitioner would have experienced neck pain immediately or shortly after the accident and that Petitioner's right arm complaints were non-dermatomal (Respondent's Exhibit 2; pp 15-17).

On cross-examination, Dr. Crane reaffirmed his opinion that Petitioner's right shoulder condition was related to the accident. However, on redirect examination, Dr. Crane stated that if there were medical records which documented Petitioner had shoulder issues prior to the accident, his opinion in regard to causality might change (Respondent's Exhibit 2; pp 22-23, 31-32).

At trial, Petitioner testified she continues to have neck pain, tingling in both arms and sleep disruption. She wants to proceed with the disc replacement surgery 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 not causally related to the accident of May 12, 2017.

In support of this conclusion the Arbitrator notes the following:

Petitioner did not seek any medical treatment following the accident until approximately one month after it occurred, on June 9, 2017.

In regard to Petitioner's right shoulder, Petitioner previously underwent right shoulder surgery on September 6, 2016, and was being treated by Dr. Paletta who had evaluated her just one month prior to the accident, on April 12, 2017.

Petitioner underwent MRI scans on April 7, 2017, and June 16, 2017 (before and after the accident) and when both the radiologist and Dr. Paletta compared them, they both opined there was either "no change" or no "further injury."

Initially, Dr. Paletta opined the accident did not cause any further injury and the treatment options he previously recommended remained the same.

As noted in his medical record of August 18, 2017, Dr. Paletta changed his mind regarding causality, but did not provide any specific explanation as to why he did so.

Petitioner was diagnosed with a recurrent right rotator cuff tear and surgery was recommended both before and after the accident.

Respondent's Section 12 examiner, Dr. Crane, opined Petitioner's right shoulder condition was related to the accident; however, for some unknown reason, Dr. Crane did not have the benefit of reviewing the medical records for treatment Petitioner had received prior to the accident. When he was deposed, Dr. Crane testified that if there were medical records which documented Petitioner had received right shoulder treatment prior to the accident, his opinion as to causality might change.

In regard to Petitioner's right carpal tunnel syndrome condition, Dr. Paletta opined this had nothing to do with her shoulder condition.

In regard to Petitioner's neck/cervical spine condition, Petitioner had no complaints of neck/cervical spine symptoms until August 30, 2018, approximately one year and three months post accident.

Petitioner previously received medical treatment for neck symptoms in November, 2012, and January, 2015.

Dr. Gornet's opinion as to causality was based, in part, on Petitioner having no prior neck pain of any significance. Obviously, Petitioner had prior neck symptoms which were significant enough for her to seek medical treatment.

Respondent's Section 12 examiner, Dr. Crane, opined that if Petitioner had injured her neck as a result of the accident, she would have experienced neck pain immediately or shortly after its occurrence. He also opined the only finding noted in the diagnostic studies was a small disc bulge at C6-C7 which did not correlate with her symptoms.

Based upon the preceding, the Arbitrator is not persuaded by Dr. Paletta's change in opinion in regard to the causality of Petitioner's right shoulder condition and that the opinion of Dr. Crane is more persuasive than that of Dr. Gornet in regard to causality of Petitioner's neck/cervical spine condition.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Respondent is not liable for payment of the medical services provided to Petitioner and Petitioner is not entitled to prospective medical treatment.

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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAWN TURNER,

Petitioner,

vs.

20IWCC0738

NO: 17 WC 9500

MERIDIAN CUST #101,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability benefits, 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, but corrects the scrivener's error as explained below.

On Page 9, in the first sentence of the first paragraph, we correct the date from "June 28, 2017" to "June 15, 2017".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 19, 2019, is hereby affirmed and adopted with the correction noted above.

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

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

20IWCC0738

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: DEC 16 2020

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O: 111020
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TURNER, DAWN Case# **17WC009500**

Employee/Petitioner

MERIDIAN CUSD #101

Employer/Respondent

20IWCC0738

On 7/19/2019, 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 2.01% 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:

1167 WOMICK LAW FIRM CHTD
CASEY VanWINKLE
501 RUSHING DR
HERRIN, IL 62948

2795 HENNESSY & ROACH PC
PAUL N BERARD
415 N 10TH ST
ST LOUIS, MO 63101

20IWCC0738

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Dawn Turner,
Employee/Petitioner

v.

Meridian CUSD #101,
Employer/Respondent

Case # **17 WC 09500**

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 **Herrin**, on **June 12, 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 **September 7, 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 **$45,805.00**; the average weekly wage was **$880.86**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of **$484.07** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$484.07**.

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

ORDER

Petitioner failed to prove her current condition of ill-being regarding her low back after October 5, 2016 is causally related to her September 7, 2016 work injury.

Respondent shall pay Petitioner permanent partial disability benefits of $528.52/week for 15 weeks, because the injuries sustained caused the permanent partial disability of the person-as-a-whole as provided in Section 8(d)2 of the Act to the extent of 3% thereof.

Respondent has paid all reasonable and necessary medical expenses. Respondent is entitled to a credit for medical expenses paid by its workers' compensation insurer referenced in Respondent's Exhibit 2.

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

July 18, 2019
Date

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACTS

On March 30, 2017, Petitioner filed an Application for Adjustment of Claim alleging that on September 7, 2016, she sustained a lumbar injury after being pushed from behind by a student. At the June 12, 2019, Arbitration hearing, the parties stipulated that Petitioner sustained an accident arising out of and in the course of her employment with Respondent. Respondent disputed whether Petitioner's condition in her low back, including a December 16, 2017, low back surgery, was causally related to her work accident, as well as Petitioner's entitlement to any additional TTD or medical expenses.

At the time of her accident, Petitioner was a 49-year-old physical education teacher for Meridian School District. (TR-12) Petitioner testified she had worked as a physical education teacher for the school district for 15 years. (TR-12) Petitioner testified that on September 7, 2016, there was a behavioral student in the cafeteria and she was on cafeteria duty with her class. (TR-12-13) The student was not supposed to be in the cafeteria at that time. (TR-13) Petitioner removed the student from the cafeteria and when she turned to walk away he charged at her and pushed her in the back of her waist, shoving her forward. (TR-13) He was a nine year-old, third grade student of average size. (TR-13) Petitioner testified that when she was hit from behind she was caught by surprise. (TR-14)

Petitioner testified an ambulance was called when she went to the teacher's lounge after taking the student down the hall to his teacher. (TR-15-16) Petitioner was evaluated in the Emergency Room and released. (TR-16) Petitioner then sought care with her chiropractor that same day for a previously scheduled appointment for a prior neck injury. (TR-16) Petitioner had been seeing her chiropractor, Dr. Whitehead, since 1998, for various conditions, including after two car accidents in 2012 and 2014. (TR-17-18) Petitioner testified that she had previously sought chiropractic care for her low back off and on, including between January and September of 2016. (TR-18-19) Petitioner testified that her low back pain became increasingly worse after her accident. (TR-21)

Petitioner testified she began seeing a spine specialist, Dr. Kube, and then Dr. Jones. (TR-23-24) Petitioner testified Dr. Jones performed surgery on December 16, 2017. (TR-25) Petitioner testified she would consider the surgery a 90% success because she still has some moderate pain but not anything close to what she previously had. (TR-31) Petitioner testified

she was able to return to most of her prior activities with the exception of jogging that she never enjoyed. (TR-32)

On cross-examination, Petitioner testified she did not recall reporting to the initial Emergency Room physician that her back pain was better by the time she got to the ER. (TR-36) Petitioner testified she was in prior motor vehicle accidents, but could not recall the years. (TR-36-37) Petitioner denied having sought care with Dr. Whitehead for her low back in August of 2010. (TR-38) Petitioner could not recall having back pain of 9 out of 10 in August of 2010, but acknowledged that may be what the records reflect. (TR-38) Petitioner testified she sought chiropractic care for back pain in September, October and November 2010, as well as in 2011 and 2012. (TR-39) Petitioner testified she also sought care for back pain in February, June, July and August of 2016. (TR-40) Petitioner testified she sought chiropractic care with Dr. Whitehead two weeks prior to her work accident on August 24, 2016, and was continuing to complain of back pain. (TR-41)

Petitioner denied any knowledge of Dr. Kube noting that he would have a difficult time causally relating her work accident to her need for surgery, and that his opinions were the reason she quit treating with him and began seeing Dr. Jones again. (TR-43-47) Petitioner initially could not recall having sustained a slip and fall accident on June 22, 2017, that necessitated her to go to the Emergency Room at Heartland Regional Medical Center, but then acknowledged she had. (TR-47-48) Petitioner disagreed that Dr. Kube's records from May of 2017 would only reference her complaining of medium back pain and that her back of 10 out of 10 at the ER in June was any different than when seeing Dr. Kube. (TR-47-48) Petitioner testified she reported to Dr. Jones that she was in two prior motor vehicle accidents. (TR-50)

Respondent introduced chiropractic records from Whitehead Wellness Center dating back to August 2010. On August 27, 2010, Petitioner sought care for acute back pain after feeling something pop which gradually worsened over the past few days. Petitioner reported having some sciatic pain into her right leg to her knee. Petitioner reported an average pain score of 8.5 out of 10. Petitioner was diagnosed with a lumbar strain with intervertebral disc syndrome with muscle spasms. (RX 3)

Petitioner continued to seek chiropractic care with Dr. Whitehead for her back on August 30, 2010; September 1st; September 3rd; September 8th; September 10th; September 13th; September 15; September 17th; September 22nd; September 24th; September 27th; October 1st; October 4th; October 8th; October 11th; October 15th; October 18th; October 22nd; October 29th; November 24th; and December 20, 2010. Throughout her treatment in 2010 Petitioner reported varying degrees of back pain with sciatic symptoms in both legs at times. (RX 3)

Petitioner sought chiropractic care with Dr. Whitehead for lower back pain in 2011 as well. On August 31, 2011, Petitioner reported having lower back pain radiating into her right hip/buttock. She continued to seek chiropractic care with Dr. Whitehead on September 7, 2011; September 14th; September 21st; October 5th; November 2nd; and December 21, 2011. Throughout her chiropractic treatment in 2011 Petitioner complained of lower back pain, including at the L4 and L5 level. (RX 3)

Petitioner also sought chiropractic care with Dr. Whitehead for lower back pain in 2012. Petitioner continued to complain of lower back pain at her January 11, 2012, chiropractic appointment. Petitioner sought additional chiropractic care for her low back on February 20th, April 6th and May 23rd. Petitioner complained of lower back pain with occasional sciatic neuralgia pain during this period. (RX 3)

Petitioner sought chiropractic care with Dr. Whitehead in the months leading up to her September 7, 2016, work accident. On February 3, 2016, Petitioner was complaining of pain in her lower back, neck and across her shoulders. Petitioner reported having occasional spasms in her lower back. Petitioner sought chiropractic care with Dr. Whitehead on March 6th for neck pain; March 23rd for upper back and neck pain; April 20th for neck pain; May 18th for upper back and neck pain; June 22nd for left sided neck and lower back pain; July 13th for mild lower back pain; July 15th for bilateral lower back pain; July 27th for back and knee pain; August 3rd for neck and lower back stiffness; August 10th for upper back and neck discomfort; August 17th for lower back, upper back and neck pain; and August 24th for lower back, upper back and neck pain. (RX 3)

On September 7, 2016, Petitioner presented to the Union County Hospital ER. She reported being pushed by a child in the low back and having pain in the lower back that has progressively caused lower neck and shoulder pain, worse with movement. Petitioner denied falling. Petitioner reported being unable to turn her head to the left. Petitioner reported her old whiplash injury has been exacerbated by the new low impact insult. Petitioner was diagnosed with a neck sprain and discharged from the ER. (RX 5)

Petitioner sought chiropractic care with Dr. Whitehead after being discharged from the ER. Petitioner reported being shoved from behind by a student. Petitioner complained of constant pain across her lumbar spine as well as the upper dorsal and cervical spine. Petitioner rated her pain as a 4 to 8 out of 10 with an average of 5. Petitioner scored a 48% on Oswestry and 52% on neck disability index. Dr. Whitehead diagnosed sprain/strains of the lumbar and dorsal/cervical spine, posttraumatic muscle spasms, cervicogenic headaches and facet joint pain. Dr. Whitehead adjusted Petitioner and took her off work for the remainder of the week.

Petitioner continued to undergo chiropractic care with Dr. Whitehead on September 9th, 12th, 13th, 14th, 15th, 16th, 19th, 21st, 23rd, 28th, October 3rd and 5th. By her October 5th appointment, Petitioner was reporting improvement in her symptoms and pain of 2 to 4 out of 10 with an average of 3. Petitioner's Oswestry score was 18%. Petitioner continued to seek chiropractic care with Dr. Whitehead on October 10th, 19th, 28th, and November 7th. Petitioner continued to complain of sciatic neuralgia in her right leg and back and neck pain at her November 7th appointment. Dr. Whitehead recommended a lumbar spine MRI at this appointment. Dr. Whitehead continued to do so at her November 14th appointment. Petitioner sought treatment with Dr. Whitehead on November 21st, 23rd, and 30th. Dr. Whitehead kept Petitioner off of work from September 7th through the 16th. (RX 1 & PX 2)

Petitioner continued to seek chiropractic care with Dr. Whitehead on December 5, 2016. Petitioner continued to complain of lower back pain worse on the right side and radiating into her hip/gluteal. Petitioner continued to undergo chiropractic treatment with Dr. Whitehead on December 7th; December 9th; December 12th; December 14th; December 19th; December 23rd; December 28th; December 30th; January 2, 2017, January 4th; January 6th; January 9th; January 11th; January 13th; January 16th; January 25th; January 27th, February 1st; February 3rd; February 6th; February 10th; February 13th; February 17th; February 24th, March 15th; March 24th; March 29th, April 7th and May 24th. By her May 24th appointment with Dr. Whitehead, Petitioner continued to complain of lower and mid back pain with neuralgia symptoms into her lower extremities with the right leg being more consistently painful than the left. Petitioner also reported having occasional neck pain and headaches. (RX 3 & PX 2)

Petitioner underwent a lumbar spine MRI at Auburn Park Imaging on January 12, 2017. The radiologist's impression was: (1) no evidence of acute osseous injury involving the lumbar spine; (2) very mild scoliosis of the lumbar spine convex to the left; (3) grade 1 spondylolisthesis at the L5-S1 level with degenerative disc disease and circumferential disc bulging with mild asymmetrical bulging on the right posterior lateral aspect of the disc, mild to moderately severe central spinal canal stenosis along the bilateral lateral recess stenosis; (4) very mild disc bulging at L4-5, osseous degenerative changes, very mild central spinal canal stenosis; (5) very mild disc bulging at L3-4, osseous degenerative changes, very mild central spinal canal stenosis; and (6) minimal disc bulging and osseous degenerative change at L2-3 level. (RX 4)

On March 8, 2017, Petitioner presented to Dr. Richard Kube at Prairie Spine & Pain Institute for low back pain and numbness, and pain and weakness in her legs. Petitioner reported having symptoms since September 7, 2016, when she was pushed in the back by a student. Petitioner reported not having any specific treatment for her back since 2003. Petitioner reported

having two whiplash type injuries to her cervical spine as well. Dr. Kube opined Petitioner's lumbar spine MRI revealed grade 1 spondylolisthesis at L5-S1 and a very, very significant gap in her facet joints which is suggestive of hypermobility or possible instability at that level. Dr. Kube recommended plain x-rays including bending films to further assess her condition. Dr. Kube noted that Petitioner is likely looking at a fusion procedure to stabilize her back.

Dr. Kube released Petitioner to light-duty of no frequent lifting over 10 pounds, limited lifting up to 35 pounds, rare overhead and floor to waist lifting, limited bending and twisting, and limited prolonged sitting or standing. (RX 4 & PX 3)

On March 20, 2017, Petitioner underwent lumbar spine x-rays at Heartland Regional Medical Center. The radiologist's impression was: Grade 1 out of 3 spondylolisthesis L5 and S1 with pars defects, no instability demonstrated, degeneration at L5-S1. (PX 5)

On March 28, 2017, Petitioner presented to Dr. Jeffery Jones at The Orthopedic Institute of Southern Illinois for evaluation of her lumbar spine. Petitioner reported constant symptoms since her work injury. Dr. Jones opined that Petitioner may be a candidate for a lumbar interbody fusion, but recommended she exhaust all conservative options first. Dr. Jones recommended lumbar epidural injections. Dr. Jones released her to work without restrictions. (PX 4)

On March 29, 2017, Petitioner sought follow up care with Dr. Kube for continued bilateral leg pain and back pain. Dr. Kube reviewed the lumbar spine x-rays and opined that there is definitely mobility at the bottom level that would be consistent with blown facets. Dr. Kube prescribed physical therapy three times a week for four weeks and bilateral L5-S1 transforaminal lumbar epidural injections. (RX 4 & PX 3)

Petitioner began physical therapy at Union County Hospital on April 11, 2017. Petitioner complained of severe back pain with pain down her entire backside of her legs. Petitioner was to continue therapy 2 to 3 times a week for 4 weeks. Petitioner attended physical therapy on April 21st, 24th, 26th, May 1st, 4th, 10th and 11th. (PX 1)

On May 3, 2017, Petitioner sought follow up care with Dr. Kube. Petitioner reported having medium pain in her back and neck and a lot of pain in he legs. Dr. Kube noted Petitioner was having difficulty scheduling the injections due to facilities in southern Illinois being unwilling to perform them without authorization and her being unable to drive to Peoria. (RX 4)

On June 22, 2017, Petitioner sought care at Heartland Regional Medical Center ER for a muscle spasm in her back. Petitioner reported dislocating L5 when she tripped over a step today and twisted her back. The attending nurse noted Petitioner's mechanism of injury as twisting. Petitioner rated her pain as 10/10. Petitioner reported to the ER physicain that she had an

accident on 9/7/2016 and had seen Dr. Kube earlier in the day for her back. Petitioner then reported that one-hour prior she tripped over a step and had severe low back pain and spasms. Petitioner was diagnosed with a muscle spasm in her back and discharged from the ER. (RX 6)

On June 28, 2017, Petitioner underwent a Section 12 Examination with Dr. Paul Matz, a neurosurgeon at St. Luke's Brain and Spine Center. (RX 7) Dr. Matz opined that Petitioner's diagnosis is lumbago related to spondylolisthesis at L5-S1 with lumbar radiculopathy on the right at L5 and history of resolved lumbar strain. Dr. Matz opined that Petitioner's sustained a lumbar strain as a result of her work accident, but it resolved by October 5, 2016. Dr. Matz opined that Petitioner's lumbar spondylolisthesis was symptomatic prior to her work accident and her accident would not have caused, aggravated or accelerated this pre-existing condition. Dr. Matz opined that a lumbar fusion at L5-S1 is medically necessary but would not be related to her work accident. Dr. Matz opined that Petitioner reached MMI for her lumbar strain by October 5, 2016. (RX 7)

On August 9, 2017, Petitioner sought follow up care with Dr. Kube. Petitioner continued to complain of significant back pain and leg symptoms. Dr. Kube reviewed Dr. Matz's IME report and opined that if Petitioner's history is accurate her work accident is causally related to her current condition, but if she had ongoing low back treatment with a chiropractor prior to her accident that it would be a challenge to tie her condition to any kind of work-related accident. Dr. Kube continued Petitioner's work restrictions of no frequent lifting over 10 pounds, limited lifting up to 35 pounds, rare overhead and floor to waist lifting, limited bending and twisting and limited prolonged sitting or standing. (RX 4 & PX 3)

On November 14, 2017, Petitioner sought care with Dr. Jones. Dr. Jones recommended a repeat MRI. Dr. Jones recommended a transforaminal lumbar interbody fusion at L5-S1 to stabilize this level due to the severity of her spondylolisthesis grade 2 at this level.

On December 11, 2017, Petitioner underwent a lumbar spine MRI at The Orthopedic Institute of Southern Illinois. The radiologist's impression was: (1) spinal canal narrowing is moderate at L5-S1; (2) neural foraminal narrowing is moderate at L5-S1 and mild to moderate at L4-L5; (3) mild grade 1 anteriorlisthesis of L5 on S1; and (4) mild to moderate disc height loss at L5-S1. (PX 4)

On December 16, 2017, Dr. Jones performed surgery consisting of: (1) lumbar hemilaminectomy, foraminotomy, medial facetectomy L5-S1 on the left; (2) primary transforaminal lumbar interbody fusion of L5-S1; (3) primary posterior lumbar spinal instrumentation L5-S1; (4) fluoroscopy for confirmation of surgical leval, placement of PEEK

spacer and instrumentation; (5) intraoperative microscope for micro-dissection technique; and (6) intraoperative neuomonitoring: free run EMG and pedicle screw monitoring. (PX 4)

On December 22, 2017, Petitioner sought follow up care with Dr. Jones one-week post-surgery. Petitioner reported doing well without any specific complaints. (PX 4)

On January 22, 2018, Petitioner sought follow up care with Dr. Jones six weeks post-surgery. Petitioner reported doing well and wanting to return to work. X-rays did not show any concerns for screw loosening or hardware failure. Petitioner was released to full-duty work as of 1/26/18. Petitioner was to follow up three months post-surgery for a CT of the lumbar spine to assess her fusion. PX 4)

On March 14, 2018, Petitioner underwent a CT of the lumbar spine at The Orthopaedic Institute of Southern Illinois. The radiologist's impression was: (1) postoperative changes in the form of posterior fusion of L5 and S1 vertebral bodies and the intervening disc; (2) degenerative changes of osteoarthritis in the lumbar spine; (3) L2-3 disc shows mild diffuse bulge; and (4) L3-4 and L4-5 show diffuse disc bulge causing mild narrowing of the spinal canal and both neural foraminas. (PX 4)

On June 5, 2018, Petitioner sought follow up care with Dr. Jones and continued to complain of lumbar spine pain. Dr. Jones' assessment was midline low back pain with sciatica and lumbar spondylolisthesis. Dr. Jones opined that Petitioner's instrumentation was intact and she was going well clinically. Dr. Jones requested she follow up one more time in 6 months for a final recheck. (PX 4)

Dr. Jeffery Jones testified via evidence deposition on July 10, 2018. (PX 6) Dr. Jones testified he is a board-certified neurosurgeon. Dr. Jones first saw Petitioner on March 28, 2017. Dr. Jones testified Petitioner reported being pushed from behind by a child at work and having increased back and leg pain. Dr. Jones found Petitioner to have spondylolisthesis and recommended epidural steroid injections. Petitioner followed up with Dr. Jones again on November 28, 2017 and reported not receiving any relief from epidural steroid injections. Dr. Jones recommended surgery at that time. Dr. Jones testified that Petitioner likely had spondylolisthesis before she was pushed since the mechanism was small, but that her condition got worse after her work accident. Dr. Jones testified that Petitioner's September 7, 2016, work accident permanently exacerbated her pre-existing condition and necessitated her surgery. (PX 6)

On cross-examination, Dr. Jones testified he was not aware of any prior back problems Petitioner may have reported at her initial appointment in his office. Dr. Jones had not reviewed any of Petitioner's chiropractic or medical records prior to his initial evaluation. Dr. Jones never

reviewed any records of Petitioner's other spine surgeon, Dr. Kube. Dr. Jones testified he was not aware of any automobile accidents Petitioner had been involved in. Dr. Jones testified he was not aware of what type of chiropractic adjustments Petitioner was having in 2016 before her work accident. Dr. Jones denied having any knowledge of Petitioner having radiating leg pain prior to September 7, 2016. Dr. Jones testified if Petitioner had such radiating pain before her work accident she may have needed surgery then too. Dr. Jones testified that Petitioner's Oswestry Disability Index scores could support Petitioner having only sustained a temporary exacerbation of a pre-existing condition. Dr. Jones testified that Petitioner's spondylolisthesis could cause muscle spasms and hip pain, and Petitioner may have been experiencing symptoms of an undiagnosed condition prior to her work injury. (PX 6)

Dr. Paul Matz testified via evidence deposition on February 7, 2019. (RX 7) Dr. Matz testified he is a board-certified neurosurgeon concentrating on cranial, spinal and peripheral nerve surgery. Eighty percent of his practice is devoted to spine surgery and he performs a few hundred a year. Dr. Matz testified regarding his independent medical examination of Petitioner on June 15, 2017. Dr. Matz testified that Petitioner emphatically denied having any issues with her lower back prior to September 7, 2016. Dr. Matz testified the reviewed records from Whitehead Wellness Center from both before and after Petitioner's accident. Dr. Matz testified that by October 5, 2016, Petitioner's Oswestry Disability Index score improved from 48 percent to 18 percent. Dr. Matz testified Petitioner suffered a lumbar strain that improved as a result of her September 7, 2016, work accident. Dr. Matz testified he based his opinions on Petitioner's clinical history of low back pain and her Oswestry Disability Index score going from 48 percent after her work accident down to 18 percent by October 5, 2016. Dr. Matz testified anything under 20 percent is considered a good outcome. Dr. Matz opined Petitioner's work accident was not severe enough to permanently aggravate Petitioner's preexisting lumbar spondylolisthesis. Dr. Matz reiterated that his opinions were based on Petitioner's clinical history of low back pain and the force of the impact from the accident. On cross-examination, the only question asked was whether Dr. Matz agreed that Petitioner was a surgical candidate which he responded in the affirmative. (RX 7)

CONCLUSIONS OF LAW:

(F) IS PETITIONER'S CONDITION OF ILL-BEING CAUSALLY RELATED TO HER WORK INJURY?

The Arbitrator incorporates and adopts the facts contained in the Statement of Facts, above, into this and all following Sections.

Based on a thorough review of the entire record, the Arbitrator finds and concludes Petitioner failed to prove her current condition of ill-being related to her lumbar spine after October 5, 2016 is causally connected to the stipulated work accident.

In summary, this conclusion is based in part, as follows:

(1) the Arbitrator's finding that Petitioner is not credible - her trial testimony overall (see facts above) her adamant denial to Dr. Matz that she ever had any prior back problems is both problematic and erroneous;

(2) Dr. Jones' causation opinion has a wobbly foundation, as he was unaware of many significant and relevant medical facts and history (such as his admission he had not reviewed any of Petitioner's chiropractic or medical records prior to his initial evaluation) rendering his ultimate opinions very weak;

(3) Dr. Matz reviewed and considered the most relevant, complete and accurate history and medical facts (Dr. Jones did not) and therefore his opinions against causation were solid, well-reasoned and most informed and accordingly the Arbitrator adopts his opinions and affords them to the most credibility, reliance and weight;

(4) Dr. Kube did not review relevant and important medical records, was unaware of Petitioner's complete medical history and agreed that if Petitioner had ongoing low back treatment with a chiropractor prior to her accident then it would be "a challenge" to tie her condition to any kind of work-related accident.

In Illinois, the Petitioner bears the burden of proof in establishing that the medical treatment is causally related to the accident. *See: City of Chicago v.. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 258 (1st Dist. 2011). In this case, Petitioner failed to meet her burden of proof that her condition of ill-being in her back after October 5, 2016, is causally related to her work injury. The Arbitrator bases his finding, in part, on the more credible, reliable and persuasive testimony of Dr. Matz.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the

character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). **The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion**. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. **Expert opinions must be supported by facts and are only as valid as the facts underlying them.** *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts. Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion." Gross v. Illinois Workers' Compensation Comm'n, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. "If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative [**18] to be reliable." Id. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." In re Joseph S., 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003).

Based on an application of the above case law, the Arbitrator finds and concludes Dr. Matz clearly had a much better and complete understanding of Petitioner's condition prior to her work accident and thereafter than both Dr. Jones (and Dr. Kube). Dr. Matz reviewed Petitioner's chiropractic records from both prior to and after her work accident. **Significantly, Dr. Jones did not.** Dr. Matz also reviewed all of Petitioner's medical records after her work accident. **Significantly, Dr. Jones did not**. Dr. Matz was aware of Petitioner being involved in prior motor vehicle accidents. **Significantly, Dr. Jones was not.**

Dr. Matz's causation opinions are also more well-reasoned than those offered by Dr. Jones. **Dr. Matz relied on Petitioner's own subjective complaints immediately prior to and after her work accident to form his opinions. Dr. Jones relied solely on Petitioner's reported history at the time of his initial evaluation several months later.** Dr. Matz testified that by October 5, 2016, Petitioner's Oswestry Disability Index score improved from 48 percent to 18 percent and that anything under 20 percent is considered a good outcome. **Petitioner's complaints to her chiropractor around the time of her accident are inherently more**

reliable than her later testimony at trial that her condition remained significantly worse after her work accident.

Dr. Matz's opinions are also supported by Dr. Kube's opinions in his medical records. Dr. Kube noted in his August 9, 2017, office note that if Petitioner's history is accurate her work accident is causally related to her current condition, but if she had ongoing low back treatment with a chiropractor prior to her accident that it would be a challenge to tie her condition to any kind of work-related accident. Dr. Kube agreed with Dr. Matz's opinions regarding the importance of Petitioner's clinical history of low back treatment in determining whether her work accident is causally related to her condition of ill-being and need for low back surgery.

Dr. Jones also acknowledged that Petitioner having leg pain, in addition to her low back pain, prior to September 6, 2016, would lead him to believe she may have required low back surgery before her work accident. (PX 6 at 27-28) **Dr. Jones was not aware** of Petitioner having leg pain in addition to her back pain before her work accident because he had not reviewed any records of her treatment prior to his initial evaluation in March 2017 and Petitioner did not report such to him.

Petitioner testified that her back complaints before her work accident were a moderate inconvenience and rated her pain as a 2 out of 10, but that after her work accident her pain was a 10 out of 10 or higher. (TR-21) However, Petitioner's testimony is contradicted by her own chiropractic records. **Petitioner was reporting back pain with some sciatic pain into her leg of an average of 8.5 out of 10 all the way back in August 2010. Petitioner's chiropractic records indicate she was complaining of back pain between 2 and 7 out of 10 in February 2016, and her back pain continued throughout 2016, and as recently as two weeks before her work accident.**

Based on the above, and having considered the entire record, the Arbitrator finds and concludes based on the preponderance of the **credible evidence** Petitioner sustained a lumbar strain only as a result of her stipulated accident of September 7, 2016, and that condition more likely than not resolved by October 5, 2016.

(J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Based on the Arbitrator's findings regarding disputed issue (F), causation, the Arbitrator finds and concludes Petitioner failed to prove by a preponderance of the credible evidence entitlement to payment by Respondent of any medical treatment incurred after October 5, 2016.

The Arbitrator awards only those medical expenses identified in Petitioner's Exhibit 7 incurred prior to October 5, 2016, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for medical bills 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 TOTAL DISABILITY BENEFITS IN DISPUTE?

Based on the Arbitrator's findings regarding disputed issue (F), causation, the Arbitrator finds and concludes Petitioner is entitled to temporary total disability only for the period of September 10, 2016, through September 16, 2016, for which period Respondent has already issued payment. Therefore, no additional TTD is awarded.

(L) WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. Applying this standard to this claim, the Arbitrator notes as follows:

1. The reported level of impairment:

There was no impairment rating introduced into evidence. Therefore, the Arbitrator gives no weight to this factor.

2. The occupation of the injured employee:

Petitioner testified she was a physical education teacher. The Arbitrator gives some weight to Petitioner's job duties requiring her to walk and stand while supervising students.

3. The age of the employee at the time of the injury:

Petitioner was 49 years old at the time of his accident. The Arbitrator finds Petitioner will not have to work as long with her back condition than a younger individual would. The Arbitrator gives some weight to this factor.

4. The Petitioner's future earning capacity:

There was no evidence introduced at trial regarding whether Petitioner's future earning capacity has been impacted in any way due to her work accident. The Arbitrator gives some weight to this factor.

5. The evidence of disability corroborated by the treating physicians' medical records:

The medical evidence indicates Petitioner was released to work without restrictions by her own treating chiropractor less than one week after her work accident and she was back to her baseline condition by October 5, 2016, or approximately one month after her accident. The Arbitrator finds and concludes Petitioner underwent a minimal amount of conservative care consisting of chiropractic treatments for one month. Petitioner had a total of 13 chiropractic adjustments before October 5, 2016.

Based on the above and the totality of evidence admitted at trial, the Arbitrator finds Petitioner sustained a minor strain injury to her low back resulting in permanent partial disability to the person as a whole pursuant to Section 8(d)2 of the Act to the extent of 3% thereof, or 15 weeks of compensation at Petitioner's PPD rate of $528.52 per week.

Robert M. Harris

Robert M. Harris, Arbitrator

July 18, 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

THOMAS POZZIE,

Petitioner,

20IWCC0739

vs.

NO: 15 WC 27146

EXTERIOR CLEANING SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability, "Intoxication defense; Evidentiary ruling with improper exclusion of evidence," wage calculations and nature and extent, and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes the following clarifications and modifications to the analysis.

Initially, although Petitioner filed a Petition for Review on the issues of wage calculations and nature and extent, his brief did not make any arguments about these issues and explicitly requested that the Arbitrator's decision be affirmed.

Second, we reverse the Arbitrator's exclusion of the Facebook post. Petitioner's attorney objected to Rx5 based on relevance, which the Arbitrator sustained and stated:

> I think it's too remote in time and place. Now, that being said, the document is not excluded from the record. It's just that I'm not going to consider it. If in the future on review it turns out that my ruling on this piece of evidence was incorrect, they should have that document to review. But I will not review it, and I will not consider it as part of the record. *T.130-31.*

However, in his decision, the Arbitrator wrote:

> Respondent presented evidence of Facebook postings in or about 2012, three years prior

20IWCC0739

> to the accident in his case, in which Petitioner referenced sticking to the whacky, which Petitioner denied was a reference to marijuana. This arbitrator finds the reference to whacky is more likely than not a reference to marijuana, but only supports Petitioner's testimony he was a recreational user. It fails to address whether Petitioner was intoxicated at the time of his accident. *Dec. 6.*

Therefore, it appears that the Arbitrator actually did consider the postings in Rx5 but found them unpersuasive. To rectify this inconsistency, we find that this exhibit is relevant and should have been admitted, although we also give it little weight.

Third, we modify the Arbitrator's analysis regarding the presumption of intoxication. The Arbitrator wrote, "Respondent has not met the threshold standard under Section 11 to create a rebuttable presumption of intoxication." We disagree. Section 11(ii) of the Act, in relevant part, states, "if there is **any** evidence of impairment due to the unlawful or unauthorized use of...cannabis...then there shall be a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury." (*Emphasis added*). Therefore, Dr. Conibear's testimony qualifies as evidence of impairment such that the rebuttable presumption applies. Accordingly, it was no longer Respondent's burden to demonstrate that Petitioner's intoxication was the proximate cause of his accidental injury.

The Act is very clear that 1) "any" evidence of impairment due to the unlawful or unauthorized use of cannabis triggers the rebuttable presumption that "the intoxication was the proximate cause of the employee's injury; and 2) that this presumption may be rebutted "by the preponderance of the admissible evidence that the intoxication was not the sole proximate cause or proximate cause of the accidental injuries."

We point out that the rebuttable presumption in Section 11 of the Act is different than the one that exists in Section 6(f). Section 6(f) provides that certain impairments or conditions suffered by firefighters, emergency medical technicians and paramedics are "rebuttably presumed" to arise out of and in the course of employment. The appellate court in *Johnston v. IWCC* noted, unlike other statutes, "Section 6(f) is silent as to the amount of evidence required to rebut the presumption therein" and concluded that "the legislature intended an ordinary rebuttable presumption to apply, simply requiring the employer to offer *some* evidence sufficient to support a finding that something other than claimant's occupation as a firefighter caused his condition." 2017 IL App (2d) 160010WC, ¶ 41,44, 80 N.E.3d 573, 583-84. *See also, Simpson v. IWCC*, 2017 IL App (3d) 160024WC, 79 N.E.3d 643.

However, Section 11 relating to intoxication is not silent about "the amount of evidence required to rebut the presumption." It specifically states, "The employee may overcome the rebuttable presumption by the preponderance of the admissible evidence that the intoxication was not the sole proximate cause or proximate cause of the accidental injuries." The question, in the case at bar, is whether Petitioner has overcome that presumption. We find that he did.

Failure of Respondent's Senior Worker, Nicholas Ellwanger, to Follow the Safety Procedures

Dr. Conibear did not testify that Petitioner's marijuana use (and impairment therefrom) was the "sole" cause of his accident. Rather, she answered in the affirmative when asked whether Petitioner's daily marijuana use *contributed* to the incident. *Rx3 at 14*, 15. Dr. Conibear based her opinion that Petitioner was impaired on three factors: 1) the positive finding of cannabis; 2) his admission of daily marijuana use; and 3) the fact that he was putting gas in

something that he knew or should have known was injurious. *Rx3 at 37.*

Dr. Conibear's belief that Petitioner was warned against filling up the gas tank when the engine was on and that ignoring this warning is what led to his accident *(Rx3 at 17. 41)* is not consistent with the facts in this case. The evidence does not show that Petitioner was filling the motor while it was still running. Rather, it was off but still hot. Therefore, this basis of Dr. Conibear's opinion is not factual.

More importantly, Dr. Conibear admitted that her opinions regarding impulsivity "might" be different if Petitioner's supervisor told him to fill the machine while it was still running or if it was routine behavior that Petitioner and all the other employees did. *Rx3 at 42.*

In this case, Petitioner testified that Todd Bedgood was the first one who taught him how to perform his job and the "second guy" was "Nick" but Petitioner was unsure of his last name. *T.10.* The police and fire reports indicate that "Nick's" last name is Ellwanger. *Px2, Px3.* Petitioner testified that the extent of the training he received by Mr. Bedgood was he "[j]ust walked me around the truck, showed me the equipment we were going to be using and how to generally just turn it on and start up, the right amount of soap we need to use." *T.11.* In terms of specifically filling the gas tank, the only training he received from Mr. Bedgood or Mr. Ellwanger was "[j]ust the average, the gas tank, you know, showed me the gas tank and where you fill it up at, but that's common sense." Petitioner received no other training on how to refuel that pump. *T.14.*

Petitioner testified that when the pump ran out of gasoline on August 5, 2015, Mr. Ellwanger asked Petitioner to fill it up. *T.15.* Petitioner testified, "I walked up into the trailer. I opened the door to have full air flow in it. I picked up the gas tank, and I proceeded to fill it up as usual with it off." *T.16.* Petitioner testified that he switched the pump off before he filled it. *T.17.* He testified that nobody taught him to turn the switch off before filling the gas tank but he did it because "it was just common, you always turn something off before you fill it." *Id.* Petitioner testified that after the pump burst into flames, "I ran out of the trailer and put myself out and then ran up to Nick, and I called 9-1-1 and he called 9-1-1, too." *Id.*

Petitioner testified that "not long" had passed between the time that the generator had been off and when he filled it with gas. He testified, "It had just ran out, and protocol is, you know, time is money, so I went over and I filled it up." *Id.* Petitioner testified that at the time the flame engulfed him, "I think Nick was in the truck because when we wash the trucks, we would have to get the numbers off the side to show that we washed that truck, and I think he was getting the numbers, grabbing the clipboard to go do the numbers." *T.22.*

Petitioner testified that he filled the tank that day the same as he did any other day. *T.22.* He testified that the generator running out of gas was a common occurrence and he had observed Todd and Nick do it the same way he did. *Id.* Petitioner testified that almost every day either he or his co-worker would fill the gas tank "whoever was closest to it." *T.24.* Petitioner testified that he was never warned by a co-worker or supervisor or written up about the manner in which he filled the tanks. *Id.*

On cross-examination, Petitioner testified that Respondent's owner, Ronald Goode, did not provide him with the "Fueling/Refueling Procedure" (Rx10) and that Petitioner did not remember ever seeing that document before. *T.45.* Petitioner testified that the only paperwork that he received was a W-2 tax form, which he filled out and returned at the shop, but he was

given nothing "about the job." *T.45-46.* Petitioner reiterated that he never received instruction from Mr. Goode that he should ask for assistance before refueling and never received "this piece of paper or any other piece of paper." *T.47.* Petitioner testified that if Mr. Goode recalls personally explaining this procedure to him, "I would say that's inaccurate, and I don't see a date or my signature on that." Petitioner testified that he did not recall Mr. Goode correcting him for not letting an engine cool down. *T.62.*

On redirect, Petitioner was asked about the fueling procedure contained in Rx10 that states the pump unit is supposed to be removed from the trailer with the assistance of another employee before filling. Petitioner testified that during the four to five months he worked for Respondent, he never assisted another employee and no other employee ever assisted him in removing a unit from the trailer in order to refuel it. *T.64.* Petitioner testified that Rx10 refers to removing the pump on a cart but "we did not have a cart" and that the pump was bolted to the ground of the trailer. *T64-65.* Petitioner testified that he never saw Todd or Nick ever follow the protocol in Rx10 of touching the unit to make sure it was cool before adding gas. *Id.* He testified that Todd and Nick were "more senior than me" since they had worked at Respondent longer and it was his understanding that he was to follow their direction on the job. *T.69.*

Mr. Goode, Respondent's owner, testified that he personally trains the new employees "exactly how to start the units, how to refuel the units, and I have a very strict refueling procedure and a certain procedure that I follow in order to operate any of the equipment in the trailer" and that it is not accurate that other co-workers may have performed the training. *T.81.* Mr. Goode testified that he personally trained Petitioner and provided him with the safety procedures (Rx10). *T.82.* He testified that Respondent has had that document for 30 years, but it is undated. *T.83.* He testified that, in some of the trailers, the power-washing motor sits on a cart and others have pins with quick-release bolts in order to move the unit outside to refuel it. *T.83.* Mr. Goode testified that all of the power-washing motors have to go outside the trailer to be refueled and "also have to be cooled down, not by touch." *T.84.* Mr. Goode testified that he verbally reprimanded Petitioner in July 2015 for refueling the machine while it was still running, and he told Petitioner to never do that again. *T.88-89.*

On cross-examination, Mr. Goode testified that he was not present with Petitioner's crew on a daily basis and he did not know what instructions the senior person on that crew would have given Petitioner. *T.94-95.* Mr. Goode had previously only warned Petitioner about refueling the motor while it was still running but he assumed that, at the time of the accident, the motor had run out of gas and was no longer running. *T.96.* He did not have any personal knowledge of having warned Petitioner about filling the tank when it was not running. *T.98.*

Mr. Goode clarified that all of the motors are on carts, but some have wheels and others, like the unit Petitioner was assigned to, have quick-release pins and 2 people are required to lift it out of the trailer. *T.99.* Mr. Goode testified that the training he provided for Petitioner was "a couple hours" when Petitioner started working for Respondent and he did not work with Petitioner on a daily basis after that. *T.101-102.* The parties agreed that a surveillance video, which was not entered into evidence, did not indicate whether the motor in question here was running or not at the time of the accident. *T.107-108.*

Based on the above and the evidence in the record, we find Petitioner's testimony persuasive. He credibly testified that he never received Rx10 and had never previously received assistance from his co-worker to remove the motor from the trailer before refueling it. He was asked by Mr. Ellwanger to refuel the motor on the date of accident. Even if Respondent did have

the Rx10 procedures in existence for 30 years, it seems clear that Respondent's employees were not following those procedures.

We believe Petitioner's testimony is also supported by the Elk Grove Village Police report (Px2) that states **"Ellwanger" (Nick) was working on the north side of a trailer** "while their truck and attached trailer...was parked partially in front of the semi trailer while they were power washing the units. **The unit ran out of gas, and the victim went to refill the tank in the trailer. The witness advised me that suddenly he heard a lot of screaming and when he came around the front of the trailer, he observed that the victim** was yelling and he saw a nearby five gallon gas can on fire in the middle of the parking lot. The witness said he immediately jumped inside the truck to move the truck and trailer away from the flames and called 911 for assistance." (*Emphases added.*)

If Nick Ellwanger, Petitioner's co-worker and the more senior employee on the crew, knew that Petitioner "went to refill the tank in the trailer," why didn't he stop Petitioner and remind him of the alleged "safety procedure" that *both of them* were supposed to remove the power washer from the trailer before refilling it? Why was Mr. Ellwanger in a different location "on the north side of the trailer" that was being washed instead of with Petitioner while the refilling was taking place? The reasonable inference from this behavior is that the safety procedures in Rx10 were not typically followed.

In addition, the Elk Grove Fire Dept. incident report states that "the gasoline powered motor unit was mounted on the floor at the passenger side of the trailer." Page 2 of this report has a section for "Human Factors Contributing to Ignition." "None" is checked. There is also an option for "Possibly impaired by alcohol or drugs" and that is also not checked. There is a similar section on Page 3 relating to Injury.

To the question at hand, we find that a "proximate cause" of Petitioner's accident (other than "the intoxication") was the failure of both Petitioner and his senior co-worker, Mr. Ellwanger, to remove the motor together from the trailer and letting it cool off before refueling. Even if the Rx10 safety procedures did exist and all of his employees were aware of it, we do not believe that Mr. Goode enforced these procedures. Petitioner credibly testified that he did it the same way his co-workers did it and they never performed that task together. This undermines the opinion of Dr. Conibear who blamed Petitioner's impulsivity due to daily marijuana use for the accident. If Petitioner and his co-workers always did it the same way, then there was nothing impulsive about Petitioner's actions. Furthermore, Dr. Conibear based her opinion on her belief that Petitioner was refilling a running motor. In contrast, the evidence indicates that the motor was not running at the time Petitioner refilled it.

Pay Structure that Encouraged Speed and Shortcuts

We believe another "proximate cause" of Petitioner's accident was Respondent's pay structure and the incentive its employees have to work quickly. Petitioner testified that he was paid daily (not hourly) and was paid the same amount per day to perform the jobs that were assigned to his crew whether he worked 8 hours or 12 hours. *T.68.* We find this to be a highly significant incentive to work as fast as possible, which undermines Respondent's alleged safety rules.

Petitioner testified that Mr. Goode "would call Nick or Todd...to see how far we are and to tell us we need to make sure we get all the accounts done before the day is over" and that both

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Nick and Todd pushed Petitioner to get things moving faster. *T.68-69.* Petitioner testified that Mr. Goode "told us to get them all done before we return the trucks back to the shop." *T. 69.*

Mr. Goode testified that it is not true that his employees are compelled to complete the tasks as quickly as possible, that he never compelled them to complete a certain number of jobs in a shorter period of time, and never asked them to cut corners with his safety procedures. *T.90.* However, he never contradicted Petitioner's testimony that his employees were paid by the day (not hourly) and that they had to continue working after 5 p.m. (until 9 p.m. if necessary) to complete their assigned tasks.

This pay structure seems to be a recipe for disaster. Respondent argues that Petitioner's claim that he had to rush through his jobs is not "plausible" because, "While he claimed a need to hurry through jobs, he also admitted that he would have to work late on certain days to get all of the jobs done. If work could be completed beyond the typical 8 hour day, and there was no hard deadline each day to complete all assignments, the assertion that they must rush through jobs and forego safety protocol doesn't make sense." *R-brief at 9.* We find Respondent's argument to be completely without merit. If Petitioner had been paid hourly (and at an overtime rate) for working late, then Respondent might have a point. But, since Petitioner was paid daily, there is a built-in incentive to work faster and finish his workday earlier. Every hour Petitioner worked beyond the "normal" workday was, essentially, reducing his hourly wage because he was not being paid for this additional work time. It is common sense and human nature that if people are not going to be paid any additional money but are still required to get a certain number of jobs done per day, they are going to be highly motivated to complete those jobs as quickly as possible. No reasonable person would voluntarily work 12 hours a day without additional pay if they could get the job done in 8 hours. It appears that Petitioner and all of his co-workers had every motivation to perform their jobs quickly and find ways to reduce the time on each job. Unfortunately, that resulted in Petitioner and his co-worker not following the purported safety procedures.

We believe Respondent's pay structure that encouraged doing the jobs as fast as possible led to shortcuts being taken on a regular basis by its employees and is another "proximate cause" of Petitioner's accident. Therefore, his presumed intoxication was not the "sole" proximate cause.

Szarek v. IWCC

Although *Szarek v. IWCC* was decided prior to the changes to Section 11 of the Act, it is still helpful in evaluating whether a claimant's intoxication is the sole proximate cause of an accident. The claimant, Mr. Szarek, had fallen through a hole in a second-floor home where he was working and tested positive for marijuana and opiates. *Szarek v. IWCC,* 396 Ill. App. 3d 597 (3rd Dist., 2009). The court noted that respondent's expert testified:

> the reason claimant '*might or could* have mistakenly stepped into the stairway opening and fell two stories through it was from an impaired visual response caused by marijuana intoxication." He also opined that the reason claimant "*might or could* have mistakenly stepped into the stairway opening and fell two stories through it was from an impaired cognitive response caused by marijuana intoxication." *Id. at 601 (Emphases in original).*

The court wrote:

In *Paganelis v. Industrial Comm'n, 132 Ill. 2d 468, 481, 548 N.E.2d 1033, 139 Ill. Dec. 477 (1989)*, our supreme court articulated two ways in which an employer could successfully make out an intoxication defense:

> "First, an employee, though in the course of his employment, will be denied recovery if his intoxication is the cause of the injury--that is, if the injury arose out of the intoxication rather than out of the employment. Second, excessive intoxication may constitute a departure from the course of employment, and an employee who is injured in that condition does not sustain an injury in the course of his employment. Under the latter rationale, intoxication of a sufficient degree is viewed as an abandonment of employment, or a departure from employment."
> ...
> Respondent first contends that claimant's injuries did not occur in the course of employment. Respondent cites *Paganelis, 132 Ill. 2d 468, 548 N.E.2d 1033, 139 Ill. Dec. 477*, and *Parro v. Industrial Comm'n, 167 Ill. 2d 385, 657 N.E.2d 882, 212 Ill. Dec. 537 (1995)*, two cases where the claimants' high blood-alcohol contents were given great weight in denying compensation under the Act. We find these cases distinguishable in that they involve alcohol rather than marijuana. The testing for these two substances is simply different. Respondent points to nothing to suggest that the same inferences should flow form the presence of alcohol in the blood and the presence of marijuana metabolites in the urine. The statements of two of respondent's employees regarding claimant's condition prior to the accident--which the Commission expressly relied upon--clearly establishes that claimant was performing his job prior to and at the time of his injuries.

Id. at 609-10 (Emphases added). The Court ultimately found:

> Notably, but-for the existence of the hole, claimant could not have fallen through it. *Cf. O'Fallon School District No. 90 v. Industrial Comm'n, 313 Ill. App. 3d 413, 416-17, 729 N.E.2d 523, 246 Ill. Dec. 150 (2000)* (holding a but-for relationship to a condition of employment was sufficient to find an injury arose out of employment). As such, even if marijuana impairment was a contributing cause of claimant's injury, it was not the sole cause. Under *Paganelis*, it would have to be the sole cause to prevent claimant from recovering under the Act. *Paganelis, 132 Ill. 2d at 481*. As it is often stated, "A claimant is not required to prove that employment was the sole or principle cause, but only that the employment was a causative factor." *Palos Electric Co. v. Industrial Comm'n, 314 Ill. App. 3d 920, 926, 732 N.E.2d 603, 247 Ill. Dec. 548 (2000)*.

Id. at 611.

Applying *Szarek* to the case at bar, Dr. Conibear's opinion that Petitioner's daily marijuana use was *a* contributing factor to his accident is similar to the "might or could have" opinion of respondent's expert in *Szarek*. It does not preclude other causes. Similar to Mr. Szarek, who the evidence showed was able to perform his job duties prior to his accident, Petitioner was injured while performing his duties at the second "account" that day. There is no evidence that Petitioner was unable to perform his duties prior to the accident.

In summary, there are at least three other proximate causes of Petitioner's accident including:

1) The failure of Respondent's senior worker, Nick Ellwanger, to also follow the alleged

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safety procedures.

2) The pay structure that encourages speed at the expense of safety.

3) The inherent danger associated with gasoline and gasoline powered engines. This is similar to the hole in the second story floor in the *Szarek* case. "But for" this inherently dangerous job task, Petitioner's accident would not have occurred.

Based on all of the evidence and the analysis above, we modify the Arbitrator's decision to find that the rebuttable presumption of intoxication in Section 11 does apply but that Petitioner overcame that presumption by showing that his intoxication was not the sole proximate cause of his accidental injuries.

Finally, in the Order section, under factor (v) of the §8.1b(b) permanency analysis, we replace the word "restrictions" with "precautions" in the last sentence.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 29, 2018, is hereby affirmed and adopted with the modifications outlined above.

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 $36,300.00. 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: DEC 16 2020

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

SE/
O: 10/20/20
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

POZZIE, THOMAS
Employee/Petitioner

Case# **15WC027146**

EXTERIOR CLEANING SERVICES
Employer/Respondent

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On 5/29/2018, 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 2.08% 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:

1218 LAW OFFICES OF MARK SCHAFFNER
205 N MICHIGAN AVE
SUITE 2560
CHICAGO, IL 60601

2965 KEEFE CAMPBELL BIERY & ASSOC
JOHN P CAMPBELL
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

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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

THOMAS POZZIE,
Employee/Petitioner

v.

EXTERIOR CLEANING SERVICES,
Employer/Respondent

Case # **15** WC **27146**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **April 10, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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FINDINGS

On **August 5, 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 $**18,687.76**; the average weekly wage was $**359.38**.

On the date of accident, Petitioner was **22** 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 $**1,058.32** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**1,058.32**.

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 $239.59/week for 4-5/7 weeks, commencing August 6, 2015 through September 8, 2015, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $32,417.70, as provided in Sections 8(a) and 8.2 of the Act. Additionally, Respondent shall pay the bill of MEA-Elk Grove, LLC for medical services rendered on August 5, 2015 upon said provider producing bills that contain all information required for application of the medical fee schedule.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a washer/brusher at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury. The Arbitrator notes Petitioner has no lifting restrictions and has returned to employment working in a garden center. Because of Petitioner's ability to return to regular employment, albeit with precautions for sun exposure, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 22 years old at the time of the accident. Because of Petitioner's young age and period of time he will have to work with skin protections, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes no evidence was presented that Petitioner's earnings will be impacted in the future as a result of his burns nor is there any reason to believe the future earnings will be impacted. Because of the lack of evidence that future earnings will be affected, 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 Petitioner's skin where he sustained the burns is subject to irritation and faster burns when exposed to the light. Petitioner is therefore required to permanently protect himself from sun exposure. Petitioner further noted dryness on his burned skin, particularly on the arms. While Petitioner did not receive treatment for anxiety that he related to the accident, he does note anxiety around fire. Because of the permanent impairment and restrictions around sun exposure, 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 3.5% loss of use of person pursuant to §8(d)2 of the Act.

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

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

Signature of Arbitrator

05-25-18
Date

MAY 29 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

THOMAS POZZIE,	)	
	)	
Petitioner,	)	
	)	No. 15 WC 27146
v.	)	
	)	
EXTERIOR CLEANING SERVICES, INC,	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER, having come before this arbitrator for hearing on April 10, 2018, this arbitrator having heard the testimony of the parties and considered the evidence submitted into the record, makes the following findings in support of his award pursuant to the Illinois Workers' Compensation Act:

I. Findings of Fact

The Petitioner was employed by Respondent as a washer and brusher. At the time of the accident alleged in this matter, Petitioner had been employed by Respondent for approximately four months.

Petitioner testified that initially he would drive to Respondent's shop where he would meet the crew at the start of the workday. Later, his co-employee, Nick, would pick up Petitioner for work. During a time, Petitioner was staying at a hotel. The owner of Respondent Company, Ron Goode, would occasionally drop Petitioner off after work.

Petitioner denied he was ever given paperwork for his employment, except a W-2, and denied he was asked on multiple occasions to complete the paperwork. He

was never disciplined for failure to return such paperwork. Petitioner testified he completed the W-2 at the time it was provided to him. Petitioner also denied he was given an employee handbook or a document entitled Fueling/Refueling Procedure.

The owner of the company, Ron Goode, disputed Petitioner's testimony, claiming he provided an employee handbook and other employment documents to Petitioner, including a written Fueling/Refueling Procedure. He testified Petitioner repeatedly failed to return the documents to him, despite numerous requests. This arbitrator finds Petitioner more credible than Respondent on this issue, as Respondent could not have issued paychecks to Petitioner unless he provided a signed W-2. Respondent failed to identify what other documents were required to be returned, as the employee manual and Fueling/Refueling Procedures were informational. At no time did Respondent testify a signature was required on these documents.

The Respondent, Exterior Cleaning Services, Inc., is in the business of power washing trucks and houses, although Petitioner strictly worked power washing trucks. The job required Petitioner to operate a pump and a heater. Since Petitioner started his employment in the spring, he did not have much opportunity to operate the heater. He primarily operated the pump, which is run on gasoline. Petitioner learned how to operate the equipment on the job through Todd Bedgood, another washer. Respondent disputed this testimony, claiming the owner, Ron Goode, provided training to Petitioner. However, since this was just a couple hours initially spent by Mr. Goode showing Petitioner the various elements of the job, this

arbitrator gives credit to both Petitioner's and Respondent's testimony. While Petitioner may not have seen a short two-hour session as training, it certainly would constitute training within the normally accepted understanding of the term. However, since Petitioner then worked primarily with a more senior co-worker through the remainder of his employment, it is understandable he would see this as training. This arbitrator finds Petitioner received training from the owner and also from his senior co-employee.

Respondent testified that the written Fueling/Refueling Procedure required, among other things, for the pump to fully cool and for the pump to be removed from the trailer before refueling. Notwithstanding Respondent's written Fueling/Refueling Procedure, at no time did Petitioner ever see the pump removed from the trailer for refueling. This arbitrator concludes that while a written policy for refueling was in place, there is no evidence it was fully enforced or even abided by any of the brushers or washers.

Petitioner was trained by his co-workers on how to fuel the pump, but Petitioner denied further training on the operation of the pump. He had observed his co-workers, Todd and Nick, filling the gas tanks on occasions and Petitioner filled the gas tanks in the same manner. Mr. Goode testified that in or about July 2015 he verbally warned Petitioner on his refueling procedure while fueling a running motor. This arbitrator is unable to draw conclusions regarding the extent of the warning in July since it was not similar to the present claim, where the motor

was not running. In fact, Mr. Goode acknowledged no knowledge of ever warning Petitioner about filling a tank when the motor is not running.

Mr. Goode ran an operation with three trucks, with two employees assigned to each truck. Generally Mr. Goode was not present while each crew worked and Mr. Goode acknowledged he has no knowledge of what instructions the senior employees on a crew gave.

On August 5, 2015 Petitioner was working with a co-employee, Nick. They had completed one job and had been working approximately 15 to 20 minutes on the second account when the pump ran out of gasoline. The co-employee, who was working as a brusher on this day, asked Petitioner to fill the gas tank. At this time, the pump had stopped operating since it was out of fuel. Petitioner testified he followed protocol of turning the switch to the pump off and then proceeded to fill the gas tank. Filling the gas tanks was a daily routine and he completed the task the same way each time. It was not uncommon for the pump to run out of gas. At the time of filling the gas tank, the pump had not been off for long. Petitioner believed time was money, but clarified that Respondent only required them to complete all accounts assigned on a particular day, allowing them to work longer hours if needed to complete. However, the employees were paid by the day and not the hour, so they would not receive any additional compensation for working the longer hours. Respondent's owner did instruct the employees they had to complete all accounts assigned.

When the gas tank was filled to over half way, Petitioner experienced a big burst of flames into his face, and he noticed he was covered in flames. The flames engulfed the trailer in which the pump was located. Petitioner testified he was burned on his face and eyes, left arm, some burns on his right arm, back of his legs, and his hands. Petitioner ran out of the trailer and rolled on the ground to put out the flames.

At the scene of the accident, Petitioner noted the burned skin seemed to just melt off him. Petitioner testified to nearly blacking out. When the ambulance arrived at the scene, the paramedics dumped ice water on Petitioner, at which point he felt he went into shock. Petitioner testified to feeling severe pain in his face, left arm, neck and upper chest. The pain was described as similar to grabbing a hot rod and just being on him nonstop for 10 days.

Petitioner was transported from the scene of the accident by the Elk Grove Village Fire Department to Alexian Brothers Medical Center. During the transport, the paramedics administered morphine and noted in their record that there was no apparent alcohol or drug use observable. On arrival at Alexian Brothers Medical Center, Petitioner was administered more pain medications and fluids. Once stabilized, he was transported by Superior Ambulance to the Loyola University Medical Center, where he was admitted as an inpatient from August 5 to August 14, 2015.

On admission to Loyola University Medical Center (LUMC), a drug screen was performed that reported a positive result for marijuana. This test is sufficient to

demonstrate some marijuana use, but fails to demonstrate how recently the use was. The test did not measure or report the level of marijuana in Petitioner's system. The records of LUMC reflect a history from Petitioner of daily marijuana use. Petitioner, while admitting use of marijuana on a recreational basis, denied at trial he gave that history and denied he used it daily. Given the strong narcotic pain medications administered to Petitioner prior to his arrival at and during his admission to LUMC and Petitioner's inability to remember much of the first inpatient days, this arbitrator gives little credibility to the history of daily marijuana use. At no time during his LUMC hospitalization was Petitioner ever told of the drug screen results or counseled on marijuana use.

Respondent presented evidence of Facebook postings in or about 2012, three years prior to the accident in his case, in which Petitioner referenced sticking to the whacky, which Petitioner denied was a reference to marijuana. This arbitrator finds the reference to whacky is more likely than not a reference to marijuana, but only supports Petitioner's testimony he was a recreational user. It fails to address whether Petitioner was intoxicated at the time of his accident.

Petitioner denied use of marijuana on the date of the accident and, at no time on that date did Petitioner's co-worker suggest to him he was impaired or not acting like himself.

Initially following his hospital admission, Petitioner could not walk because the skin would stretch. During the hospital stay the burns were treated, Petitioner received physical therapy and he was counseled on coping strategies for anxiety.

Petitioner testified during the hospitalization he was so anxious when they came to clean his wounds, he would get sick and the anxiety would interfere with the wound cleaning.

On discharge from the hospital, Petitioner was prescribed Benadryl, Neurontin, Ativan, oxycodone, Liquifilm tears and Silvadene. Petitioner used the pain medications for approximately one month after his hospital discharge and used the medications for nerves three to four months after the discharge.

After his hospital discharge, Petitioner received physical therapy at Advocate Sherman Hospital between August 20 and September 3, 2015. He continued his medical follow up at LUMC as an outpatient, until his release on September 4, 2015.

After being discharged, Petitioner noted significantly reduced pain if he was not physically active, but reported a lot of pain if he went out in the sun. The pain he continued to experience was in his face, neck, left arm and left leg. When discharged from care, Petitioner was instructed to continue use of 600 mg Ibuprofen and 650 mg Tylenol for pain control, to continue his use of Benadryl, to continue to massage the scars and, on a permanent basis, to use sunscreen.

Petitioner was medically certified off work, and did not work, from the date of the accident until he was authorized to return to work on September 9, 2015. The Respondent paid temporary total disability benefits during this period of $1,058.32.

At the time of hearing, Petitioner testified he has to wear sunscreen and wear long-sleeved shirts and hats to avoid sunburns. If he does not take the protective actions, he will not just get a sunburn, but something he describes as a burn. His

injured skin will burn faster when exposed to sunlight. Petitioner also reports anxiety when around fire. However, he has seen no counselors for this anxiety since his release from LUMC. Petitioner did testify to taking anxiety medication prescribed by a doctor at Horizons Behavioral Health. However, there was no evidence presented that this was related to the accident alleged in this case and no records were presented from Horizons Behavioral Health. This arbitrator accordingly does not consider the anxiety medications in making his decision in this case.

A records only independent medical evaluation was performed by Dr. Shirley Conibear, limited to the issue of Respondent's marijuana intoxication defense. She testified the drug screen performed at LUMC was an immunoassay, which is a qualitative test to detect the presence of certain drugs. The doctor based her opinions on a history of Petitioner being a daily user of marijuana from the LUMC medical records. It was therefore her conclusion, based on daily marijuana use or use on the date of accident, that it affected Petitioner through increased impulsivity or impaired decision-making. She reached this decision based on her understanding a person would not pour gas into a running machine. However, this conclusion is flawed since Petitioner was not pouring gas into a running machine, but one that had stopped and was out of gas. The doctor acknowledged that the test does not measure the level of cannaboids, but she was able to reach her opinion based on the admission of daily use. The doctor notes that even after one stops smoking marijuana, there are measurable levels of THC in the body for weeks to months.

There was no evidence available to the doctor how much marijuana Petitioner smoked or the manner in which was consumed, if he did use it regularly. Based on the lack of a quantitative measure of THC in Petitioner's urine, based on Dr. Conibear having an incorrect history of accident and based on the many unknowns acknowledged by Dr. Conibear, this arbitrator does not find the testimony of Dr. Conibear helpful to the issue before this Commission and discounts her testimony accordingly.

Petitioner incurred various medical bills as a result of his treatments, all of which remain unpaid.

II. Conclusions of Law

On the issues presented, this arbitrator finds as follows:

A. Accident and Causal Connection

It is not disputed that Petitioner was injured while performing work duties for Respondent. Respondent alleges, however, that Petitioner's use of marijuana was a causative factor in the accident that bars a finding of accident under Section 11 of the Illinois Workers' Compensation Act. This arbitrator finds that Respondent has not met the threshold standard under Section 11 to create a rebuttable presumption of intoxication.

The Act provides two basis for the intoxication defense. The first is found in Section 11(i). This section requires Respondent to demonstrate that "the employee's intoxication is the proximate cause of the employee's accidental injury." In this respect, Respondent failed to demonstrate that any other employee

performed differently than Petitioner in filling empty fuel tanks on the pumps. At best, Respondent produced a written procedure for filling fuel tanks, but did not produce any other employee to confirm they followed the written procedure. Petitioner testified during the time he worked at Respondent, all other washers and brushers he worked with filled the tanks the same way as he did on the date of the accident. Left on their own to work in two person crews, without much direct supervision, and with instructions to complete all assigned clients before they returned to the shop, it is reasonable to believe Petitioner's testimony that none of his co-workers removed the pump from the trailer before filling and none waited to fill the tanks after the pump ceased working due to lack of fuel.

The record also fails on evidence of contemporary use of marijuana. While Petitioner acknowledged recreational use of marijuana, which he described as once or twice a month, he denied using it on the date of the accident. As Dr. Conibear noted, once in the system, THC may remain detectable for weeks or months. Based on this, there is nothing to confirm any contemporaneous or even recent use of marijuana by Petitioner.

It is not disputed that he tested positive for THC at LUMC. However, this test did not quantify the presence of THC. It is possible it was just that, a trace level. For Respondent to demonstrate impairment, it has a duty to show more. The trace reading could just as easily reflect use of marijuana weeks or months prior.

Further, there is no evidence of Petitioner acting abnormally on the date of his accident. As the paramedics noted in their records of transport, Petitioner

showed no signs of alcohol or drugs. His co-worker did not warn petitioner that he was acting abnormally and there is no evidence that Petitioner was ever suspended or disciplined for acting abnormally. The reasonable conclusion is that Petitioner did not demonstrate a level of impairment on the date of the accident or at any other time during his employment with Respondent that raised any flags about THC caused impairments of judgment. Respondent thus fails under Section 11(i) as it has failed to demonstrate intoxication and, more importantly, has failed to show a proximate cause between whatever level of THC Petitioner had in his system and the accident of August 5, 2015.

The second method, under Section 11(ii) is if Respondent can demonstrate that Petitioner was so intoxicated at the time of the accident to constitute a departure from employment. This requires "Admissible evidence of the **concentration** of cannabis . . . " *(Emphasis added.)* Here, Respondent has failed to produce evidence of the concentration of cannabis. As noted above, the LUMC testing did not test for the concentration of cannabis and, as Dr. Conibear testified, no other evidence of the THC concentration was available. Petitioner was engaged in an act in furtherance of his employment, albeit misguided, at the time of the occurrence. He was not sleeping on railroad tracks. While this Commission does not condone any drug use, absent more evidence this defense must fail.

Based on the above failure of proof, this arbitrator finds the Respondent has failed to establish an intoxication defense under Section 11. Petitioner sustained his

burden of proof that an accident occurred that arose out of and in the course of his employment.

B. Medical Bills

Respondent's objection to medical bills was based on liability. The treatment provided to Petitioner was reasonable and necessary for his injuries. In light of this arbitrator's findings relating to Accident and Causal Connection, this arbitrator finds Petitioner is entitled to an award of his medical bills incurred, reduced to the fee schedule, as follows:

Loyola University Medical Center	$ 23,989.91
Alexian Brothers Medical Center	$ 4,362.31
Advocate Sherman Hospital	$ 1,667.69
Village of Elk Grove	$ 941.18
Superior Ambulance Service	$ 1,375.54
Prescription medications	$ 81.07

The emergency room physicians at Alexian Brothers, MEA-Elk Grove, LLC, have also billed for their services in the sum of $1,691.00. However, since this billing fails to include procedure codes, this arbitrator is unable to apply the medical fee schedule. These bills shall be payable by Respondent at the fee schedule rate upon the provider producing bills with the appropriate billing codes.

D. Temporary Total Disability

Petitioner was unable to work for the period of August 6, 2015 through September 8, 2015 as documented by the medical records of Loyola University Medical Center. This represents 4-5/7 weeks for which TTD is payable at the rate of $239.59 per week, subject to Respondent's credit for TTD paid.

E. Nature and Extent

The records of LUMC confirm that Petitioner was diagnosed with 1st degree burns of his chest wall and face; 2nd degree burns of the face, left arm and left lower leg; acute pain due to accident caused by fire and flames; and mood disorder due to general medical condition. Petitioner testified the pain during the first ten days of treatment was like touching a hot iron rod and not removing it from the body.

The treatment was effective in relieving most of the pain and in healing the wounds. When Petitioner was discharged by LUMC on September 4, 2015, he reported to the doctor still feeling very anxious. He was taking Benadryl for the itching of the healing skin and taking Gabapentin for pain. On discharge, Petitioner was instructed to continue taking the Gabapentin, continue applying lotion, continue 600 mg ibuprofen and 650 mg Tylenol for pain, continue the Benadryl, continue scar massage and scar desensitization, and apply sunscreen.

At trial, Petitioner credibly testified that he burns easily in the affected areas. As a result, he must always wear long sleeves, hats and apply sunscreen. This is particularly important as he works in a garden center where he may be exposed to the sun regularly. When he sweats he notices his sunscreen wears off and he burns. Nearly three years after the industrial accident, Petitioner continues to note very dry skin on his arms where he was burned.

Based on the above, and considering the factors set forth in Section 8.1b(b) of the Act, this arbitrator finds Petitioner sustained the 3.5% loss of the person under section 8(d)2.

III. Conclusion

For the reasons stated, Petitioner is entitled to an award of benefits under the Illinois Workers' Compensation Act consistent with the findings herein.

Arbitrator Kurt Carlson

05-25-18

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 Valadez,

Petitioner,

20IWCC0740

vs.

NO: 12 WC 003022

City of Harvey,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, 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 September 6, 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.

DATED: DEC 16 2020
o102020
MEP/ypv
049

Maria Elena Pozela
Maria E. Pozela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VALADEZ, JERRY
Employee/Petitioner

Case# **12WC003022**

14WC027354
15WC009789
15WC035245

CITY OF HARVEY
Employer/Respondent

20IWCC0740

On 9/6/2018, 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 2.24% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2512 THE ROMAKER LAW FIRM
PATRICK G SEROWKA
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

1295 SMITHAMUNDSEN
GAIL A GALANTE
3815 E MAIN ST SUITE A-1
ST CHARLES, IL 69174

20IWCC0740

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

Jerry Valadez
Employee/Petitioner

Case # **12 WC 3022**
Consolidated cases: **14 WC 27354, 15 WC 9789, 15 WC 35245**

v.

City of Harvey
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **11/23/2016** & **1/23/2017**. 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. ☒ 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 §8(j)2 credit?

O. ☐ Other _____

FINDINGS

On **11/24/2011**, 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 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 **$63,540.62**; the average weekly wage was **$1,162.63**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Petitioner's claim for benefits is denied, the Arbitrator finding that Petitioner failed to prove that he sustained an accident that arose out of and in the course of his employment by Respondent and, further, failed to prove that his current condition of ill-being was causally related to the accident or to work activities incidental to his employment.

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

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

Signature of Arbitrator

September 5, 2018
Date

SEP 6 - 2018

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

Jerry Valadez,

Petitioner,

vs.

20IWCC0741

NO: 15 WC 009789

City of Harvey,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, 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 September 6, 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.

DEC 16 2020

DATED:
o102020
MEP/ypv
049

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VALADEZ, JERRY
Employee/Petitioner

Case# **15WC009789**

12WC003022
14WC027354
15WC035245

CITY OF HARVEY
Employer/Respondent

20IWCC0741

On 9/6/2018, 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 2.24% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2512 THE ROMAKER LAW FIRM
PATRICK G SEROWKA
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

1295 SMITHAMUNDSEN
GAIL A GALANTE
3815 E MAIN ST SUITE A-1
ST CHARLES, IL 60174

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

Jerry Valadez
Employee/Petitioner

Case # **15 WC 9789**
Consolidated cases: **12 WC 3022, 14 WC 27354, 15 WC 35245**

v.

City of Harvey
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **11/23/2016** & **1/23/2017**. 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

C. ☐ 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 §8(j)2 credit?

O. ☒ Other: Did Petitioner exceed the two-healthcare provider rule set forth in §8(a) of the Act?

FINDINGS

On **10/20/2014**, 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 $**67,208.60**; the average weekly wage was $**1,221.84**.

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

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

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

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

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

ORDER

Petitioner's claim for benefits is denied, the Arbitrator finding that Petitioner failed to prove that he sustained an accident that arose out of and in the course of his employment by Respondent and, further, failed to prove that his current condition of ill-being was causally related to the accident or to work activities incidental to his employment.

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

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

Signature of Arbitrator

September 5, 2018
Date

SEP 6 - 2018

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

JERRY VALADEZ,

Petitioner,

20IWCC0742

vs.

NO: 14 WC 27354

CITY OF HARVEY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability benefits, medical expenses and direct payment, permanent partial disability, credits for PEDA – salary continuation payments, two choices of medical providers and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's decision as to causation, temporary total disability benefits and Petitioner's not exceeding his choice of two physicians. However, the Commission vacates the award of 25% loss of use of man as a whole and addresses permanency in case 15 WC 35245, reverses the Arbitrator's finding that Respondent failed to prove its entitlement to credit for the PEDA payments received by Petitioner and modifies the Arbitrator's award regarding the recipient of payment of medical expenses.

Factual Background

On June 24, 2014 Petitioner was injured responding to a structural fire. While backing out of the building with zero-visibility, Petitioner fell over Lt. Gary Pleckham, who had fallen. Petitioner immediately had a stabbing pain. The run report (Px15) confirmed Petitioner's injury. The accident was not disputed. Petitioner was transported to Ingalls Hospital via ambulance from the scene of the fire on June 24, 2014. (Px6) He presented with a back injury noting pain and swelling. (Px6) Petitioner reported the injury to the Respondent. (Rx4, Px9 and Rx19) The emergency room records note Petitioner's complaints of low back pain. Petitioner was diagnosed with a muscle strain and referred to orthopedist Dr. DiLella. Petitioner saw Dr. DiLella on June 27, 2014 and complained of an acute onset of lower back pain following a backwards fall on June 24, 2014. There was no mention of a back injury in the records in 2011. X-rays showed mild arthritic changes at L4-5 an L5-S1 and Dr. DiLella ordered a lumbar MRI due to radicular symptoms. Dr. DiLella also kept Petitioner off duty.

On June 28, 2014 Petitioner followed up with Dr. Gormley, his primary care physician at Advocate Medical Group, with complaints of back pain with radiculopathy. (Px5) He underwent an MRI on July 3, 2014. (Px9, Rx19, Rx20) When he followed up with Dr. DiLella on July 11, 2014, he was assessed to have sustained an aggravation of back pain. Although he was released back to work, he was not pain free when he was released to full duty. (T. 59) He was diagnosed with a L3-4 and L4-5 herniated nucleus pulposus. Dr. DiLella referred him to physical therapy and post-dated a work release. (Px9) Petitioner returned to Dr. DiLella on August 22, 2014 where it was noted he continued to work full duty status. He was instructed to continue physical therapy. (Px9) He continued physical therapy per Dr. DiLella's recommendation, but the therapy did not relieve his pain completely. He was also treating with a new primary care physician at Advocate Medical Group, Dr. Bonk, who at that time, referred Petitioner to neurosurgeon, Dr. Neckrysh. (T. 63) Petitioner wanted a second opinion with Dr. Neckrysh because the pain was not going away. (T. 63)

On August 24, 2014, Petitioner visited neurosurgeon, Dr. Neckrysh, for a consultation. He reported an original date of accident in November of 2011, with a second incident on June 24, 2014, wherein he aggravated his symptoms. Dr. Neckrysh brought up the possibility of surgery to treat Petitioner's back symptoms. (Px12) Petitioner indicated to Dr. Neckrysh and APN Blood that he still continues to have symptoms despite physical therapy and epidural steroid injections. (Px12 and Px13) Petitioner established care with a new primary care physician, Dr. Bonk, on September 24, 2014, complaining of back pain related to his June 24, 2014 fall. (Px5) On October 7, 2014, Dr. Neckrysh recommended proceeding with surgery. (Px12) Petitioner was never pain free when he was working in September and October of 2014. (T. 66) Petitioner had a lot of sick time he was forced to take because he was off on injury earlier that year. (T. 65)

Dr. Neckrysh took Petitioner off of work on November 1, 2014, pending surgery. (T. 74) Petitioner underwent a fusion and decompression surgery on December 1, 2014. (Px 13) The pre and post-operative diagnosis was lumbar spondylotic radiculopathy. On December 16, 2014, Petitioner returned for follow-up with Dr. Neckrysh and reported a significant reduction in leg pain. Dr. Neckrysh continued work restrictions. Dr. Neckrysh opined that prior to the work

injury, Petitioner was working full duty and was asymptomatic, but after the work accident, Petitioner had weakness and a neurological deficit. (Px14, p. 16) Dr. Neckrysh opined that this was a degenerative condition made symptomatic by a work accident and that it was a causative factor in the need for surgery. (Px14, p. 19)

Petitioner did not work from October 30, 2014 through November 10, 2014, the date of the Section 12 exam by Dr. Michael Kornblatt. Petitioner testified Dr. Kornblatt was rude and did not conduct a thorough exam. Dr. Kornblatt did not touch him at all. (T. 75-76) Dr. Kornblatt did not review the original imaging of any MRI or CT scan of the lumbar spine. At the November 10, 2014 exam, Petitioner gave a history of being injured and dealing with back pain following the June 24, 2014 work injury. Petitioner reported increased back pain after a subsequent work injury in late October 2014 while moving and carrying car accident victims and restrictions from work since that accident. Dr. Kornblatt diagnosed mechanical back pain with chronic multilevel degenerative lumbar disc disease and a history of lumbosacral strain and contusion related to June 24, 2014 injury. (Rx1, p. 20) He relied on the MRI reports, Petitioner's subjective complaints, and normal objective findings on exam. Dr. Kornblatt opined that Petitioner's degenerative lumbar condition was not aggravated or accelerated by the June 24, 2014 work injury because there were no abnormal objective findings on his exam. Further, the 2014 MRI report did not reflect traumatic findings. Dr. Kornblatt opined that surgery was a reasonable treatment option but unrelated to the work accident. Dr. Kornblatt further testified that Petitioner had suffered a strain as a result of the June 24, 2014 accident, and had reached maximum medical improvement as of the date of his November 10, 2014 exam. (Rx1, p. 24)

Dr. Neckrysh disagreed with Dr. Kornblatt's assessment that the June 24, 2014 work fall did not result in an aggravation. (Px14, p. 18)

Petitioner participated in therapy from February 11, 2015 through April 15, 2015. Petitioner was discharged from therapy when his progress plateaued. Work hardening was recommended to prepare for and assess his ability to return to work. Petitioner began work hardening on June 4, 2015. He started at the light-medium physical demand level. The July 3, 2015 FCE noted Petitioner's physical abilities consistent with a very heavy physical demand level. (Px16) Petitioner was released to return to work effective July 13, 2015. (Px5)

Petitioner followed up with Dr. Neckrysh on October 1, 2015, where it was noted he had done well post-operatively and been working full duty. It was noted, however, that Petitioner had concerns about his ability to perform his job due to pain. (Px12 and Rx21)

Analysis

The Commission affirms the Arbitrator's decision finding that Petitioner met his burden of proof as to causation, temporary total disability, and that he did not exceed his choice of physicians. Petitioner credibly and consistently testified regarding the June 24, 2014 work accident. His testimony was corroborated by the medical records, run reports and reports of injury. The Commission finds that Dr. Neckrysh was far more persuasive and credible than Respondent's expert, Dr. Kornblatt, in his opinions as to Petitioner's condition following the June 24, 2014 work accident and the need for treatment up to and including the surgery and

20IWCC0742

attendant care. However, a finding of permanency in the instant case is premature. Additionally, the Commission awards payment of medical expenses directly to Petitioner and reverses the Arbitrator's finding regarding the credit for PEDA payments.

Permanency

The Commission vacates the award of 25% man as a whole in the instant case. The Commission addresses permanency in 15 WC 32545. In the instant case, Petitioner testified that that Dr. Neckrysh returned him to work full duty after his FCE of July 9, 2015. Petitioner testified that he loves his job and wanted to make every effort to stay as a fireman. Dr. Neckrysh had suggested Petitioner not go back because of the surgery that was done. Petitioner testified he told Dr. Neckrysh that he was one of the old guys and that he had a lot of young guys would help out. (T. 81-82) After returning to work, he participated in a lot of calls that were not physically intensive. He was never pain free during the period of time from July, August, September and October of 2015, and that he would hide the pain because he wanted to be a fireman. He did not feel his body was back to where it is supposed to be. (T. 83) When he saw Dr. Neckrysh on October 1, 2015, he advised Dr. Neckrysh of the pain he was having in the course of his work activities. (T. 87) Dr. Neckrysh noted on October 1, 2015, that Petitioner told him if he had to fight large fires, carry heavy equipment, or pick things up and move things, he would be out for the next 3-4 days in significant back pain. Dr. Neckrysh's plan was to see how Petitioner was over the next month or two and then re-discuss the best long-term plan for Petitioner and for his job. (Px12) Despite Petitioner's work-status after July of 2015, it was clear from Petitioner's testimony and the medical records that Petitioner was having on-going problems with his back. Petitioner sustained another work accident on October 21, 2015.

Notwithstanding the fact that Petitioner returned to work full duty on July 13, 2015 following the June 24, 2014 accident and subsequent surgery, Petitioner was still experiencing ongoing back problems stemming from the June 24, 2014 work accident.

The Act prohibits two permanency awards for the same current condition of ill-being even if that current condition of ill-being is the result of two separate industrial accidents. In *City of Chicago v. Illinois Workers' Compensation Comm'n*, 409 Ill.App.3d 258, 265 (2011), the Court reasoned that where a claimant has sustained two separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, unless there is some evidence presented at the consolidated hearing that would permit' the Commission to delineate and apportion the nature and extent of permanency attributable to each accident, it is proper for the Commission to consider all the evidence presented to determine the nature and extent of the claimant's permanent disability as of the date of the hearing. Additionally, in *Baumgardner v. Illinois Workers' Compensation Comm'n,* 409 Ill.App.2d 274, 279-80 (2011), the Court found that the Act clearly contemplates a single determination as to the permanency of a claimant's' condition as a result of an employment accident. 820 ILCS 305/8(e) provides, in relevant part, that a claimant may be granted a scheduled award, "but shall not receive any compensation under any other provisions of this Act." From a procedural and practical standpoint, where a claimant has sustained two separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, it is proper for the Commission to consider all of the

evidence presented to determine the nature and extent of his permanent disability as of the date of the hearing.

In the instant case, Petitioner sustained two separate and distinct injuries to the same body part and the claims were consolidated for hearing. As Petitioner was having ongoing problems with his back that had not completely resolved following the June 24, 2014 accident at the time he sustained the accident on October 21, 2015 accident, it is impossible for the Commission to delineate and apportion the nature and extent of permanency attributable to each accident. Therefore, permanency will be addressed in case 15 WC 35245.

Payment of Medical Benefits

820 ILCS 305/8(a) states in pertinent part:

> (a) The employer shall provide and pay the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or according to a fee schedule, subject to Section 8.2, in effect at the time the service was rendered for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury, even if a health care provider sells, transfers, or otherwise assigns an account receivable for procedures, treatments, or services covered under this Act. *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.* The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. If as a result of the injury the employee is unable to be self-sufficient the employer shall further pay for such maintenance or institutional care as shall be required. (Emphasis added)

In the instant case, the medical was in dispute. Based on the Act, undisputed medical is paid directly to the provider. As medical was in dispute, and some remains unpaid, it is reasonable that the unpaid medical should be paid to Petitioner to pay the medical providers pursuant to the fee schedule. Of note, as Petitioner's attorneys can collect fees regarding disputed medical, it stands to reason that disputed medical payments would be awarded to Petitioner rather than to the medical providers.

PEDA Credit

The Arbitrator erred in denying Respondent a credit for PEDA payments, but only up to the amount of temporary total disability benefits owing for the relevant periods.

The fundamental rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. *Hamilton v. Industrial Comm'n*, 203 Ill.2d 250, 255 (2003). "In determining legislative intent, we first look to the statutory language." *Airborne Express, Inc. v. Illinois*

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Workers' Compensation Comm'n, 372 Ill.App.3d 549, 553 (2007). When the language is clear and unambiguous, we must apply it as written without reading into it exceptions, limitations, or conditions not expressed by the legislature. *Mahoney v. Industrial Comm'n*, 218 Ill,2d 358,363-64 (2006).

The legislative intent of PEDA is designed to protect an injured employee's income for a period of one year. 5 ILCS 345/1(b) (West 2014). The clear and unambiguous language of section 1(d) of PEDA provides: "Any salary compensation *due* the injured person from workers' compensation or any salary due him from any type of insurance which may be carried by the employing public entity shall revert to that entity during the time for which continuing compensation is paid to him under this Act." (Emphasis added.) 5 ILCS 345/1(d) (West 2014). Petitioner was paid a total of $119,268.59 salary PEDA payments for the period of June 25, 2014 through July 15, 2014, October 30, 2014 through July 12, 2015, and October 22, 2015 through November 1, 2016. Following the plain language of the statute, the amount that should be credited to the City of Harvey in the equivalent of Petitioner's temporary total disability benefit award. Section 1(d) of PEDA provides for a credit equal to the temporary total disability benefit the Respondent would have paid, rather than the salary actually paid through PEDA. *City of Chi. Heights v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 182387WC-U, ¶¶33-34

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $775.09 per week, from June 25, 2014 through July 15, 2014 and November 1, 2014 through July 12, 2015, for a period of 39 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 the award of 25% loss of person as a whole is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner did not exceed his choice of physicians.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner any and all unpaid balances for the foregoing charges and fees pursuant to §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for PEDA payments, but only up to the amount of temporary total disability benefits owing for the relevant periods.

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

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

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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: DEC 16 2020

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O: 102020
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VALADEZ, JERRY
Employee/Petitioner

Case# **14WC027354**

12WC003022
15WC009789
15WC035245

CITY OF HARVEY
Employer/Respondent

20IWCC0742

On 9/6/2018, 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 2.24% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2512 THE ROMAKER LAW FIRM
PATRICK G SEROWKA
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

1295 SMITHAMUNDSEN
GAIL A GALANTE
3815 E MAIN ST SUITE A-1
ST CHARLES, IL 60174

20IWCC0742

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

Jerry Valadez
Employee/Petitioner

Case # **14 WC 27354**
Consolidated cases: **12 WC 3022, 15 WC 9789, 15 WC 35245**

v.

City of Harvey
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **11/23/2016** & **1/23/2017**. 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

B. ☐ 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 §8(j)2 credit?

O. ☒ Other: Did Petitioner exceed the two-healthcare provider rule set forth in §8(a) of the Act?

FINDINGS

On **6/24/2014**, 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 **$60,472.12**; the average weekly wage was **$1,162.63**.

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

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

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

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

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

ORDER

Respondent shall Total Temporary Disability benefits commencing **June 25, 2014 through July 15, 2014** and commencing **November 1, 2014 through July 12, 2015, 39 weeks**, at a rate of **$775.09/week.**

Respondent shall pay all outstanding unpaid balances for medical services, to be adjusted in accord with the Medical Fee Schedule provided in §8.2 of the Act.

Respondent shall pay Petitioner Permanent Partial Disability benefits of **$697.58/week** because the injuries sustained by petitioner caused a **25% loss of a person-as-a-whole, 125 weeks.**

The Arbitrator finds that Petitioner failed to prove that he is entitled to penalties pursuant to §19(l) and §19(k) or attorneys' fees pursuant to §16 of the Act.

The Arbitrator finds that Respondent failed to prove that it is entitled to a credit for payments received by Petitioner pursuant to the Public Employees Disability 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.

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Signature of Arbitrator

September 5, 2018
Date

SEP 6 - 2018

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

JERRY VALADEZ,

Petitioner,

20IWCC0743

vs.

NO: 15 WC 35245

CITY OF HARVEY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability benefits, medical expenses and direct payment, permanency, credits for PEDA – salary continuation payments, two choices of medical providers, 19(d) refusal of treatment, and denial of reimbursement for medical cannabis, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's decision as to causation and its findings that Petitioner did not exceed his choice of medical providers, did not violate section 19(d), and denied reimbursement for medical cannabis. However, the Commission vacates the award of permanency and awards Petitioner 70% loss of use of the person as a whole, reverses the Arbitrator's finding that Respondent failed to prove its entitlement to credit for the PEDA payments received by Petitioner, modifies temporary total disability benefits and modifies the Arbitrator's award regarding the recipient of payment of medical expenses.

Factual Background

On October 21, 2015 Petitioner responded to a major car accident. Petitioner described the rescue as "horrendous". Once he knew it was done, he felt the pain wash over him and he went back on his knees. Lt. Wojciechowski called an ambulance to bring Petitioner to Ingalls Hospital. Petitioner filled out an accident report. The EMS noted that Petitioner sustained traumatic back pain on October 21, 2015 at 23:15 hours (Px10). The report noted Petitioner was injured while extricating 3 men from a car accident. (Px12) Petitioner consulted APN Blood on November 12, 2015. X-rays demonstrated no broken hardware. Petitioner had low back pain going into the right buttock, worse than before "this event on October 21, 2015" and the pain had increased since this incident. A recommendation was made for follow up post CT and MRI of lumbar spine and to continue off work restrictions. Petitioner consulted Dr. Jido on December 23, 2015 on referral from Dr. Bonk and gave a history of work injury on October 21, 2015. Dr. Jido performed facet blocks January 5, 2016, January 18, 2016, and July 6, 2016. (Px3)

Petitioner was seen by APN Blood and Dr. Neckrysh on December 15, 2016. Petitioner's history of his December 1, 2014 fusion surgery as well as work accidents on June 24, 2014 and October 21, 2015 were documented. It was noted that those accidents aggravated Petitioner's lumbar spine to the point where he needed surgery. APN Blood noted Petitioner had done very well and returned to work after surgery. APN Blood noted that Petitioner's back continued to be aggravated by work activities after his return. After the accidents Petitioner's pain increased significantly to the point where it was debilitating and where he was unable to work. APN Blood and Dr. Neckrysh concurred that Petitioner was at risk from the demands in extreme conditions of his work as a firefighter and that sedentary work was advisable. (Px12)

On January 7, 2016, Dr. Neckrysh reviewed the MRI of the lumbar spine performed on December 17, 2015, noting that it did not reflect any adjacent segment level failure above or below the surgical construct. There were no concerning findings on MRI. Dr. Neckrysh reiterated that Petitioner should stay off work because he can no longer work as a firefighter. (Rx26)

In his deposition, Dr. Neckrysh opined that Petitioner was restricted from work as of October 21, 2015 and that the October 21, 2015 work injury was a causative factor in Petitioner's current condition. (Px14, p. 30) He based his opinions on his exams and clinical findings subsequent to the October 21, 2015 accident. Additionally, he opined, given Petitioner's symptomatic lumbar condition following his return to work in July 2015 and his history of work during that period that Petitioner's disablement from active fire service relates to both the June 24, 2014 and October 21, 2015 work injuries. (Px14, p. 30) Dr. Neckrysh also restricted Petitioner to sedentary duty with no lifting/pushing/pulling of anything heavier than 10 pounds with no kneeling or stooping. He opined that these restrictions are related to his vocational history, work-related injuries and are permanent. (Px14, p. 30)

Dr. Neckrysh saw Petitioner January 7, 2016. Diagnostic tests were negative for any adjacent segmental failure. Dr. Neckrysh recommended Petitioner stay off work. He explained that Petitioner gives 100% at work, gave 200% effort in his recovery, went back to work, and tried his best. The October 2015 event led to a significant exacerbation of back pain. It was not

reasonable for Petitioner to come back as there is no light duty in his line of work and re-injury was likely if he returned to work. Dr. Neckrysh strongly disagreed with Dr. Kornblatt's diagnosis of "failed back syndrome" explaining that Petitioner had returned to work following the surgery and was doing well for a general population who have had lumbar surgery. He opined that the October 21, 2015 accident caused more than myofascial back pain. Dr. Neckrysh opined that Petitioner is unable to return to work as a firefighter and is permanently restricted from lifting/pushing/pulling anything heavier than 10 pounds. (Px12, p. 32)

Respondent's expert, Dr. Kornblatt, testified that at his February 29, 2016 exam, Petitioner complained of central low back pain, throbbing, aching worsening with significant sitting, twisting, standing, walking, and bending. He diagnosed Petitioner with failed fusion syndrome because Petitioner had not improved, and a strain related to the October 21, 2015 extrication work injury. He recommended aggressive therapy and work restrictions of light to medium lifting to 30 pounds. occasional, 15 pounds. frequently, which relate to the October 21, 2015 work injury and the back surgery. (Rx1, p. 38-39)

Dr. Kornblatt testified that Petitioner never needed surgery. (Rx1, p. 53) He maintained there were no abnormal objective signs of pathology on his exam. Dr. Kornblatt testified that Petitioner did not suffer an aggravation of a pre-existing injury to his lumbar spine, despite a history of twisting and falling when carrying a fully charged heavy hose, and that Petitioner never presented with clinical radiculopathy. Dr. Kornblatt testified that Petitioner did not have herniated discs at L3-4 and L4-5. (Rx1, p. 62) He denied that Petitioner's presentation at the November 2016 IME with moderate to severe central low back pain with radiation into his posterior thighs, bilateral narrowing of the neural foramina at the L4 nerve roots and symptomatic radiculopathy provided a reasonable basis for surgery. (Rx1, p. 64) Dr. Kornblatt attributed the need for trigger point injections and physical therapy to a strain occurring on October 21, 2015. (Rx1, p. 68)

Both parties presented the testimony of vocational rehabilitation counselors to opine on Petitioner's ability to return to the work force. Petitioner's expert, Jacky Ormsby, testified that Petitioner is unable to perform his usual and customary occupation as a firefighter. She further testified that he can no longer perform firefighting given his restrictions and that he cannot be accommodated within his restrictions. She believed there is no position that Petitioner can do relating to firefighting.

Based on Petitioner's age, lack of skills, lack of computer training and lack of education, it was Ms. Ormsby's opinion that there is no sustainable labor market for Petitioner or an abundance of jobs. She further remarked that Petitioner does not possess the background, skills or education to work in a sedentary job. (T. 197-200) Ms. Ormsby did not perform any vocational rehabilitation or placement of Petitioner, but merely conducted an evaluation. (T. 184)

Respondent's vocational rehabilitation counselor, Ed Steffan, testified that there is a stable labor market for Petitioner regularly and continuously available and that he disagreed with Ms. Ormsby's opinions. Mr. Steffan prepared an Initial Evaluation and rehabilitation Plan for Petitioner, but did not perform any vocational rehabilitation or placement of Petitioner. (T. 243) Mr. Steffan testified that for an individual to have an earning capacity they must be a competitive

candidate to be hired over other applicants. If other applicants have more applicable skills they stand a better chance of getting hired than a person who doesn't. Firefighters have a very specialized set of skills and transferability of skills is limited for that reason. (T. 289)

Analysis

The Commission finds that the Petitioner met his burden of proof as to causation, that he did not exceed the two-choice of physician rule, that there was no violation of Section 19(d) and that the reimbursement/payment for medicinal cannabis was properly denied. However, the Commission reverses/modifies the Arbitrator's decision as follows:

TTD

The Commission modifies the Arbitrator's award of temporary total benefits. The Arbitrator awarded temporary total disability benefits from October 21, 2015 through March 29, 2016. The Commission finds the appropriate period of temporary total benefits to be from October 22, 2015 through the date that Dr. Neckrysh imposed permanent restrictions on March 8, 2016. The Commission further awards maintenance from March 9, 2016 through the date of hearing of January 23, 2017.

To be entitled to temporary total disability benefits, a claimant must prove not only that he did not work but that he was unable to work. *City of Granite City v. Industrial Comm'n*, 279 Ill.App.3d 1087, 1090 (1996). The dispositive test is whether the condition has stabilized, because a claimant is entitled to temporary total disability benefits when a "'disabling condition is temporary and has not reached a permanent condition.'" *Manis v. Industrial Comm'n*, 230 Ill.App.3d 657, 660 (1992) (quoting 820 ILCS 305/19(b) (West 1998)). It does not matter whether Petitioner could have looked for work. Even though a claimant may be entitled to permanent disability compensation under the Act, once the injured employee's physical condition has stabilized, he is no longer eligible for temporary total disability benefits because the disabling condition has reached a permanent condition. *Manis*, 230 Ill.App.3d at 660.

Among the factors to be considered in determining whether a claimant has reached maximum medical improvement include a release to return to work, with restrictions or otherwise, and medical testimony or evidence concerning claimant's injury, the extent thereof, the prognosis, and whether the injury has stabilized. *Beuse v. Industrial Comm'n,* 299 Ill.App.3d 180, 183 (1998). Once an injured claimant has reached maximum medical improvement, the condition is no longer temporary and entitlement to temporary total benefits ceases even though the claimant may thereafter be entitled to receive permanent total or partial disability benefits. Once Dr. Neckrysh declared Petitioner's restrictions to be permanent, Petitioner should have then been receiving maintenance benefits.

Medical

As medical was in dispute, and some remains unpaid, it is reasonable that the unpaid medical should be paid to Petitioner to pay the medical providers pursuant to the fee schedule. The Commission affirms the Arbitrator's decision as to medical awarded and medical denied, but modifies the medical award of the Order of the Arbitrator's decision as follows:

Respondent shall pay Petitioner all outstanding unpaid balances for medical services rendered by ATI in the amount of $15,756.04 and the bill from United Health Care in the amount of $80,642.06 pursuant to Sections 8(a) and 8.2 of the Act.

Permanency

The Illinois Appellate Court clarified that an employee seeking "odd-lot status" must do more than make a *prima facie* case to shift the burden to the employer. *Lanter Courier v. Industrial Comm'n*, 282 Ill.App.3d 1, 6-7 (1996). With respect to the burden of production, the employee must initially establish by a preponderance of the evidence that (s)he falls within the "odd-lot" category. *See Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill.2d 538, 547 (1981). Only where an employee proves by a preponderance of the evidence that he falls into the odd-lot category does the burden of production shift to the employer to demonstrate that the employee is employable in a stable labor market and that such a market exists. Whether the parties satisfy their respective burdens are questions of fact. In deciding issues of fact, it is the function of the Illinois Workers' Compensation Commission to determine the weight to be given to the evidence, judge the credibility of the witnesses, and resolve conflicting medical evidence. *City of Chicago v. Ill. Workers' Comp. Comm'n*, 373 Ill.App.3d 1080, 1092 (2007) *citing Boyd Electric v. Dee*, 356 Ill.App.3d 851, 860-61 (2005).

Petitioner has not submitted sufficient evidence to prove that he was an odd-lot permanent total and consequently, to shift the burden to the employer to negate said finding. Although Petitioner's testimony was credible, his lack of participation in a vocational rehabilitation program or attempt at job placement fails to prove he was truly unemployable.

An evaluation conducted by Ms. Ormsby along with her merely "poking holes" in the labor market survey prepared by Respondent's vocational expert and without her having prepared a labor market survey of her own is insufficient to satisfy the burden of proof that Petitioner was an odd-lot permanent total. The evidence in this case confirms that Petitioner can no longer work as a firefighter but also indicates that he is capable of returning to work at a sedentary/light duty job level. The evidence did not support the conclusion that Petitioner was unemployable in other fields.

In determining the level of permanent partial disability as per the five factors pursuant to Section 8.1(b):

1) No impairment rating was performed. This factor is given no weight.
2) Petitioner worked as a firefighter. Both Drs. Neckrysh and Kornblatt agreed that Petitioner would not be able to return to work in this capacity given the very heavy physical demands. This factor is given greater weight.
3) Petitioner was 53 years old at the time of the accident. Petitioner has been a firefighter since 1997, and had 17 years in. This factor is given moderate weight.

4) Petitioner cannot return to work as a firefighter where he was earning $64,041.21, and thus the accidents impacted Petitioner's future earning capacity. This factor is given greater weight.

5) Petitioner's injury and treatment were corroborated by the evidence, testimony, and treating physician opinions. Although the evidence shows that Petitioner had significant degenerative disc disease, the testimony and medical evidence supports that the work accidents of June 24, 2014 and October 21, 2015 significantly changed Petitioner's condition of ill-being from one of non-symptomatic, to debilitating to the point Petitioner was unable to perform his job as a firefighter. The work injuries of June 24, 2014 and October 21, 2015 rendered Petitioner unable to return to his job as a firefighter, or to even function in activities of daily living, without the use of significant narcotics and medical marijuana. This factor is given greater weight.

Based on the totality of the evidence – Petitioner's inability to return to work as a firefighter, his age, and his significant physical limitations, the Commission finds the Petitioner to be disabled to the extent of 70% loss of person as a whole based on the June 24, 2014 and October 21, 2015 work accidents.

PEDA Credit

The Arbitrator erred in denying Respondent a credit for PEDA payments, but only up to the amount of temporary total disability benefits owing for the relevant periods.

The fundamental rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. *Hamilton v. Industrial Comm'n*, 203 Ill.2d 250, 255 (2003). "In determining legislative intent, we first look to the statutory language." *Airborne Express, Inc. v. Illinois Workers' Compensation Comm'n*, 372 Ill.App.3d 549, 553 (2007). When the language is clear and unambiguous, we must apply it as written without reading into it exceptions, limitations, or conditions not expressed by the legislature. *Mahoney v. Industrial Comm'n*, 218 Ill,2d 358,363-64 (2006).

The legislative intent of PEDA is designed to protect an injured employee's income for a period of one year. 5 ILCS 345/1(b) (West 2014). The clear and unambiguous language of section 1(d) of PEDA provides: "Any salary compensation *due* the injured person from workers' compensation or any salary due him from any type of insurance which may be carried by the employing public entity shall revert to that entity during the time for which continuing compensation is paid to him under this Act." (Emphasis added.) 5 ILCS 345/1(d) (West 2014). Petitioner was paid a total of $119,268.59 salary PEDA payments for the period of June 25, 2014 through July 15, 2014, October 30, 2014 through July 12, 2015, and October 22, 2015 through November 1, 2016. Following the plain language of the statute, the amount that should be credited to the City of Harvey in the equivalent of Petitioner's temporary total disability benefit award. Section 1(d) of PEDA provides for a credit equal to the temporary total disability benefit the Respondent would have paid, rather than the salary actually paid through PEDA. *City of Chi. Heights v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 182387WC-U, ¶¶33-34.

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The Commission also corrects the following scrivener's errors: on page 19 of the Arbitrator's decision, the Commission strikes the fifth paragraph as it is duplicative to the second paragraph; on page 26 of the Arbitrator's decision, the Commission strikes the last paragraph beginning with "Petitioner testified regarding his condition" through the top of page 27 ending with "stress on his back."; on page 56 of the Arbitrator's decision under Section (J), the Commission strikes the words "on coat" in the second line of the sentence beginning with "In light of..."; and finally on page 56 of the Arbitrator's decision under Section (J), the Commission strikes the word "leave" and replaces with "relieves" in the fifth line of the sentence beginning with "In light of..."

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $821.02 per week for a period of 19 6/7 weeks, from October 22, 2015 through March 8, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $821.02 per week for a period of 45 6/7 weeks, from March 9, 2016 through January 23, 2017, that being the period of maintenance under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of permanent total disability is vacated and that Respondent pay to Petitioner the sum of $738.92 per week for a period of 350 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 70% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $15,756.04 for the unpaid balance for medical services rendered by ATI, and $80,642.06 for the bill from United Health Care, 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 Petitioner did not exceed his choice of physicians.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for PEDA payments, but only up to the amount of temporary total disability benefits owing for the relevant periods.

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.

20IWCC0743

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: DEC 16 2020

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O: 102020
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VALADEZ, JERRY
Employee/Petitioner

Case# **15WC035245**

12WC003022
14WC027354
15WC009789

CITY OF HARVEY
Employer/Respondent

20IWCC0743

On 9/6/2018, 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 2.24% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2512 THE ROMAKER LAW FIRM
PATRICK G SEROWKA
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

1295 SMITHAMUNDSEN
GAIL A GALANTE
3815 E MAIN ST SUITE A-1
ST CHARLES, IL 60174

20IWCC0743

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

Jerry Valadez
Employee/Petitioner

v.

City of Harvey
Employer/Respondent

Case # **15 WC 35245**
Consolidated cases: **12 WC 3022, 14 WC 27354, 15 WC 9789,**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **11/23/2016** & **1/23/2017**. 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

D. ☐ 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 §8(j)2 credit?

O. ☒ Other: Did Petitioner exceed the two-healthcare provider rule set forth in §8(a) of the Act?

P. ☒ Other: Did Petitioner refuse to submit to recommended medical care in violation of §19(d) of the Act?

FINDINGS

On **10/21/2015**, 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 **$64,041.21**; the average weekly wage was **$1,231.53**.

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

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

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

ORDER

Commencing on the second July 15th after entry of this award, Petitioner shall become eligible for cost-of-living adjustments, to be paid from the Rate Adjustment Fund provided by §8(g) of the Act.

Respondent shall pay all outstanding unpaid balances for medical services, particularly including $15,756.04 to ATI Physical Therapy and $80,642.06 to United Health Care, to be adjusted in accord with the Medical Fee Schedule provided in §8.2 of the Act.

The Arbitrator finds that Petitioner failed to prove that he is entitled to penalties pursuant to §19(l) and §19(k) or attorneys' fees pursuant to §16 of the Act.

The Arbitrator finds that Respondent failed to prove that it is entitled to a credit for payments received by Petitioner pursuant to the Public Employees Disability Act.

The Arbitrator finds that Respondent failed to prove that Petitioner exceeded the two-healthcare provider rule set forth in §8(a) of the Act?

The Arbitrator finds that Respondent failed to prove that Petitioner refused to submit to recommended medical care in violation of §19(d) of the Act?

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

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

Signature of Arbitrator

September 5, 2018
Date

SEP 6 - 2018

INTRODUCTION

These matters proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were:

12 WC 3022 (DOI: 11/24/2011): ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***E:*** Was timely notice of the accident given to Respondent?; ***F:*** Is Petitioner's current condition of ill-being causally related to 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? TTD; ***L:*** What is the nature and extent of the injury?; ***M:*** Should penalties be imposed upon Respondent?; ***N:*** Is Respondent due any §8(j)2 credit?

14 WC 27354 (DOI: 6/24/2014): ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***G:*** What were Petitioner's earnings?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** What temporary benefits are in dispute? TTD; ***L:*** What is the nature and extent of the injury?; ***M:*** Should penalties be imposed upon Respondent?; ***N:*** Is Respondent due any §8(j)2 credit?; ***O:*** Did Petitioner exceed the two-healthcare provider rule set forth in §8(a) of the Act?

15 WC 9789 (DOI: 10/20/2014): ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***E:*** Was timely notice of the accident given to Respondent?; ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***G:*** What were Petitioner's earnings?; ***J:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***K:*** What temporary benefits are in dispute? TTD; ***L:*** What is the nature and extent of the injury?; ***M:*** Should penalties be imposed upon Respondent?; ***N:*** Is Respondent due any §8(j)2 credit?; ***O:*** Did Petitioner exceed the two-healthcare provider rule set forth in §8(a) of the Act?

15 WC 35245 (DOI: 10/21/2015): ***F:*** Is Petitioner's current condition of ill-being causally related to 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? TTD; ***L:*** What is the nature and extent of the injury?; ***M:*** Should penalties be

imposed upon Respondent?; ***N:*** Is Respondent due any §8(j)2 credit?; ***O:*** Did Petitioner exceed the two-healthcare provider rule set forth in §8(a) of the Act?, and ***P:*** Did Petitioner refuse to submit to recommended medical care in violation of §19(d) of the Act?

At the hearing on November 23, 2016, the parties agreed that Petitioner's average weekly wage in 15 WC 35245, for the date of injury October 21, 2015, was $1,231.56, although Arbitrator's Exhibit #4, Request for Hearing and Stipulation, was not physically amended.

STATEMENT OF FACTS

Petitioner Jerry Valadez testified to working as a full duty Fire Fighter for Respondent City of Harvey since 1997. He had had some back problems in 2007 but, following injections and therapy, returned to work full duty without incident. From his work release in 2007 through November 2011, he testified he never had any injuries or conditions which prevented him from performing the full duties of a fire fighter. Petitioner submitted Respondent's "Run Reports 2011-2013", which documented that he worked full duty as a firefighter from January through November 29, 2011 (PX #11).

Petitioner testified that he loves being a firefighter: helping people and making a difference in the lives of people who really live a hard life. His general duties include use of K-12 saws to cut cars to extricate individuals from car accidents. The use of axes, hammers, sledgehammers, pipe poles to destroy walls, cut holes into roofs, "Jaws-of-Life", spreaders, cutters, and carrying hose. A K12 saw weighs 55 lbs. and has substantial centrifugal force when operated by one fire fighter. The "Jaws-of-Life", depending on the model, weighed 40 to 60 lbs. and can be operated by one or two people. Fire fighters also use generators weighing up 80 or 90 lbs. Hoses range from 5 inches, 2-1/2 inches, and 1-3/4 inches. The 2-1/2 requires 2 men to handle and it takes 6 men to handle a charged 5-inch hose. Empty, they range from 30-70 lbs. He is expected to carry or drag individuals on foot and on ladders. When he extricates individuals from car wreckage he can be in low position-underneath a hood, bent over and squatting. In 2014 he earned an annual salary of $63,000.00, approximately $1,200.00-$1,400 week.

On November 24, 2011, Petitioner was called to assist Phoenix Fire Department with a car versus house accident because Phoenix's equipment had broken down. He used spreaders and the "Jaws-of-Life" to access the driver, whose legs were caught under the dashboard. He got onto his knees and worked her legs out, shoved the back-board underneath her, lifted her out while twisting. He then passed her to Chris Mankowski. He then felt a sharp stabbing pain in his back. There had been no room to get a good stance.

Petitioner reported his injury to Lieutenant Cook, the incident/shift commander on scene. He thought Lt. Cook needed to know he had been hurt. Lt. Cook asked if he wanted to go to the hospital but Petitioner declined because it was Thanksgiving and time of a shift change, and the next shift was at the firehouse. He said "No, Jeff, let's just go home." He explained that he didn't fill out an accident report as he "didn't want to do that to the guys as it was Thanksgiving". Further, his old captains had always said "you had better be dead before I will fill out a report because they didn't' want to do it and he didn't want to put Jeff through all the paperwork and he thought he'd be OK.

Petitioner also testified that he told Deputy Chief Buie when he returned to work in March 2012 how he hurt his back. He acknowledged that he should have filed an injury report. Deputy Chief Buie commented that his wife was having back problems too.

Petitioner testified that Run Reports would note injuries to personnel. He explained that if the Run Reports did not reflect his accident injury it was because Harvey was called to the scene in Phoenix. It was Phoenix's call and it would be their responsibility to prepare a Run Report. Respondent's "Run Reports 2011-2013, Incident # 11-0001141" on November 24, 2011 notes Petitioner responded to an "assist Phoenix with auto-extrication". It noted that Jeffrey Cook was the acting Lieutenant at the scene (PX #11). There was no notation that Petitioner was injured.

Petitioner consulted Dr. (Richard) Lim November 30, 2011. He testified that he told Dr. Lim that he had been hurt at work. He does not know why Dr. Lim's record did not note his report that he had been hurt at work. Petitioner testified that he was referred for pain care at Advocate Christ Medical Center (Advocate), where he had a series of low back injections. Petitioner also testified that Dr. Lim referred him for physical therapy and took him off work. He treated with Dr. Lim through March 2012. Petitioner acknowledged that February 2, 2012 records at Advocate reflect his history of lifting a large woman from auto wreckage and having low back pain. Dr. Lim released Petitioner to full duty on March 14, 2012.

On November 30, Dr. Lim noted that he saw Petitioner in 2007, when Petitioner had a left-sided L4-5 disc herniation and radiculopathy. Petitioner had an epidural and therapy then with good relief. Petitioner reported that his current pain had returned in the previous 3 months without precipitating events. Petitioner complained of severe posterior thigh pain along with numbness and tingling.

On examination Petitioner had full range of spine motion. He had 4/5 strength with left foot dorsiflexion. He had a positive left-sided straight-leg but had negative

Faber bilaterally. Fine touch and sharp touch in both legs was normal. Dr. Lim diagnosed lumbar radiculopathy. He referred Petitioner for a new MRI, noting the last one was in 2007 showing a herniated disc. He also referred to Christ Hospital Pain Clinic.

The December 5, 2011 MRI (PX #2) showed multilevel degenerative changes, specifically disc desiccation and disc space narrowing, most prominent at L3-4 and L4-5. There was a mild diffuse disc bulge at L3-4 with a superimposed central/right disc protrusion and central annular fissure which had progressed compared to the 2007 exam. There was also a mild diffuse disc bulge at L4-5 with a superimposed central/left disc protrusion and central annular fissure with displacement of right L4 nerve roots which had progressed compared to the 2007 exam. There was also a minimal diffuse bulge at L5-S1.

Petitioner consulted Dr. Mohammed Qasim at Advocate for pain management on December 29, 2011 (PX #1). Petitioner gave a history of low back pain in 2007, which was treated with a steroid injection. Petitioner had good relief and was able to continue day-to-day work as a firefighter. Petitioner reported that over the previous few weeks he noticed a return of pain which was severe. Pain disrupted his sleep. Petitioner did not report a specific incident or work accident as onset of this pain.

On examination Petitioner's lumbar range of motion was limited by pain. There was significant tenderness to palpation over L3-4. Dr. Qasim noted that all muscle groups in the lower extremities had 4/5 strength. Dr. Qasim found no positive Waddell signs. Deep tendon reflexes were reduced on the left but there were positive straight-leg raise signs both right and left. Dr. Qasim diagnosed lumbar radiculitis. Dr. Qasim recommended a lumbar epidural steroid injection which he had administered that day. He also prescribed Neurontin, Flexeril, and Norco. Dr. Qasim and administered additional ESIs on January 12 and January 27, 2012.

Petitioner was evaluated for physical therapy on February 2, 2012 (PX #1). At that time, he gave a history of his work accident on November 24, 2011. He reported that he had developed low back pain when he had to lift someone out of a car who had been involved in an accident. Petitioner described initial pain which got worse in the following days. Petitioner received physical therapy through May 5, 2012. By then he had met both short-term and long-term goals and was discharged.

Petition saw Dr. Qasim March 9, 2012. Petitioner reported good progress with therapy and that his pain was now down to 2–3/10. He did have flareups up to 5–6/10 with physical exertion. He was still taking Flexeril and Neurontin but had discontinued Norco because of a "heavy" feeling in his head. Petitioner was improved on clinical

examination although motor and sensory signs were essentially the same as before. Petitioner was released to return to work with the limitation of avoiding lifting more than 50 pounds.

On March 14, 2012, Dr. Lim released Petitioner to full duty work on March 19, 2012 (PX #2). Petitioner reported that he felt great and that all pain was gone. On exam, he had full range of motion, flexion, extension, lateral bend and rotation. Petitioner was discharged and was to return as needed.

Petitioner testified that he was in a motor vehicle accident July 25, 2013, where he was struck from behind. The accident occurred while driving his personal vehicle. He denied care at the scene. The July 25, 2013 records of Metro South Medical Center reflect a restrained driver in a rear-end collision (PX #4). Petitioner had low back pain with no radiation and was diagnosed with a strain. Petitioner was discharge with instructions to apply ice to low back.

On cross-examination Petitioner confirmed that he was off work from December 2, 2011 to March 18, 2012 and was paid sick time for the time off.

Pages 11-12 of the attendance records in Respondent's "Run Reports 2011-2013" show Petitioner was not "on duty" between November 30, 2011 through March 18, 2012 (PX #11). Petitioner did not receive Workers Compensation benefits from November 25, 2011 through March 2012. He testified that he returned to full duty, as noted in the "Run Reports", through 2012 and into July 2013. The "Run Reports" and attendance records contained in the personnel records of the Respondent's Fire Department reflect Petitioner's return to full duty as a Firefighter for Respondent from March 18, 2012 through June 24, 2014 (PX #11 & PX #15).

Petitioner testified that he was in a motor vehicle accident July 25, 2013, where he was struck from behind. The accident occurred while driving his personal vehicle. He denied care at the scene. The July 25, 2013 records of Metro South Medical Center noted he was a restrained driver in a rear-end collision (PX #4). Petitioner had low back pain with no radiation and was diagnosed with a strain. Petitioner was discharged with instructions to apply ice to the low back.

On August 12, 2013, Petitioner saw Dr. Robert Strugala at Midland Orthopedics for low back pain (PX #7). Petitioner gave a history of lumbar disc disease and spinal stenosis treated with an epidural injection in 2011. Petitioner presented with low back pain from a motor vehicle crash 3 weeks before. On examination Petitioner had mild back pain with flexion/extension and a negative straight-leg sign. Dr. Strugala

diagnosed a sprain/strain or possible aggravation of degenerative disc disease. Physical therapy was recommended. No restrictions from work were noted. Petitioner had therapy from August 19 through August 30, 2013 at Physical Therapy and Sports Injury Rehabilitation, with goals achieved and an independent home exercise program (PX #8). There was no follow up appointment at Midland Orthopedics.

Petitioner testified that he returned to work full duty for Respondent as a firefighter. Attendance records for 2013 (PX #11 & PX #15) reflect Petitioner worked his normal 24 hours on/48 hours off schedule from July 30, 2013 through June 19, 2014.

On June 24, 2014, Petitioner testified that was injured responding to a structural fire. He was extinguishing a fire when he was ordered to leave the building due to concerns of structural integrity and safety. He was retreating from the structure carrying a charged hose and suppressing fire. While backing out of the building with zero-visibility. Petitioner fell over Lt. Gary Pleckham, who had fallen. Petitioner testified that he fell with the force of the hose-flow throwing him backward and twisted as he fell. He landed on his air-pack with his low back when he hit the ground. He immediately had a stabbing pain; he turned off the hose and eventually exited the fire. After they were outside the fire he told Lt. Gary Pleckham, "he was not O.K., I fell." He told Bruce Randall, the Shift Commander/Captain, that his back was hurting. He was transported by ambulance to Ingalls Memorial Hospital (Ingalls). The Run Report, incident # 14-0000675-676 (PX #15), confirmed Petitioner's injury and that he was transported to Ingalls.

The Ingalls records (PX #6) contain a South County EMS Report reflecting Petitioner's transport from a fire scene to Ingalls with back pain following a twisting fall inside a fire while striking his low back in the course of exiting a fire. The ER records note Petitioner's complaints of low back pain. He denied any numbness or tingling. The physical exam was normal except for back motion limited by pain. Straight-leg raise was negative. Petitioner was neurologically intact. X-rays were negative for fracture. Petitioner was diagnosed muscle strain and prescribed Flexeril and Toradol. Petitioner was referred to orthopedist Dr. Carl DiLella.

Petitioner saw Dr. DiLella of Bone & Joint Physicians June 27, 2014 (PX #9). Petitioner complained of an acute onset of lower back pain following a backwards fall with a heavy hose for the Harvey Fire Department on June 24, 2014. There was no mention of a back injury in 2011. The fall caused a significant twisting injury to his low back. Petitioner complained of throbbing achy 6/10 pain despite medication, with pain radiating down the right leg past the knee and pain radiating down the left leg to the level of the knee. On examination flexion was limited by pain to 40° and extension was

limited to 10°. Petitioner could laterally bend to 45°. Seated and supine straight-leg testing on the right was positive and mildly positive on left. Petitioner was neurologically intact. X-rays showed mild arthritic changes at L4-5 and L5-S1. A lumbar MRI was ordered due to radicular symptoms. Dr. DiLella also kept Petitioner off duty pending results.

Petitioner was seen at Advocate Medical Group June 28, 2014 for low back pain and bilateral pain radiating with tingling into the legs following a June 24 work injury (PX #5). Petitioner reported that he was seeing an orthopedist and awaiting approval for an MRI. Dr. Nanette Gormley noted a positive straight-leg sign without documenting which side or whether bilateral. She also noted Petitioner's history of consuming 4 beers daily and active problems of alcoholism and liver disease. The care plan reflected a referral to an orthopedist for sciatica and evaluation for hepatitis.

Petitioner followed with Dr. Robert Bonk at Advocate Medical Group September 24, 2014 (PX #5). Dr. Bonk noted that Petitioner had seen another physician and had also sought a second opinion due to a difference of opinion with the original physician regarding care. Dr. Bonk diagnosed sciatica. On October 13, 2014 Petitioner was complaining of low back pain with numbness and tingling and pain radiating down the leg. Dr. Bonk noted Petitioner had seen Dr. Neckrysh, but seem to focus the consultation on Petitioner's metabolic presentation. On November 13, 2014 CMA Patricia Bochenek and Dr. Bonk cleared Petitioner for surgery.

Petitioner returned to Dr. DiLella July 11, 2014. Dr. DiLella noted that Petitioner had an aggravation of back pain when he fell while fighting a fire. Dr. DiLella reviewed the July 3, 2014 lumbar MRI which showed small disc protrusions at L3-4 and L4-5, "unchanged from previous examination." His impression was L3-4 and L5-S1 HNP (herniated disc). He noted Petitioner reported improvement with conservative treatment and was prepared to return to work. On examination Petitioner could forward flex to 50° and extend to 30°. He was able to side bend to the left and right to 45° without pain. Seated and supine straight-leg raise was negative. Petitioner was neurologically intact. Petitioner was released full duty without restriction for "next Wednesday" but recommended physical therapy to assist him with strengthening and stretching over the next 6 weeks. Dr. DiLella wanted to see Petitioner in 6 weeks to assess his progress.

On August 22, 2014 Petitioner returned to Dr. DiLella after completing therapy. Petitioner had been working at full duty status. On examination Petitioner could flex to 60° and extend to 30°. He could side bend to 40°, both right and left. Seated and supine straight-leg raise was negative bilaterally.

Billing records reflect Dr. DiLella's consultation on January 22, 2015 but there were no clinical notes for January 22 (PX #9). There are physical therapy clinical notes from August 11 through August 19, 2014. Billing records show physical therapy from July 15 through August 26, 2014. There are also billing records from 3 visits in 2010 without specifying the reason for those consultations. Respondent's Exhibit #31 reflected payments for physical therapy at "Ridge Ortho and Rehab" from August 27 through November 7, 2014 (RX #31).

Petitioner testified he was referred to Dr. Sergey Neckrysh at University of Illinois Medical Center by Dr. Bonk of Advocate Medical Group. He sought a second opinion with Dr. Neckrysh because his pain was still there, drugs were only masking this pain, therapy was going nowhere, my legs were numb and the doctor [DiLella] wasn't doing a good job listening to him about that.

On August 28, 2014 Petitioner saw Advanced Practice Nurse Allison and Dr. Sergey Neckrysh at UIC Hospital Department of Neurosurgery (PX #12 & PX #13). Clinical notes noted Petitioner's ongoing back pain since original November 2011 injury. He was managing well and had returned to work. Another work accident on June 24, 2014 aggravated his symptoms when Petitioner fell over another firefighter while fighting a fire. Petitioner reported immediate back and leg pain, right leg worse than the left. Failed conservative care was noted. The 2014 lumbar MRI was reviewed which showed very advanced degeneration at the L3–4 and L4-5 levels. There was significant facet arthropathy resulting in a diffuse disc bulge resulting in in bilateral lateral recess and foraminal stenosis at L4-5, right worse than left. There also was very significant facet arthropathy and modic changes within and plates. There was significant disc degeneration with diffuse disc bulge facet arthropathy at L3-4, resulting in bilateral lateral recess and foraminal stenosis. Dr. Neckrysh also reviewed x-rays from 2011 and 2014.

On examination Dr. Neckrysh noted weakness in the right leg with extension and 4/5 weakness on dorsiflexion and plantar flexion. Dr. Neckrysh's assessment was that if Petitioner failed to respond to further treatment, then, based on symptoms and findings on MRI, a 2-level decompression and fusion from L3 to L5 due to lateral foraminal stenosis, significant facet arthropathy with mechanical back pain, to treat his back pain was recommended. Petitioner wanted to discuss the recommended fusion with his wife and get back to the doctor.

Dr. Neckrysh forwarded the most recent clinical note to Dr. Bonk on October 7, 2014. The letter summarized Petitioner's encounter with Advanced Practice Nurse

Allison Blood and Dr. Neckrysh on August 28. Dr. Neckrysh again reviewed Petitioner's imaging and symptoms noting Petitioner had severe lateral recess and foraminal stenosis caused by work-related injuries. He reiterated his recommendation to proceed with L3-4 and L4-5 decompression, instrumentation, and fusion.

Petitioner testified that he was initially unsure about back surgery because of horror stories about back surgeries he had heard and that he continued working. He further that Dr. Neckrysh explained his concern with Petitioner returning to work, stating he should not be doing any heavy manual labor. In September and October Petitioner was not working as much because he was forced to take all the accrued sick time before the end of the year or he'd lose it. He was never pain-free while working and he acknowledged that he took up to as many as 11 days in between shifts in September and October 2014.

Petitioner testified a fire "Run Report" covers all bases with respect to what transpired at a fire scene: why we were called to the scene, what action was taken, and what caused the fire. He clarified it does not specify the activity of each firefighter but a summary about the nature of the call. He had reviewed the Run Reports from his return to work from July 14, 2016 through October 23, 2014, which refreshed his memory of the events of that period. He explained they were mostly small accidents, a lot of automatic alarms and CO calls; "I don't think we had one fire."

Respondent's Run Reports reflect Petitioner returned to duty July 16, 2014, working 26 shifts from July 16, 2014 through October 31, 2014 (PX #15). Further, Petitioner testified he was working in a condition of pain throughout this period. He was hiding, knowing the younger recruits were "pushing the old man aside" and doing the job, he was letting them do that and supervising. Further, when he did have to don his full gear and air-pack, he would need time to recuperate from the pain. He had one active fire call with an oil-tanker fire inside a factory. Other guys did a lot of the work and he helped when he could. He felt selfish for not being able to operate at full capacity-I wasn't able to do my full job and participate, he knows that is unacceptable and it put "my brother firefighters" in danger in case they needed to be rescued.

On October 7, 2014 Dr. Neckrysh again recommended an L3-4 and L4-5 decompression, instrumentation, and fusion. Petitioner testified that Dr. Neckrysh had told him he wouldn't be getting any better without surgery and he wanted to get the surgery to allow him to continue his career as a firefighter.

On October 20, 2014, Petitioner responded to a 3-car motor vehicle accident. He helped extricate a large woman through the middle of the van, along with lifting 2 other

injured people from the wreckage, he hurt his back again. The pain was the same as before but worse. Every time it seemed to get a little worse. He did not fill out an accident report but told Lt. Wojciechowski and Bob Schmidt at the scene that he was hurt. He told Lt. Jeff Cook upon return to Station #1. Deputy Chief Willie Buie was not at the fire scene on October 20, 2014 and Petitioner never informed him of the aggravation. Petitioner admitted that it is protocol that he tell supervisors on the scene of any injury. He explained he didn't go to hospital because all they were going to do was give him therapy and painkillers, which wasn't doing his body any good.

On November 4, 2014 UIC nurse Nancy Filoramo forwarded a letter restricting Petitioner from work until and though the expected surgery date of "12/12/14" (PX #12).

Petitioner did not work from October 30, 2014 until the §12 examination of Dr. Michael Kornblatt on November 10, 2014. Petitioner testified that Dr. Kornblatt was rude and did not conduct a thorough examination. Dr. Kornblatt did not touch him at all. Dr. Kornblatt had him walk and bend over only. Dr. Kornblatt talked to him about why he took off work and why another doctor.

On December 1, 2014 Petitioner was admitted to UIC Hospital for surgery. Advanced practice nurse Sybille Nelson performed the admitting history and physical, noting Petitioner's history of back pain since 2011 from in the line of duty injury with a second injury in June 2014. Petitioner had low back pain which radiated to the right leg which also had tingling. APN Nelson referred to previous clinical notes describing the 2014 MRI findings. She noted Petitioner's report consuming 2 to 3 beers per week at most.

On December 1 Dr. Neckrysh performed 1) an L3, L4, and partial L5 laminectomy with facectomies at L3-4, L4-5 and decompression of the L3, L4, and L5 nerve roots on both sides, with pedicle screws at L3, L4, and L5; 2) arthrodesis, transforaminal lumbar interbody technique at L3–4 and L4–5 interspaces; 3) application of intervertebral biomechanical device at L3-4 and L4-5 interspaces; and 5) arthrodesis posterolateral technique from L3 to L5 (PX# 12 & PX #13). Pre and post-operative diagnosis was lumbar spondylotic radiculopathy. The December 5, 2014 Discharge Summary noted that Petitioner was to follow up with Dr. Neckrysh and Dr. Bonk.

On December 16, 2014 Petitioner returned for follow-up with Dr. Neckryrsh. Petitioner reported a significant reduction in leg pain. Dr. Neckryrsh continued work restrictions, ordered for an x-ray, physical therapy, and a 3-month follow-up appointment. The history of work injuries in 2011 and June 24, 2014 but also a mid-September 2014 motor vehicle accident. Dr. Neckrysh noted that Petitioner's major

issue was related to his "work comp" injury June 24, 2014. Petitioner testified the September 2014 accident note was a mistaken entry; there was no car accident in September, only in July 2013.

A January 20, 2015 nurse's note at UIC Neurosurgery reflects Petitioner's complaint of 6/10 pain and would be seeing his primary care physician, Dr. Bonk, for pain medication management.

Petitioner returned to CMA Elisa Connell and Dr. Bonk at Advocate medical group January 23, 2015. Petitioner gave a history of his recent back surgery and complained of leg achiness and leg cramps. The January 23 consultation did not address petitioner's back injury. Petitioner returned on March 10, 2015 for a hydrocodone refill. He denied numbness and tingling and denied pain radiating down the leg. He did complain of lower back pain on the right. March 31, 2015 lumbar spine x-rays showed minimal grade 1 retrolisthesis of L3 over L4 and chronic loss of anterior vertebral both heights from T-10 to L-1, recurrent/residual degenerative disease most, most significant neural foraminal narrowing at L5–S1 and functional narrowing of the thecal sac at L3-4

On February 11, 2015, Petitioner began therapy at Advocate Christ Medical with the stated goals of returning to firefighting (PX #3). The records reflect consistent participation in therapy from February through April 15, 2015. The April 8, 2015 therapist's note documents Petitioner's concern for re-injury and with patients' ability to do the physical work required to be a firefighter. Petitioner was discharged from therapy on April 15, 2015 as his progress had plateaued. Work hardening was recommended to prepare for and assess his ability to return to work.

Petitioner began work hardening at ATI Physical Therapy June 4, 2015 (PX #16). He started at Light-Medium physical demand level (PDL) with soreness, demonstrated weakness with squatting and lifting from floor and progressed to Medium PDL by June 21. By July 5, 2015 Petitioner had reached Very Heavy PDL. The FCE July 3, 2015 at ATI noted physical abilities consistent with a Very Heavy PDL.

Petitioner continued to follow up his surgery with Dr. Neckrysh through April, June, and July 2015. On June 4 Dr. Neckrysh ordered work conditioning for 4 weeks, followed by an FCE. On July 9 Dr. Neckrysh noted Petitioner had completed work hardening and that he had passed the requirements for heavy duty with "with flying colors." Petitioner was released to return to work effective July 13, and return in 12 months and 24 months for post-operative monitoring.

Petitioner saw CMA Connell and Dr. Bonk April 30, 2015 for his continuing back pain and pain in his toes (PX #5). Petitioner reported he was doing badly with worsening lower back pain Petitioner had discontinued Norco. Dr. Bonk diagnosed chronic back pain and referred Petitioner for pain management. They also discussed Petitioner's abnormal liver function in light of his continuing pain. Petitioner returned to Dr. Bonk on May 14, 2015 for follow-up for his back pain and discussion of liver damage secondary to pain medication. Dr. Bonk noted that Petitioner can never have these types of medications as they will damage his liver again. Petitioner was referred for pain management for consult/treatment due to elevated liver enzymes secondary to medication. Dr. Bonk further noted that if Petitioner continued down this path he would need a liver transplant.

Petitioner consulted Dr. Ebby Jido June 3, 2015 at Advocate Christ Medical Center on referral from Dr. Bonk for pain management (PX #3). Petitioner gave a history of low back pain radiating into the buttocks since a work-related injury June 24, 2014. Petitioner had exhausted conservative care prior to surgery, had fusion surgery and post-surgical physical therapy. He stopped opioids/Tylenol following elevated liver enzymes causing exacerbation of pain with a recommendation for Tramadol.

Dr. Jido's examination revealed intact strength and sensation. Straight-leg raise was negative and reflexes were normal. Dr. Jido diagnosed post lumbar fusion syndrome. He noted that Petitioner required short acting painkillers without Tylenol and so prescribed Tramadol. Dr. Jido would consider Dilaudid if Tramadol did not provide relief. Petitioner declined an offer of steroid injections. A copy of the clinical note was forwarded to Dr. Bonk.

Petitioner saw Dr. Bonk's CMA Connell at Advocate Medical Group October 16, 2015 (PX #5). Petitioner presented with symptoms of a cold but was also seeking a referral for pain management and a back surgeon. In addition to treatment of cold symptoms referrals for pain management consultation and orthopedic consultation were given.

Petitioner testified regarding his condition after returning to work. His recollection was refreshed by review of the Run Reports before the October 2015 incident. He indicated there were a lot of false alarms, carbon dioxide investigations and stove or "hot pot" calls, no imminent danger or major fires, a pretty light load. Even so, he was never pain-free from July through October 2015. He hid his pain because he wanted to be a firemen; "I didn't feel my body was where it's supposed to be." He would lay back from incidents and let someone else do the work. He stated he could not wear his air-pack; his gear was crushing on his back. Specifically, he recalled an arson fire at

150th and Halsted where they didn't have to wear their air packs because the damage had already been done. They took out the hoses to hook up to the "street monitor"- a manifold which takes water from multiple hoses and directs it to a gun which extinguishes the fire. His job was to move hoses and direct the monitor towards the fire during which he had extreme pain and stress on his back.

Petitioner returned to UIC Neurosurgery October 1, 2015 for surgical follow-up (PX #12). APN Allison Blood noted Petitioner's clinical history. She noted Petitioner was eager to get back to work, having gone through all the physical therapy, work conditioning, and FCE. She noted Petitioner had put in "great effort." APN Blood further noted the FCE was valid and found Petitioner at MMI for heavy duty. He had been back to work since July. Petitioner expressed concern about re-injuring his back while fighting fires.

On October 21, 2015 Petitioner responded to a major car accident where a car slammed underneath a flatbed carrying steel coils. They opened the car with the "Jaws of Life." Petitioner testified that he was crouching and squatting underneath the flatbed trying to extricate a 350 lb. man covered in blood from the opposite side of their entry-point. All 3 firefighters worked, wiggled, and pulled him out, jammed the board underneath him, and passed him onto the cot. Petitioner then began pulling out the driver stuck under the dashboard who had no pulse. They cut the seat out, worked the victim's legs out, pulled and yanked him out. It was a "rip and tear." They got the victim onto a board and lifted him onto the cot. Petitioner said adrenaline had been flushing through him and he felt no pain while working under the flatbed.

Petitioner described the rescue as "horrendous." Once he knew it was done he felt the pain wash over him and he went back on his knees, breathing shallow because of severe back pain. Firefighter Omar looked at him and asked him if he was OK. Petitioner replied "No, I can't get up." "Wojo" [Lt. Wojciechowski] instructed him not to get up but he tried to get up but Wojo said "No." Lt. Wojciechowski called South Holland ambulance to bring him to Ingalls Hospital. Petitioner indicated he filled out an accident report, he identified his signature and authenticated Petitioner's Exhibit #19/Respondent's Exhibit #7 as his written statement from the October 21 scene of his work injury.

Petitioner presented to the Emergency Department Ingalls Memorial Hospital at 00:22 October 22, 2015 (PX #6 & RX #23). South Holland Fire EMS noted Petitioner sustained traumatic back pain October 21 at 23:15 hours (PX #10). The South Holland fire incident report noted Petitioner was injured while extricating 3 men from a car accident. In the Ingalls Emergency Department, Petitioner's history of back surgery

was noted. Petitioner was complaining of back pain and numbness in the right buttock. Petitioner was prescribed Dilaudid, chest X-ray, and CT scan of lumbar spine. The CT noted his post-surgical hardware but that there was no hardware breakage or loosening. Petitioner was diagnosed with chronic back pain exacerbation. He was discharged to home and with advice to follow up his primary care physician.

Petitioner consulted Dr. Neckrysh's APN Blood at UIC Hospital Department of Neurosurgery November 12, 2015. Petitioner gave a history of extracting three men weighing between 225 and 380 lbs. from a car that T-boned a tractor-trailer truck. Petitioner described a very intense situation and he had to act fast to get these victims out of the vehicle. He was squatting, kneeling and pulling out 3 very large guys out from under the tractor-trailer. This required not good body mechanics but with rushing adrenaline: one man victim died while the other two were critically injured. Following the extraction, Petitioner himself collapsed in severe low back pain, right buttock pain, complete exhaustion and was taken to the hospital for treatment. X-Rays demonstrated no broken hardware.

Petitioner had low back pain going into the right buttock, worse than before "this event on 10/21/2015" and had increased since this incident. A recommendation for follow-up post CT and MRI of lumbar spine, continue off work restrictions, and referral to an interventional pain consultation, script for chlorzoxazone and Norco for pain control until he sees a pain specialist.

Petitioner consulted Dr. Jido December 23, 2015 on referral from Dr. Bonk (PX #3). Petitioner gave a history of a work injury in October 2015 while extricating victims from a car vs. semi collision. Following the rescue, he felt severe, uncontrollable back pain. Dr. Jido recommended lumbar facet blocks at L3-4, L4-5, and L5-S1 bilaterally and hydrocodone. Dr. Jido performed facet blocks at L3-4, l4-5, and L5-S1 January 5, January 18, and July 6, 2016.

Petitioner returned to APN Blood and Dr. Neckrysh December 15, 2016 (PX #12). Petitioner's history of his December 1, 2014 fusion surgery as well as work accidents June 24, 2014 and October 21, 2015 were documented. It was noted that those accidents aggravated petitioner's lumbar spine to the point where he needed surgery. APN Blood noted Petitioner had done very well and had returned to work after surgery. APN Blood noted that Petitioner's back continued to be aggravated by work activities after his return. After the accidents Petitioner's pain increased significantly, to the point where it was debilitating and where he was unable to work. APN Blood and Dr. Neckrysh concurred that Petitioner was at risk from the demands in extreme conditions of his work as a firefighter and that sedentary work was advisable.

On January 7, 2016, Dr. Neckrysh reviewed the MRI, noting that it did not reflect any adjacent segment level failure above or below the surgical construct. There were no concerning findings on MRI. Dr. Neckrysh reiterated that Petitioner should stay off work because he can no longer work as a firefighter. Dr. Neckrysh provided some counseling on how to manage residual pain symptoms and scheduling a follow-up with x-rays at 2-year post-surgical follow-up. Further, Petitioner testified that, at that time, Dr. Bonk had recommended pain care, corroborated Dr. Bonk's October 16, 2015 clinical note (PX #5).

Petitioner recalled that Dr. Bonk tested his liver enzymes in May 2015 and discussed the need for a liver transplant if he kept taking opioid pain medication. Dr. Bonk then took him off pain medication. Further, following the facet injections in December Dr. Jido asked him how he felt about medical marijuana. Dr. Jido stated he would be a perfect candidate because of his liver problems and blood in his stool caused by the Norco but that he could not prescribe it as it was against their policy. Dr. Bonk also recommended medical marijuana but stated prescribing it was against Advocate Group's policy. Dr. Jido told Petitioner about a website where he could get oil and flowers that have high THC, which deals with pain. Petitioner found "The Healing Clinic" through his internet search.

Petitioner testified that Dr. Jido said he was a good candidate for medical marijuana but that he could not prescribe it. Dr. Bonk also said he was a good candidate for medical marijuana but he could not prescribe it either. Petitioner found the Healing Clinic on a website. The Healing Clinic prescribed medical marijuana for his spinal condition. He is approved for the Illinois Medical Cannabis Pilot Program.

The Illinois Compassionate Use of Medical Cannabis Pilot Program Act, 410 ILCS 13, et seq., provides for the medical use of marijuana for debilitating medical conditions as defined in the Act. Spinal cord injury is defined as a debilitating medical condition. A physician certification is required. The physician must certify that the patient will benefit from using medical marijuana, has a qualifying medical condition and is under the physician's care for the condition (PX #26).

On February 6, 2016 Petitioner saw Dr. Garcia of The Healing Clinic for the compassionate use of medical cannabis pilot program (PX #23). His debilitating medical condition was noted as spinal cord injury. On February 20 Petitioner was examined by Dr. Spero. Dr. Spero certified Petitioner's diagnosis and treatment for a debilitating medical condition of spinal cord injury damage to the nervous tissue of the spinal canal with objective neurological indications of intractable spasticity. Dr. Spero certified the diagnosis of debilitating medical condition as defined in the Act. He

certified his physician-patient relationship with Petitioner and that Petitioner was likely to benefit from using medical cannabis.

Petitioner testified he went to a facility in Posen named "Windy City Cannabis" who informed him that oils and CBC attack the pain. He has tried medical marijuana and it works. It does not mask the pain; it allows him to function and motivates him to play with his grandchildren and to do things. He contrasted the effects with the Norco which make him bleed [stool], constipates him and makes him comatose. The medical marijuana makes him happy and he's coming back to life. It relieves his pain. The Healing Clinic directed him to oils, applied with rubber gloves by his wife and he experiences instant relief. Further, a strain called "Silver Lights" is mild and helps him get up and do things; he smokes it and has edibles. Petitioner laid a foundation for petitioner's exhibits #22 of receipts he paid for medical marijuana, edibles and oils. He gets to be grandpa again to his 10 grandchildren and do things around the house like fixing windows, walk the dog and has increased his quality of living 100%. His pain levels are very manageable. The receipts in Petitioner's Exhibit #22 are unreimbursed out of pocket expenses.

Petitioner testified that Dr. Kornblatt cut him off at the IME when he tried to verbalize his complaints and history. He testified that Dr. Kornblatt did not conduct examine his back. Petitioner testified that he brought his x-rays to the February Dr. IME, but that the doctor reviewed them and remarked he did not know why Petitioner was there because he was not going to let him return to work seeing what he saw on the x-rays and because he got hurt at work. He said he did not think he could learn how to use a computer and his Spanish is broken and only fair. He once did interpret as a firefighter when he was the only one close by to speaking Spanish.

Petitioner stated that in July 2015 Dr. Neckrysh did not want him to return to work as a firefighter. He was still experiencing back and leg pain following his return to work in July of 2015 through October 21, 2015.

Petitioner testified about his condition after returning to work in 2015. His recollection was refreshed by review of the Run Reports before the October 2015 incident. He indicated there were a lot of false alarms, carbon dioxide investigations and stove or "hot pot" calls, no imminent danger or major fires, a pretty light load. Even so, he was never pain-free from July through October 2015. He hid his pain because he wanted to be a firemen; "I didn't feel my body was where it's supposed to be." He would lay back from incidents and let someone else do the work. He stated he could not wear his air-pack; his gear was crushing on his back. Specifically, he recalled an arson fire at 150th and Halsted where they didn't have to wear their air packs because the damage had already been done. They took out the hoses to hook up to the "street monitor"- a

manifold which takes water from multiple hoses and directs it to a gun which extinguishes the fire. His job was to move hoses and direct the monitor towards the fire during which he had extreme pain and stress on his back.

Petitioner testified his educational background as he dropped out of high school, joined the Navy, and got his GED in the Navy. He was a structural aviation mechanic where he'd change tires, struts, rudders, ailerons, heavy big pieces of huge airplanes in the 1980's. He didn't use mathematics as a structural mechanic, it was a grunt thing. Before the fire service he was a landscaper, construction worker, and a bottom-man for a sewer and water crew. He explained he was a foreman who put the pipes together water main, sanitation pipes and construction with 55-inch pipes. He never did residential plumbing only heavy construction. He does not use computers; his granddaughter assists him in checking his email.

Petitioner used a computer to write a fire report but that would take him a half-hour and most of his job was off the computer. He has no software skills and has never used Microsoft Excel or Word in a work environment. Has never used sales or customer management software. He types with one finger. Petitioner testified that his ongoing pain and numbness from bilateral CTS condition impair his ability to type beyond his "hunt & peck" method. He's never worked a commissioned sales job, never sold automotive services at a dealership, has no experience in restaurant management, does not possess two-years' experience in janitorial management, hasn't worked in a casino and has not worked in food service.

Petitioner testified that he is not completely fluent in Spanish; the guys at the fire department call him a "K-Mart Mexican" because he can barely get the words down and they're not always correct. He said he is not a good interpreter. He has not spoken Spanish on a daily basis since he was a little kid. He is not capable of working a job at a car dealership translating between a sale person and a Spanish-speaking buyer. He couldn't work in a smoke-filled casino environment due to his asthma, he was able to fight fires because of his air pack.

Deputy Fire Chief for Respondent Willie Buie testified on behalf of Respondent. He has been employed with Respondent for 24 years, Deputy Chief since 2006. His job responsibilities include the day to day operations of the fire department, employee training, and management responsibilities including work injuries. Specifically, he receives injury reports from the supervisors, the shift commanders on duty, and make sure they are forwarded to human resources. Further, he handled attendance records until March 2015. The procedure for reporting injuries is for an injured fire fighter to report it to their shift commander and that person does the investigation and fills out

paperwork as well as an injury report by the fire fighter. They then go for treatment to urgent aid or Ingalls Hospital.

Deputy Chief Buie explained a "Fire Run Report" or "Fire Incident Report" is generated whenever engines go out on a call; it documents what transpired on a call including time, location, employees, narrative and any injuries to personnel or civilians.

Deputy Chief Buie explained the notation key for the attendance records reflected in Respondent's Group Exhibit #8, Petitioner's attendance and pay records: "D" indicates working on duty; "H" indicates a "Haines" day for which a firefighter is paid while off duty; "JI" indicates job injury off duty; "S" indicates a sick day.

Deputy Chief Buie testified that on the 2011 and 2012 attendance records there were no days off listed as "job injury days" for Petitioner. Petitioner was paid full pay for the noted sick days. Petitioner worked from July 16 through October 29, 2014. The Run Report for November 24, 2011 does not document an injury to Petitioner (1.23.17 TA 43). He testified that he did have a conversation with Petitioner in March 2012 but he doesn't recall if Petitioner said he had a work injury on November 24, 2011. He remembered that Petitioner said his back was hurting, that he was in pain. Deputy Chief Buie shared that his wife had back problems from a car accident. He did not recall if Petitioner said that his back pain was due to a work injury.

Deputy Chief Buie agreed the accident report and investigation were done according to protocol for the June 24, 2014 accident. He testified that Petitioner did not report an injury for October 20, 2014. He was not informed by the incident supervisor of any injury occurrence. He testified that Respondent provides group medical health insurance to fire department employees and contributes wholly to this insurance coverage for a firefighter: Blue Cross from 2011 – 2012 and 2013 to present United Health Care.

On cross-examination Deputy Chief Buie reviewed the November 24, 2011 Run Report and agreed it showed a mutual aid call in Phoenix. The personnel present were Chris Mankowski, Jeffrey Cook, and Lieutenant David Zumm. The summary of the event is 6 words long "[a]ssist Phoenix with an auto extrication." He agreed this doesn't explain the details of the activities of the 4 firefighters on that day. He was not present on any of the fire calls for which he has reviewed Run Reports in this matter. He agreed the only information on calls he gets is from these reports. Deputy Chief Buie denied getting notice from Chis Mankowski or Jeffrey Cook that Petitioner was injured on this call.

Deputy Chief Buie spoke to Petitioner upon his return to work in March 2012. He agreed that Petitioner had been off work 3 months, from November 29, 2011 through March 14, 2012. He testified he did not know why Petitioner was off work for 3 months but that "he called in sick those days." Staffing levels were his responsibility as Deputy Chief, that a firefighter being off for three months can affect staffing levels, and that he has to get other firefighters to cover these missed shifts. He did not ask anyone in those 3 months why Petitioner was off work and did not ask anyone if he had an "off the job" injury. He agreed that Petitioner could be counted on to give his full effort as a firefighter for the people of Harvey. He acknowledged that there were parts of the conversation he did not remember that he had with Petitioner when he returned to work in March 2012. He remembered Petitioner told him he had back problems but does not recall if Petitioner told him they occurred around November 24, 2011. He was aware Petitioner injured his back at work on June 24, 2014 and on October 21, 2015.

Petitioner testified on rebuttal that when he spoke to Deputy Chief Buie in March 2012 he said his back was hurting from a Thanksgiving. Deputy Chief Buie asked him why he was out of work for 3 months. Petitioner went home instead of reporting it because it was a shift change, it was Thanksgiving, and he didn't want to bother anyone. He described the accident to Deputy Chief Buie and told the shift commander about the accident connected with the work activity when he called-in sick the next day. Further, he told Lt. Jeff Cook and Lt. Dave Zumm at the scene that he had been hurt and the chain-of-command is that they report to Chief Deputy Buie.

The Arbitrator found this testimony was repetition of direct testimony given at the first session of the hearing. Accordingly, the Arbitrator disregarded the purported rebuttal testimony.

Evidence Deposition of Sergey Neckrysh, M.D., April 28, 2016 (PX #14)

Dr. Neckrysh is head of the spine division of the University of Illinois at Chicago Department of Neurosurgery. He has been board-certified in neurosurgery since 2009. He sees 2000-3000 patients per year, a third of them are for treatment of the lumbar spine. He performed 120-150 lumbar fusions in the previous 12 months.

Dr. Neckrysh had some independent recollection of his treatment of Petitioner but referred to his notes for details (PX #13). Dr. Neckrysh began treating Petitioner August 28, 2014.

Dr. Neckrysh confirmed the history and clinical findings from August 28, 2014. On his examination of Petitioner August 28, there was weakness in the right leg with knee extension, dorsiflexion and plantar flexion deficits 4/5. He reviewed X-rays from

2011 and 2014. The MRI from 2014 demonstrated a very advanced degeneration at L4-5 and L3-4, with resulting arthropathy at L4-5 with modic changes at the end plates and diffuse disc bulge resulted in bilateral and foraminal stenosis, right worse than left. Further, significant disc degeneration with diffuse disc bulge, facet arthropathy with bilateral foraminal stenosis. He recommended two-level decompression and fusion from L3-L5 to treat very extensive stenosis and decompression [of nerves] and reconstruction of spine with instrumentation to provide spinal stability. He restricted Petitioner from work as of November 4, 2014. Intra-operative findings were consistent with pre-operative indications. Petitioner progressed through therapy and wanted to return to fire-fighting. Dr. Neckrysh released him full duty after review of the July 2015 FCE.

Dr. Neckrysh prepared an addendum to the record on October 7, 2014, which corrected Petitioner's history of injuries as provided on the original date of treatment August 28. He explained his nurse takes a more detailed history wherein he had originally had back pain in November of 2011 when he pulled a lady out of a car, the second incident was June 24, 2014 when he re-aggravated his symptoms when falling with a hose while exiting a fire. Following the fall of June 24, he started having back pain and right leg pain which was worse than the back pain, he stated the right leg felt like it was hot and tingling with some left leg pain which had improved with therapy since June and taking medications, he had epidural injections which helped his left leg pain but not his right leg.

Dr. Neckrysh prepared two narrative reports at the request of Petitioner's attorney, May 2015 and March 8, 2016. The May 2015 report summarized petitioner's care from August 28, 2014. The March 8, 2016 report included opinions based on Petitioner's attorney's summary of Petitioner's expected trial testimony. Based upon a review of Petitioner's expected testimony of accident histories, his examination and treatment through January 2016, Dr. Neckrysh opined: Petitioner was restricted from work as of October 21, 2015 and that the October 21, 2015 work injury was a causative factor in Petitioner's current condition. He based his opinions on his examinations and clinical findings subsequent to the October 21, 2015 accident. Further, he opined, given Petitioner's symptomatic lumbar condition following his return to work in July 2015 and his history of work during that period, that Petitioner's disablement from active fire service relates to both the June 24, 2014 and October 21, 2015 work injuries. Further, he restricted Petitioner to sedentary duty with no lifting/pushing/pulling of anything heavier than 10 lbs. with no kneeling or stooping. He opined that these restrictions are related to his vocational history, work-related injuries and are permanent.

Based on Petitioner's symptoms, imaging findings, primarily the sequence of events and review of the prior records Dr. Neckrysh opined that Petitioner's need for

lumbar surgery was causally related to the June 24, 2014 work injury. If Petitioner had had a motor vehicle accident on September of 2014, he opined it would have no impact on his causal opinion. Further, he recommended the lumbar fusion on August 28, 2014, prior to the motor vehicle accident. Further, as of May 2015, Dr. Neckrysh opined that Petitioner's current condition of ill-being was causally related to the June 24, 2014 work injury. Further, he opined the June 24, 2014 work injury was 'a causative factor' in his work restrictions of November 14, 2014 through July 9, 2015. This was based on the same reasons for the need for surgery and the condition of ill-being.

Dr. Neckrysh reviewed the IME opinions of Dr. Michael Kornblatt. He agreed that Petitioner had a degenerative lumbar condition but disagreed with Dr. Kornblatt's opinions that Petitioner's current condition of his lumbar spine was related to the degenerative disc disease, unrelated to the June 24, 2014 work injury and that his condition was not accelerated or aggravated by this work injury. Dr. Neckrysh explained that Petitioner was working full-time prior to this accident, had a fall, and since has had weakness and neurological deficit which was not present prior to the fall. Further, Dr. Neckrysh disagreed with Dr. Kornblatt's opinion that the need for surgery related to the degenerative condition at L3-4, L4-5. Dr. Neckrysh opined this was a degenerative condition made symptomatic by the work-related incident and was a causative factor to the necessity of surgery.

Dr. Neckrysh treated Petitioner after his return to work. He explained he had gotten to know Petitioner and Petitioner was the kind of guy who would always be there first at the site of the fire or accident. Petitioner expressed that he thought he'd get re-injured if he performed at the same level he had in the past and expressed concern about his current fire-fighting ability. Further, Petitioner reported that when he performed his duties, since his return to work after surgery, he noticed when he had to fight large fires, carry heavy equipment or pick-up or move things around he'd be out of work for the next 3-4 days in significant back pain.

Petitioner returned to Dr. Neckrysh on November 12, 2015. Petitioner reinjured his back October 21, 2015, when he extracted 3 men weighing from 225-380 lbs. who were in a car that T-boned and went under a semi-trailer. It was a very intense situation and Petitioner had to act fast to get these victims out of the vehicle. He was squatting, kneeling, and pulling out 3 very large guys. Following the extraction, Petitioner himself collapsed with severe low back pain, right buttock pain, complete exhaustion. He was taken to Ingalls Memorial Hospital by ambulance. X-rays reflected no broken hardware. Petitioner had increasing low back pain going into the right buttock, worse than before. Dr. Neckrysh recommended an MRI and a pain consult and restricted Petitioner from work.

Dr. Neckrysh saw Petitioner January 7, 2016. Diagnostics tests were negative for any adjacent segmental failure. Dr. Neckrysh recommended Petitioner stay off work. He explained that Petitioner gives 100% at work, gave 200% effort in his recovery, went back to work, and tried his best. Petitioner managed through the back pain after surgery but he was taking intervals between his shifts. Further, the October 2015 event led to a significant exacerbation of back pain. It wasn't reasonable for Petitioner to come back as there is no light duty in his line of work and re-injury was likely if he returned to work.

Dr. Neckrysh reviewed the February 29, 2016 report of Michael Kornblatt, M.D., who opined Petitioner's diagnosis was "failed back syndrome" and that Petitioner's condition relates to multiple levels of pre-existing degenerative disc disease. Dr. Neckrysh strongly disagreed with the diagnosis of "failed back syndrome", explaining that Petitioner had returned to work following the surgery and was doing well for a general population whom have had lumbar surgery. He opined that the October 21, 2015 accident caused more than myofascial back pain, which usually resolves within a couple weeks, and that Petitioner was still symptomatic in January and probably continues to be symptomatic. He reviewed Dr. Kornblatt's recommendation for aggressive physical therapy, to which Dr. Neckrysh opined that Petitioner would be likely to re-injure himself if he returned to work.

Dr. Neckrysh opined, as he did in his March 8, 2016 narrative report that Petitioner is unable to return to work as a firefighter and, further, permanently restricted from lifting/pushing/pulling anything heavier than 10 pounds.

On cross-examination Dr. Neckrysh explained there was a progression on the 2014 MRI compared with the less impressive findings on the 2011 MRI. He reviewed the August 12, 2013 record of Dr. Strugala, who saw Petitioner in connection with a July 2013 car accident. Dr. Neckrysh noted that Petitioner had low back pain, increased over 2 days, then began to improve, got better quickly and he was back to work when this note was written.

Dr. Neckrysh explained that the surgery was for foraminal stenosis and mechanical back pain. Although stenosis is degenerative, Petitioner's symptoms were caused by nerve root compression, made symptomatic by the work injury. He further explained that Petitioner had lower extremity weakness which is a neurologic deficit which can only be resolved with surgery. He stated that surgery is conservative treatment because radical treatment would be to not operate and let him continue with a neurological deficit.

Dr. Neckrysh's did not change any opinions on cross-examination. On re-direct examination Dr. Neckrysh opined that he would not expect the aggressive rehabilitation recommended by Dr. Kornblatt to restore Petitioner to the functional capacity necessary to re-start his fire-fighting career.

Evidence Deposition of Michael Kornblatt, M.D., June 13, 2016 (RX #1)

Dr. Kornblatt is a board-certified orthopedic surgeon. Approximately 30% of his professional time is devoted to IMEs. He examined Petitioner November 10, 2014 and February 29, 2016 pursuant to §12 of the Act at the request of Respondent. Dr. Kornblatt reviewed Petitioner's records from Dr. DiLella, Dr. Neckrysh, an MRI report, Ingalls emergency room for the initial exam. He had not reviewed the original imaging of any MRI or CT scan of the lumbar spine. Petitioner objected to the offer of the §12 IME reports of Dr. Kornblatt dated November 17, 2014 (Dep #2) and February 29, 2016 (Dep #3) on hearsay grounds.

At his November 10, 2014 examination, Petitioner gave a history of being injured and dealing with back pain following the June 24, 2014 work injury. Petitioner reported increased back pain after a subsequent work injury in late October 2014 while moving and carrying car accident victims and his restrictions from work since that accident. Dr. Kornblatt noted complaints of moderate to severe constant central low back pain, pain into posterior thighs, right greater than left, more back pain than leg pain. Petitioner denied tingling and numbness but otherwise the examination was normal.

Dr. Kornblatt diagnosed mechanical back pain with chronic multilevel degenerative lumbar disc disease and a history of lumbosacral strain and contusion related to June 24, 2014 injury. He relied on the MRI reports, Petitioner's subjective complaints, and normal objective findings on examination, consistent with mechanical back pain with no abnormal neurologic findings. Further, Dr. Kornblatt opined that Petitioner's degenerative lumbar condition was not aggravated or accelerated by the June 24, 2014 work injury because there were no abnormal objective findings on his examination. Further, the 2014 MRI report did not reflect traumatic findings. Dr. Kornblatt denied finding any radicular symptoms or that he presented with any clinical nerve impingement and did not present as a good candidate for a 2-level lumbar decompression fusion. Dr. Kornblatt then opined that surgery was a reasonable treatment option but not related to the work accident. He opined that Petitioner reached MMI as of his November 10, 2014 examination for a strain suffered from the June 24, 2014 accident.

Dr. Kornblatt agreed that Dr. DiLella noted a positive straight-leg raise on examination of June 27, 2014. Further, Dr. Kornblatt's review of the radiology report of the July 3, 2014 lumbar MRI revealed small disc protrusions at L3-4 and L4-5, with narrowing of the neural foramina of L4 nerve roots bilaterally, which had progressed since 2011. He agreed that Dr. Neckrysh noted Petitioner had 4/5 weakness in the right leg with knee extension, weakness on dorsiflexion and plantarflexion on August 28, 2014. Dr. Kornblatt admitted these were objective findings.

Dr. Kornblatt reviewed the records of Dr. Neckrysh, including the December 1, 2014 operative report which reflected L3, L4, and partial L5 laminectomy with facectomies at L3-4, L4-5 and decompression of the L3, L4, and L5 nerve roots, internal fixation and interbody fusion for a diagnosis of lumbar spondylitic radiculopathy. Further, he reviewed the post-surgical treatment records including his history of significant back pain upon return to work necessitating 3-4 days off work in between shifts and concern regarding his future ability to continue heavy work.

Dr. Kornblatt also reviewed the Ingalls records after the work injury of October 21, 2015 with back pain, right buttock numbness, and Petitioner's restrictions from work. He testified he also reviewed the pain treatment of Dr. Jido of facet block injections on January 5, 2016 and another injection.

On his February 29, 2016 examination Petitioner complained of central low back pain, throbbing, aching worsening with significant sitting, twisting, standing, walking, and bending. He diagnosed Petitioner with failed fusion syndrome, because Petitioner had not improved, and a strain relating to the October 21, 2015 extrication work injury. He recommended aggressive therapy and work restrictions of light to medium lifting to 30 lbs. occasional, 15 lbs. frequently, which relate to the October 21 work injury and the back surgery.

On cross-examination Dr. Kornblatt acknowledged that he had not reviewed any original MRI or X-ray imaging in this matter. He admitted that he earned $1,000.00 for each of his two exams and $2,000.00 for the deposition in this matter. He agreed he had not received any evidence which indicated that Petitioner had not been working full duty since his return to work following his 2011 work-related back injury until the June 24, 2014 work injury. He reiterated that Petitioner returned to full duty firefighting in July 2015 with reports of significant back pain and 3-4 days off work following any significant fire involvement in his medical records of Dr. Neckrysh. Further, he agreed that Petitioner worked in a condition of back pain following the June 24, 2014 work injury and that he had another work injury in October 2014 with back pain.

During his examination with Dr. Kornblatt in November 2014 Petitioner complained of severe low back pain with radiating pain in to his thighs bilaterally. Further, that the July 3, 2014 lumbar radiology report showed progressive narrowing at the exiting L4 foramina. He agreed there is nothing about the policies of his practice that would have prevented a more recent examination of the Petitioner or a review of the X-ray or MRI films.

Dr. Kornblatt stated that Petitioner never needed surgery. He has never operated on anyone in his practice without having first personally reviewing MRI and X-ray films. He reiterated that Petitioner presented without clinical surgical indications. He maintained there were no abnormal objective signs of pathology on his examination. He described Petitioner's radiating thigh pain as subjective. He also described the numbness, tingling, and weakness noted on his intake form (PetDepX #1) were subjective complaints. Dr. Kornblatt stated Petitioner did not suffer an aggravation of a pre-existing entity in his lumbar spine, despite a history of twisting and falling when carrying a fully charged heavy hose, and that Petitioner never presented with clinical radiculopathy. Knowledge that Dr. Dylan noted radicular pain July 27, 2014 and opined on July 11, 2014 that Petitioner had aggravated his back pain in the work accident.

Dr. Kornblatt disagreed with Dr. DiLella's diagnosis of herniated discs at L3-4 and L4-5, stating clearly that Petitioner did not have herniated discs at L3-4 and L4-5. He acknowledged that the December 2014 operative report noted bilateral nerve decompression at L3-4, L4, and L5. He agreed that the radiologist's interpretation of the July 3, 2014 lumbar MRI noted progression of bilateral narrowing of the neural foramina at the L4 nerve roots. He denied that Petitioner's presentation at the November 2016 IME with moderate to severe central low back pain with radiation into his posterior thighs, bilateral narrowing of the neural foramina at the L4 nerve roots and symptomatic radiculopathy provided a reasonable basis for surgery. He agreed weakness is an objective complaint and that Petitioner presented with right leg weakness with Dr. Neckrysh on August 28, 2014.

Dr. Kornblatt attributed the need for trigger point injections and physical therapy to a strain occurring on October 21, 2015. He agreed removing and carrying an individual from a car can exacerbate a degenerative condition of the lumbar spine. He acknowledged that the report of the July 3, 2014 lumbar MRI noted a generalized central disc protrusion at L3-4 and a protrusion extending posterior laterally to the left from the L4-5 disc causing mild mass regional effect.

Petitioner's vocational rehabilitation counselor, Jacky Ormsby, CRC, was called by Petitioner. She has a Master's Degree in Rehabilitation Counseling, Certified

Rehabilitation Counselor certification, and is a Licensed Clinical Professional Counselor. She has evaluated thousands of individuals and worked in this capacity since 1999. She is familiar with the job duties of a fire fighter from interviewing, observing and reading. She has worked with several other firefighters.

Ms. Ormsby testified that the significant demographic details of Petitioner were a 53 year-old male who sustained 4 work injuries to his back in the course of his firefighting. She reviewed the transcript of Dr. Neckrysh's April 2, 2016 deposition. She noted Dr. Neckrysh's restrictions were sedentary duty with no lifting/pushing/p pulling more than 10 lbs., and no kneeling or stooping. She was familiar with Petitioner's work activities following his return to work in 2014 and 2015 and had reviewed the Run Reports for those periods. She understood his duties were lighter work, cleaning the firehouse, not any real lifting and he hadn't recalled to her any active fire responses where he had to "Go full-out, heavy work". Further, Petitioner had a lot of pain during this time and used vacation time to recoup between shifts. She noted Dr. Neckrysh's opinions indicated that aggressive rehabilitation would not make a significant difference. Petitioner's education background was a high school diploma through the Navy, aviation structural mechanical duties, classes in management, building and structure but no state testing, and a Class B CDL.

Petitioner also had a work history prior to firefighting was as a "bottom-man" putting in sewers, installing piping and working in ditches. This was a heavy level duty job. She opined that Petitioner's job history did not provide any specific transferable skills for future vocational opportunities. He had no real computer skills and assumed no typing skills. She opined Petitioner had no meaningful transferable skill. Being a firefighter doesn't lead to other positions Petitioner can transfer to. He can't teach firefighting and he can't do the work or any physical type work. He did some supervisory work as a firefighter but that doesn't transfer over if he doesn't have the skills to do a job in the first place. Further, the manual labor skill of bottom-man has no transferable skill. Firefighting skills are very specialized and are not easy to transfer.

Ms. Ormsby opined Petitioner is unable to perform his usual and customary occupation as a firefighter. He can no longer perform firefighting with his restrictions and he cannot be accommodated with his restrictions. Petitioner would put himself and others in jeopardy if he attempted firefighting. Ms. Ormsby opined that there is no position that Petitioner can do relating to firefighting.

Further, Ms. Ormsby opined, based on Petitioner's age, lack of skills, lack of computer training, and his lack of education, that there is no sustainable labor market for him or an abundance of jobs. She based her opinion on the fact that he does not possess the background, skills, or education to work in a sedentary job. She explained

the difference between being physically capable of performing a job versus being a competitive candidate for hire as someone who can perform the job versus someone having the background and skills to actually be hired. Further, if someone is not a competitive candidate for a job then they can't get hired and can't earn a specified wage rate. Hypothetically, if one were to assume he was capable of light to medium with 35 lb. maximum lifting and 20 lb. frequently, Ms. Ormsby opined it would not change her opinions because of his lack of skills and education-adding 10-15 lbs. of lifting isn't going to make him employable.

Ms. Ormsby reviewed the report and labor market surveys of September 1 and September 14, 2016 by Edward P. Steffen. She opined that the positions in his labor market survey were not verified with a subsequent phone call; there is not a single phone number on the survey and it just lists the website. It appears like Mr. Steffen just copied and pasted information, "there are exclamation points" (from an advertisement). She further testified that verification is important because of the 21 jobs on the September 1, 2016 survey, 15 do not list physical demands and, therefore there was no way of knowing if Petitioner could physically perform these jobs. Of the 21, 5 of them exceeded his sedentary physical restrictions. There is one position that is within sedentary but she could not tell what skills or abilities are needed to perform the job.

Ms. Ormsby concluded Mr. Steffen's September 1, 2016 labor market survey is not a valid survey as it does not provide enough information to prove he can do any of these jobs, if anything, the opposite. She explained her familiarity with the "Express Service provider" as listed for Chevy of Frankfurt on page 2 of the survey. It is a position where one uses a computer and the job is to sell whatever you can to the customer, the more sold, the higher your commission, which is why it lists $13.00 per hour plus commission. The person walks back and forth between the customer and the mechanic. Petitioner does not possess the required one year automotive experience, one year customer service experience, familiarity with auto systems and operations, one year auto inspection and processing of work orders. Further, Petitioner does not possess the preferred degree in business administration or automotive industry. Under the physical requirements section it states "no information provided", which reflects no one called to verify the job, further confirming the survey is not valid. Ms. Ormsby opined based on the description available Petitioner is not qualified for the position nor is he a competitive candidate for the position. Further, she has been placing individuals for 21 years and had never placed someone in a "service advisor" who did not have prior experience, they might say it doesn't matter and communication skills matter; but she's never gotten someone this job without prior experience.

Ms. Ormsby further noted that Edward Steffen's Market Survey that the listing at page 4 for "Service Writer" requires 4 years of automotive service writing experience

and 50 lb. lifting requirement. A lot of the listings in the survey were for this position. Ms. Ormsby noted that Petitioner does not have the experience, that the lifting requirement exceeds his restrictions, and that he doesn't have the education for this position. On page 8, the Bon Appetite Mgmt. Company supervisor position reflects requirements of prior supervisory experience but no information on educational or physical requirements with no phone number, simply a website. Due to lack of information she could not determine if Petitioner would be a candidate, therefore it is not a valid listing.

Ms. Ormsby also testified that Petitioner does not possess the requested industry experience, background in video or electronics, Microsoft Office skills or the ability to work in a smoke-filled environment or ability to sit 100% of the shift to be a surveillance officer for the gaming industry at Pinnacle Entertainment. She reviewed the 6 bilingual sales floater jobs listings with CarMax. Further, she called the listing in Aurora and found it was in Naperville. She spoke to Maria, who stated "we don't even have that job" and that she had never heard of such a position. Ms. Ormsby stated there is no indication of the physical requirements of the job and she can't tell if Petitioner would be capable of physically performing the job and the listings have not been verified. At page 11 she reviewed the "bilingual warehouse coach associate" and the typical physical requirements range from light/medium to heavy/very heavy. The first line of the job description indicates "performs the functions of a warehouse role in a high volume for a fast-paced environment. Based upon his restrictions Ms. Ormsby opined Petitioner does not qualify for this job.

Ms. Ormsby further opined Petitioner does not have the aptitude, disposition, vocational background, or computer skills to qualify for a sales job. Further, if he were to apply in a competitive hiring situation [i.e. against other applicants] he wouldn't get an interview. He wouldn't be a competitive candidate and no one would consider him for a food service job as it's a physical job- a lot of standing, walking, lifting and he has no experience. He would not be a competitive candidate for a "loss prevention officer."

On cross-examination Ms. Ormsby testified that she has never placed anyone who is 53 years old with Petitioner's education, lack of transferable skills, background and sedentary restrictions. There is not a stable labor market for that type of person.

On re-direct examination Ms. Ormsby explained that employers don't want to hire an older worker due to different skill set, higher wages, set in their ways, possibility of getting sick. They want to hire a younger person, train them the way they want and pay them less. Ms. Ormsby's opinion is based upon common sense, research and placement experience, looking for jobs, doing numerous labor market surveys and job

research and development. Older applicants do not get call-backs, and people over the age of 50 are set in their ways and don't want to learn new things. In her experience people over the age of 45 don't have the computer skills and are electronically challenged. Petitioner does not have the skills to be hired in jobs of a sedentary nature, i.e. computer skills. She explained there may be sedentary jobs in the labor market but he does not possess the experience, skills or computer proficiency to be capable of performing them, he won't get hired or even called back.

Respondent called Edward P. Steffan, a certified vocational rehabilitation counselor and owner of EPS Rehabilitation, Inc., as a witness at trial. Mr. Steffan performed a vocational evaluation of Petitioner. He drafted an initial rehabilitation plan August 15, 2016 and labor market surveys September 1, 2016, based on Dr. Kornblatt's February 29, 2016 restrictions, and on September 14, 2016, based on Dr. Neckrysh's March 8, 2016 restrictions (RX #28, RX #29, & RX #30). Petitioner's attorney was present for the initial evaluation on August 8, 2016. Mr. Steffan reviewed Dr. Kornblatt's February 29, 2016 IME report, Dr. Neckrysh's March 8, 2016, and Jacky Ormsby's report to assist in forming his opinions. Mr. Steffan testified from his own reports.

Mr. Steffan noted that Petitioner joined the U.S. Navy after 3 years of high school. He earned a GED while in the Navy. Petitioner took classes in engineering and structures management but never obtained certification. He can on hunt-and-peck type and use a computer mouse. Mr. Steffan also considered Petitioner's Navy service as an aviation mechanic in his evaluation. He noted 19 positions within Dr. Kornblatt's restrictions with a wage range of $10.50-$20.00 per hour according to the Bureau of Labor market statistics in the September 1, 2016, although only 13 are bolded and he said only the bolded positions are appropriate. He opined he should be able to obtain gainful employment and he has access to positions paying this amount (TA 252-253). Mr. Steffan indicated Petitioner's knowledge of car repair and as mechanic in the Navy as why he cited the Service Advisor position at Honda on Grand and Toyota of Naperville. Petitioner's management and supervisory experience is why he cited the janitorial assistant manager position at GDI Services, CVS Health, Bon Appetite Mgmt. Co., and Compass Group Supervisor positions. His basis for Red Hawk Fire & Security based upon his background as a firefighter. The Security Monitoring position at Home Depot where Petitioner would monitor video screens for loss prevention. The bilingual sales job at CarMax is due to Petitioner's mechanical aptitude at $10.50 per hour. Automotive technician and mechanics mean salary was $20.96 per hour, sales & related occupations was $19.89 per hour. Mr. Steffan maintained that with Dr. Kornblatt's opinions there are any manner of employment opportunities related to bottom-man in a management trainee in equipment manufacturing, although he didn't specify any.

Mr. Steffan's September 14, 2016 labor market sampling was based on Dr. Neckrysh's restrictions of sedentary with no lifting, pulling, or pushing more than 10 lbs.; no kneeling or stooping. He had 18 responses to his labor market sampling; 7 of which are commensurate with Petitioner's rehabilitation variables paying $9.50 to $15.00 in which he could find gainful employment. The bilingual floater at CarMax paying $10.50 per hour required a GED. Based upon his prior work experience and stated ability to speak Spanish/English Mr. Steffan recommended a bilingual warehouse associate, light assembler paying $9.50, and casino surveillance operator position paying $12.50 per hour- requiring two-years' experience in surveillance.

Mr. Steffan opined Petitioner could work as a security monitor. He opined there is a stable labor market for Petitioner regularly and continuously available and that he disagreed with Ms. Ormsby's opinions. The basis for the stable labor market is the positions he outlined in his limited labor market sampling.

On cross-examination Mr. Steffan agreed that, given Petitioner's other vocational variables, with either Dr. Kornblatt's (light-medium] or Dr. Neckrysh's restrictions (sedentary, 10lb, no kneeling or stooping) Petitioner would have virtually the same earning capacity whether he could only work in a seated position or carry around 20 lbs. He confirmed Petitioner's earnings for mechanics were the median of individuals working in those positions. When Mr. Steffan concluded that Petitioner "has access" to positions paying between $10.50 and $20.96 hourly, he explained those positions exist in the labor market in which he resides (not that he's qualified to be hired). Further, when he was asked if he called and verified these job listings Mr. Steffan ultimately stated he just got the information from a website. Mr. Steffan testified that if Dr. Kornblatt's opinion on restrictions was different in his evidence deposition it would affect his opinions and Petitioner's access to jobs in his September 1, 2016 report.

Mr. Steffan agreed for an individual to have an earning capacity they must be a competitive candidate to be hired over other applicants. Further, that if other applicants have more applicable skills they stand a better chance of getting hired than a person who doesn't. He agreed prospective employers are prejudiced against 53 year-old workers, although the prejudice could be variable. Also, some employers do not like to hire people who have been out of work for a while. He agreed that firefighters have a very specialized set of skills and transferability of skills is limited for that reason. Although he focused on Service Advisor jobs he performed no testing on Petitioner's automotive capability but assumed because he was an Aviation Mechanic in the Navy 35 years ago he thought the area appropriate even though the skills don't transfer.

Mr. Steffan maintained Petitioner told him he had supervisor experience when he worked as a Firefighter for 19 years but never rose above the rank of firefighter. If

Petitioner had no supervisory experience on that job or as a firefighter it possibly would affect the availability of supervisory jobs to Petitioner. He didn't know if Petitioner had any contemporary experience repairing cars. Mr. Steffan agreed that Petitioner had no experience with Microsoft Office. Petitioner types by the "hunt and peck" method and had no experience "cold-calling". He would not agree Petitioner is not a good candidate for a computer job. Mr. Steffan characterized the job requirements of employers in job listings as "dream requirements" and evaded the question of whether computer proficiency was a "dream requirement" of today's employers. Mr. Steffan was vague of whether the Petitioner's lack of Microsoft software familiarity would likely cause his application to be "put aside" and someone with that experience is going to get an interview over him when the job requires familiarity with Word. He didn't test Petitioner's ability to speak Spanish and was unaware that Petitioner had not spoken Spanish on a daily basis since he was a child.

The job listings Mr. Steffan included in his reports that are not bolded; he agrees Petitioner is not qualified or can't work them. He "bolded" the position with Bon Appetite, but didn't verify the listing with a phone call, he doesn't know what industry the job in in, but states he thought it was a possible he could pursue it notwithstanding no information on the physical requirements of the job. He indicated a Red Hawk & Fire Security position as a "Representative." Mr. Steffen agreed Petitioner does not possess the required minimum 5 years' experience as a successful Fire & Security Systems Integrated Sales representative and it was based upon Dr. Kornblatt's restrictions. Further, he agreed the listings for CarMax bilingual floater do not reflect the physical requirements of the job and he agreed if the paperwork processing was on a computer Petitioner would not get hired.

On further cross-examination, Mr. Steffan noted the Integrity Staffing Solutions "Warehouse Coach Associate" requirements of the job states "perform functions of a warehouse role in a high-volume, fast-paced environment" are consistent with either Dr. Kornblatt or Dr. Neckrysh's restrictions; Mr. Steffan replied "this isn't saying he performs the functions but they are describing what goes on around him. He did not read it to state what the applicant is expected to perform but the work setting." Mr. Steffan did not clearly answer whether he expected the job allowed Petitioner to "stand still" while everything around him is moving in a fast pace. When asked if Petitioner's lack of ability to write in Spanish would be a bar to hire. He opined the stated job requirement of excellent Spanish and English verbal and written skills are only a "dream requirement" of the "Warehouse Coach" listing. Mr. Steffan agreed due to his sedentary restrictions with no lifting, pulling or pushing weight heavier than 10 lbs. with no kneeling or stooping Petitioner was not a candidate to the listing at page 7 of R2M Holdings light assembly requiring full range of body motion and above-average manual dexterity. He agreed he could not work as a security monitor.

On re-direct examination Mr. Steffan reiterated his opinion that the Red Hawk Fire Security Sales job which was suggested based upon Petitioner's fire-fighting background. On re-cross-examination he agreed that Petitioner does not possess the required skills of "Strong prospecting ability, ability to build customer relationships through consultative selling and promoting customer confidence.

At the close of oral testimony, the parties offered various exhibits. Respondent offered its Exhibit #33, Dr. Kornblatt's November 17, 2014 IME report, and its Exhibit #34, Dr. Kornblatt's February 29, 2016 IME report. Petitioner's hearsay objections were sustained and the exhibits were refused. Respondent offered its exhibits #35, #36, and #37, reports by vocational counselor Edward Steffan. Petitioner objected to admission of the Steffan reports on grounds of hearsay and failure to lay a business record foundation. The Arbitrator reserved ruling.

On later consideration the Arbitrator determined that Respondent's Exhibits #35, #36, and #37 were business records but that a proper business record foundation had not been laid in accord with Illinois Rule of Evidence 803(6). The Arbitrator did not admit those exhibits and disregarded them.

CONCLUSIONS OF LAW

12 WC 3022 (DOI 11/24/2011):

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

The Arbitrator finds that Petitioner failed to prove he was injured in an accident that arose out of and in the course of his employment.

Petitioner testified to an on-duty event that was certainly capable of causing a low back injury. Petitioner testified that he had a sudden onset of low back pain. He acknowledged that he had had low back pain in 2007 which had resolved. However, when Petitioner consulted Dr. Lim on November 30, 2011, less than a week after the claimed incident, he reported that his back pain had returned within the previous 3 months and that there had been no precipitating event. In addition, when Petitioner was examined by pain specialist Dr. Qasim on December 29, 2011, he did not give a history of a work accident. Also, when Petitioner was examined by Dr. Michael Kornblatt November 17, 2014 for a §12 IME, he did not report a history of a work-related back injury in November 2011.

Petitioner further testified that he informed the Incident Commander, Lt. Jeff Cook, of his work injury and yet did not make a formal written report as required by work rules and procedures.

The evidence also showed that while he was off work from December 2, 2011 to March 18, 2012 he was paid sick time as opposed to job injury time.

Petitioner did give a history to the physical therapist at Advocate on February 2, 2012 of onset of his back pain when lifting a large woman out of a damaged vehicle, but that one report is overwhelmed by the absence of reference to the claimed injury in the other records.

The totality of this evidence demonstrates Petitioner's lack of credibility on this issue. Petitioner did not report a work accident to the first two healthcare providers, one of whom he saw within one week of the claimed accidental injury.

E: Was timely notice of the accident given to Respondent?

The Arbitrator finds that Petitioner failed to prove that he gave notice of his claimed accidental injury to Respondent within the time period set forth in §6(c) of the Act.

As noted above Petitioner lacked credibility regarding this claimed accident. He testified that he gave oral notice to the shift commander, Lt. Cook, immediately after the claimed accident. Petitioner was fully aware of Respondent's policies and procedures for reporting on-duty injuries and yet did not report his claimed injury in accord with those policies and procedures. This is in accord with his failure to report to his healthcare providers and Respondent's §12 examining physician that he had been injured in a work-related accident on November 24, 2011.

The Arbitrator notes that Petitioner's Application for Adjustment was filed 63 days after the claimed date of injury.

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

In light of the Arbitrator's finding of no compensable accident this issue is moot.

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

In light of the Arbitrator's finding of no compensable accident this issue is moot.

K: What temporary benefits are in dispute? TTD

In light of the Arbitrator's finding of no compensable accident this issue is moot.

L: What is the nature and extent of the injury?

In light of the Arbitrator's finding of no compensable accident this issue is moot.

M: Should penalties be imposed upon Respondent?

In light of the Arbitrator's finding of no compensable accident this issue is moot.

N: Is Respondent due any §8(j)2 credit?

In light of the Arbitrator's finding of no compensable accident, Respondent is entitled to a credit on any and all total temporary disability benefits paid for the injuries claimed from the alleged November 24, 2011 event.

14 WC 27354 (DOI: 6/24/2014):

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

There was no dispute that Petitioner was injured in an accident that arose out of and in the course of his employment as a firefighter. Petitioner received emergency care for a low back injury at Ingalls Memorial Hospital immediately after the accident. Petitioner was initially treated by orthopedic surgeon Dr. Carl DiLella. Dr. DiLella diagnosed herniated lumbar discs. Petitioner eventually came under the care of neurosurgeon Dr. Sergey Neckrysh at UIC Hospital. Dr. Neckrysh performed lumbar fusion surgery December 1, 2014.

Dr. Neckrysh testified at his evidence deposition that Petitioner's pre-existing arthritic spondylosis was aggravated by the June 24, 2014 work accident, which, due to symptoms and clinical signs, made surgery necessary. Petitioner was examined pursuant to §12 of Act by orthopedic surgeon Dr. Michael Kornblatt. Dr. Kornblatt opined, in disagreement with Dr. Neckrysh, that Petitioner was not a surgical candidate. Dr. Kornblatt noted petitioner's pre-existing degenerative disc disease. However, he opined that Petitioner had only sustained a lumbar strain from the June 24 work accident.

The Arbitrator notes that treating physicians' opinions are often given greater weight over the opinions of retained experts. Treating physicians have a longer and broader perspective of the patient's clinical condition. A retained medical expert often has only one clinical encounter. In this case Dr. Kornblatt performed two IMEs. He also reviewed extensive medical records of Petitioner. Notably, Dr. Kornblatt did not review original radiological studies. In addition, despite consistent findings of radiculopathy by Petitioner's treating physicians, Dr. Kornblatt dismissed their significance despite his own reporting of radicular complaints by Petitioner. Likewise,

Dr. Kornblatt did not account for the significant clinical finding of weakness in Petitioner's right lower extremity noted by Petitioner's treating physicians. Further, therapy records, as well as those of treating physicians, demonstrate a history of the back condition substantially worsening due to the June 24, 2014 work injury.

Even accounting for not witnessing Dr. Kornblatt's live testimony, the transcript of his evidence deposition demonstrated a demeanor which eroded the credibility of his opinions. Dr. Kornblatt was frequently evasive and obstructive. He refused to answer certain questions.

These were all factors which undermine the persuasiveness of his opinions regarding causation of Petitioner's current condition of ill-being. Dr. Neckrysh's opinions regarding causation of Petitioner's current condition of ill-being are credible and reasonable. Accordingly, the Arbitrator adopts the causation opinions of Dr. Neckrysh.

G: What were Petitioner's earnings?

According to Arbitrator's Exhibit #2, Request for Hearing and Stipulation, Petitioner claims an average weekly wage of $1,221.94, based on annual earnings of $63,540.62. Respondent claims Petitioner's average weekly wage was $1,162.63, based on annual earnings of $60,472.12.

Petitioner did not present evidence of his earnings during the year preceding the June 24, 2014 injury. Respondent presented its exhibits numbered 10 and 11 showing earnings from June 24, 2013 to June 24, 2014, Exhibit #10, and from October 20, 2013 to October 20, 2014, Exhibit #11.

The Arbitrator finds that Petitioner failed to prove that his average weekly wage was $1,221.94. Therefore, pursuant to the stipulation in Arbitrator's Exhibit #2, the Arbitrator finds that Petitioner's average weekly wage at the time of his June 24, 2014 accident was $1,162.63.

J: Were 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 previously found that Petitioner's current condition of ill-being is causally connected to his work accident on June 24, 2014. Specifically, the Arbitrator found the causation opinion of Dr. Sergey Neckrysh credible and reasonable. Accordingly, the Arbitrator finds that the medical care provided to Petitioner by Ingalls Memorial Hospital, Dr. Carl DiLella at Ridge Orthopedics, ATI Physical Therapy for physical therapy, Advocate Medical Group for primary care from Drs. Gormley and Bonk, Advocate Christ Medical Center for work hardening, and Dr. Neckrysh at UIC

Hospital, as well as UIC Hospital itself, through July 12, 2015, Petitioner's release to full duty, was reasonable and necessary. Likewise, the Arbitrator finds that professional charges for the foregoing medical care was reasonable.

Petitioner's Exhibit #22 also included billing statements from Optum, which incorporated billing entries from July 12, 2014 through July 8, 2015. These billing entries encompass the time period of Petitioner's reasonable and necessary medical care from the above-named healthcare providers for the injuries he sustained in the June 24, 2014 work accident. These charges and fees tend to be charges for health care not included in other billing. To the extent that the Optum charges do not duplicate charges and fees from the other healthcare providers, the Arbitrator also finds the Optum charges reasonable.

Respondent shall pay any and all unpaid balances for the foregoing charges and fees, to be adjusted in accord with the medical fee schedule provided by §8.2 of the Act.

K: What temporary benefits are in dispute? TTD

Petitioner claims, and Respondent disputes, that he is entitled to total temporary disability benefits from June 25 through July 15, 2014, from November 1, 2014 through July 12, 2015, and from October 22, 2015 through October 21, 2016. Petitioner was paid full salary by Respondent pursuant to the Public Employees Disability Act (PEDA).

The Arbitrator finds that, based on the evidence, Petitioner was totally and temporarily disabled from June 25 through July 15, 2014 and from October 30, 2014 through July 12, 2015, as claimed. Inasmuch as Petitioner returned to full duty after July 12, 2015, any subsequent claim for TTD is denied, particularly in light of Petitioner claim of a separate compensable injury on October 21, 2015.

L: What is the nature and extent of the injury?

Petitioner's permanent partial disability was assessed in accord with §8.1b of the Act:

i) No AMA impairment rating was offered in evidence. The Arbitrator could give no weight to this factor.

ii) Petitioner was a full duty firefighter at the time of his injury on June 24, 2014. The occupation of firefighter frequently requires strenuous activity and heavy lifting in awkward postures. The Arbitrator gives great weight to this factor.

iii) Petitioner was 52 years old at the time of his June 24, 2014 accidental injury. He had a statistical life expectancy of 30 years. Petitioner returned to work but testified that he was limited by continuing back pain due to subsequent

accidental injuries it is unclear whether Petitioner would have continued suffering from chronic low back pain but for the subsequent injuries. The Arbitrator gives moderate weight to this factor.

iv) Petitioner received benefits under PEDA (Public Employee Disability Act) during the time of his disability. When he returned to work in July 2015 he received the same pay, apparently in accord with a collective bargaining agreement. The Arbitrator gives no weight to this factor.

v) Petitioner clearly suffered from a pre-existing degenerative lumbar spine prior to his work accident on June 24, 2014. His treating physicians, particularly Dr. Neckrysh, persuasively opined that Petitioner sustained an aggravation of his pre-existing degenerative condition. Due to the seriousness of the aggravation Petitioner underwent failed conservative care and ultimately surgical decompression and fusion in his lumbar spine from L3 to L5. Post-operative therapy was successful enough to allow Petitioner to return to work July 13, 2015. The Arbitrator gives great weight to the aggressive medical care required to permit Petitioner to return to full duty as a firefighter.

In light of all the evidence, including the five factors noted above, the Arbitrator finds that Petitioner sustained a loss of 25% of a person-as-a-whole, 125 weeks.

M: Should penalties be imposed upon Respondent?

Respondent terminated benefits and refused to authorize payment for certain medical care and procedures provided to Petitioner. Respondent relied on opinions of its retained §12 expert Dr. Michael Kornblatt in terminating benefits and refusing to authorize medical care and treatment. Although the Arbitrator did not find Dr. Kornblatt's opinions persuasive or credible, it was neither frivolous nor vexatious for Respondent to rely on Dr. Kornblatt's opinions. Therefore, Petitioner's request for §19(k) penalties is denied.

§19(l) of the Act provides for penalties for delay in payment of benefits. An employer has 14 days after receipt of a demand for payment of benefits in which to authorize payment or set forth in writing why payment is not made. The record is not clear of when Petitioner requested payment of the benefits which were not paid by Respondent or whether Respondent failed to notify Petitioner in writing why payment would not be made. Therefore, the Arbitrator finds that Petitioner failed to prove that he was entitled to §19(l) penalties.

In light of the foregoing, the Arbitrator also finds that Petitioner failed to prove he was entitled to attorneys' fees pursuant to §16 of the Act.

N: Is Respondent due any §8(j)2 credit?

Petitioner claims entitlement to TTD benefits from June 25 through July 15, 2014, from October 30, 2014 through July 12, 2015, and from October 22, 2015 through October 21, 2016 (AX# 2). Respondent claims credits totaling $119,268.59 for payments pursuant to PEDA, from June 25 through July 15, 2014, from October 30, 2014 through July 12, 2015, and from October 22, 2015 through October 21, 2016.

PEDA provides for a continuation of full pay for firefighters injured in the line of duty. 5 ILCS 345. The Act provides that the employee shall continue to be paid on the same basis as before the injury, with no deductions from his sick leave credits or vacation during the time he is unable to perform his duties due to the results of the work injury, but not longer than 1 year in relation to the same injury. Any salary compensation due the injured employee from Workers' Compensation shall revert to the public entity employer during the time that continuing compensation is paid to him under PEDA (RX #12).

§8(j)2 of the Act provides:

> Nothing contained in this Act shall be construed to give the employer or the insurance carrier the right to credit for any benefits or payments received by the employee other than compensation payments provided by this Act, and where the employee receives payments other than compensation payments, whether as full or partial salary, group insurance benefits, bonuses, annuities or any other payments, the employer or insurance carrier shall receive credit for each such payment only to the extent of the compensation that would have been payable during the period covered by such payment.

The Arbitrator notes that PEDA is not an employer funded group health plan. The Arbitrator finds that Respondent failed to prove that it is entitled to a credit, but if any credit is due the credit is limited only to the amount equivalent to TTD benefits paid for the disputed periods of total temporary disability.

O: Did Petitioner exceed the two-healthcare provider rule set forth in §8(a) of the Act?

The Arbitrator finds that Petitioner did not exceed the two-healthcare provider rule set forth in §8(a) of the Act.

Petitioner was clearly injured in a work-related accident June 24, 2014. He was transported by ambulance Ingalls Memorial Hospital, which is not an employee choice. Upon discharge from Ingalls' emergency department Petitioner was referred to Dr. DiLella. Dr. DiLella was then in the chain of referrals. Petitioner followed up with

Advocate Medical Group, his primary care provider, June 28, 2014, his first choice of provider. Petitioner was seen by Drs. Nanette Gormley and Robert Bonk. Petitioner testified that Dr. Bonk referred him to neurosurgeon Dr. Sergey Neckrysh at UIC Hospital.

On October 7, 2014 Dr. Neckrysh wrote a letter to Dr. Bonk enclosing a clinical note, a customary practice to keep referring physicians abreast of their patient's continuing care. In addition, upon discharge from UIC Hospital December 5, 2014 Petitioner was advised to follow up with both Dr. Neckrysh and Dr. Bonk. A copy of the discharge summary was faxed to Dr. Bonk. There is no documentary evidence regarding Dr. Bonk's referral of Petitioner to Dr. Neckrysh. However, there is ample circumstantial evidence of Dr. Bonk's referral so as to establish a chain of referrals from the first-choice healthcare provider.

15 WC 9789 (DOI: 10/20/2014):

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

The Arbitrator finds that Petitioner failed to prove that he sustained an accidental injury on October 20, 2014 that arose out of and in the course of his employment by Respondent.

Petitioner testified that he was injured during a fire call. He further testified that he notified the on-site commander Lt. Wojciechowski and also firefighter Bob Schmidt that he had been injured in response to the fire on October 20, 2014. He also testified that upon review turning to the fire station he reported his injury to Lt. Cook. Deputy Chief Buie testified that it was his responsibility to accurately maintain records of firefighter duty injuries. He testified that he did not recall being informed by anyone that Petitioner had been injured on the October 20, 2014 fire call.

Although Petitioner's testimony was unrebutted, the Arbitrator did not find that testimony credible. As with the claimed November 24, 2011 injury, Petitioner was fully aware of department policies and procedures requiring firefighters to report duty injuries immediately. Petitioner testified that he did not file an on-duty injury report, confirmed by chief deputy Buie. The fire run report for November 20, 2014 is silent regarding any injuries reported by responding firefighters.

In addition, at the time of the claimed injury Petitioner was awaiting authorization for the surgery recommended by Dr. Neckrysh. Petitioner was seen by Advanced Practice Nurse Sybille Nelson December 1, 2014 for his surgical admission. There was no note in the admitting record that Petitioner reported that he had been

injured on the job on October 20, 2014. Likewise, Dr. Neckrysh's clinical records are also silent as to any report by Petitioner that he had been injured on October 20. Postsurgical notes by APN Allison Blood and Dr. Neckrysh on December 6, 2014 do not document a report by Petitioner of an injury or aggravation of his condition due to a work-related accident on October 20, 2014.

The Arbitrator finds that Petitioner's claim of the injury on October 20, 2014 is unconvincing given all circumstances prevailing at that time. Petitioner was under active care for injuries he sustained in June 2014. That surgery was deemed necessary by Dr. Neckrysh due to the low back injuries sustained by Petitioner in June 2014. The Arbitrator finds that it is highly unlikely that Petitioner would not have reported a new back injury or an injury which aggravated his previous back injury to either his employer or his treating physician.

Therefore, as stated above, the Arbitrator finds that Petitioner failed to prove that he sustained an accidental injury on October 20, 2014 that arose out of and in the course of his employment.

E: Was timely notice of the accident given to Respondent?

The Arbitrator finds that Petitioner failed to prove that he gave notice of his claimed accidental injury to Respondent within the time period set forth in §6(c) of the Act.

As noted above Petitioner lacked credibility regarding this claimed accident. He testified that he gave oral notice to the shift commander, Lt. Wojciechowski and fellow firefighter Schmidt, as well as Lt. Cook. Petitioner was fully aware of Respondent's policies and procedures for reporting on-duty injuries and yet did not report his claimed injury in accord with those policies and procedures. This is inconsistent with the records of his healthcare providers, which lack any documentation that Petitioner reported an on-duty injury October 20, 2014.

F: Is Petitioner's current condition of ill-being causally related to the accident?; ***G:*** What were Petitioner's earnings?

In light of the Arbitrator's finding of no compensable accident this issue is moot.

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

In light of the Arbitrator's finding of no compensable accident this issue is moot.

K: What temporary benefits are in dispute? TTD

In light of the Arbitrator's finding of no compensable accident this issue is moot.

L: What is the nature and extent of the injury?

In light of the Arbitrator's finding of no compensable accident this issue is moot.

M: Should penalties be imposed upon Respondent?

In light of the Arbitrator's finding of no compensable accident this issue is moot.

N: Is Respondent due any §8(j)2 credit?

In light of the Arbitrator's finding of no compensable accident this issue is moot.

O: Did Petitioner exceed the two healthcare provider rule set forth in §8(a) of the Act?

In light of the Arbitrator's finding of no compensable accident this issue is moot.

15 WC 35245 (DOI: 10/21/2015)

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

The Arbitrator finds that Petitioner proved that his current condition of ill-being is causally related to the work-related accident on October 21, 2015. The Arbitrator takes particular note that Respondent did not dispute that a work-related accident occurred on October 21, 2015. Petitioner was part of a crew that Respondent dispatched to a major motor vehicle collision, where a car slammed underneath a flatbed truck. Petitioner was involved in extracting a 350 lbs. injured victim. Petitioner's complaints at the scene warranted transport by ambulance to Ingalls Memorial Hospital. Petitioner followed with care with Dr. Sergey Neckrysh at UIC Hospital, Dr. Robert Bonk of Advocate Medical Group, and Dr. Ebby Jido for pain management.

Petitioner's treating physicians, as well as Respondents §12 examining physician, Dr. Kornblatt, all found that Petitioner had a degenerative lumbar spine which pre-existed any of the claimed work-related accidents. As noted above, Petitioner sustained a condition of ill-being that was causally related to his June 24, 2014 work-related accident. Medical care related to that accident included lumbar fusion from L3 to L5. Petitioner returned to full duty work as a firefighter but was reinjured October 21, 2015. At the time of this later accident Petitioner still had a degenerative and fused lumbar spine.

As above, Petitioner's treating surgeon, Dr. Neckrysh, and Respondent's §12 examining physician, Dr. Kornblatt, hold conflicting opinions regarding the causal connection of Petitioner's current condition to the October 21, 2015 work-related

accident. Dr. Neckrysh has opined that due to Petitioner's pre-existing condition the October 21 accident exacerbated that condition to the point where Petitioner cannot return to work as a firefighter. Further, Dr. Neckrysh placed permanent restrictions that limit Petitioner to lifting/pulling/pushing of weights no greater than 10 lbs. On the other hand, Dr. Kornblatt has opined that Petitioner only sustained myofascial back pain that was really which was related to the October 21 work accident. He opined that Petitioner's current condition of ill-being is related to Petitioner's pre-existing degenerative spine. Dr. Kornblatt did note that Petitioner was unable to work return to work without restrictions but could resume light to medium physical demand work, with lifting up to 30 lbs. occasionally and 15 lbs. frequently.

The work restrictions placed by Dr. Neckrysh and Dr. Kornblatt are so similar as to be essentially identical, particularly in light that both have opined that Petitioner cannot return to work as a firefighter. Further, as noted in 14 WC 27354, Dr. Kornblatt opinions regarding lack of causation were not persuasive. For those same reasons the Arbitrator finds Dr. Kornblatt's lack of causation opinions here to be unpersuasive. Therefore, the Arbitrator adopts the opinions of Dr. Neckrysh.

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

In light of the Arbitrator's finding that Petitioner's current condition of ill-being is causally related to the work accident on coat on October 21, 2015, the Arbitrator finds that medical care provided to Petitioner following that accident, namely Dr. Sergey Neckrysh at UIC Hospital, Dr. Robert Bonk of Advocate Medical Group, and Dr. Ebby Jido, was reasonable and necessary to cure or leave the effects of the injuries sustained in the work accident on October 21, 2015. Correspondingly, the Arbitrator finds that the professional fees and charges relating to that medical care were reasonable.

The Arbitrator finds that Petitioner failed to prove that the abdominal ultrasound performed at Advocate Christ Medical Center October 28, 2016 was reasonable or necessary to cure or relieve the effects of the injuries he sustained October 21, 2015. Therefore, the charges for the ultrasound are not allowed.

Petitioner claims that his medical care and prescriptions for medicinal marijuana are also compensable. The Arbitrator notes that the Illinois Compassionate Use of Medical Cannabis Pilot Program Act exempts participants from criminal prosecution under Illinois controlled substances laws. However, the Arbitrator also notes that the Illinois Compassionate Use of Medical Cannabis Pilot Program Act does not, and cannot, exempt participants from criminal prosecution under federal controlled substances laws. The Arbitrator cannot authorize medicinal care which violates federal law. Thus, the Arbitrator finds that due to the principle of federal preemption medicinal

marijuana is not reasonable or necessary under the Illinois Worker's Compensation Act. Therefore, Petitioner's claim for compensation for care and treatment and prescriptions relating to medicinal marijuana is denied.

K: What temporary benefits are in dispute? TTD

Petitioner claims entitlement to TTD benefits from October 21, 2015 through March 29, 2016 (AX# 4). Respondent claims credits totaling $67,964.13 for payments pursuant to the Public Employee Disability Act (PEDA) from October 22, 2015 through October 21, 2016.

Based on the evidence, the Arbitrator finds that Petitioner proved that he was entitled to TTD benefits from October 21, 2015 through March 29, 2016 as claimed.

L: What is the nature and extent of the injury?

Petitioner's permanent partial disability was assessed in accord with §8.1b of the Act:

i) No AMA impairment rating was offered in evidence. The Arbitrator could give no weight to this factor.

ii) Petitioner was a full duty firefighter at the time of his injury on October 21, 2015. The occupation of firefighter frequently requires strenuous activity and heavy lifting in awkward postures. Such activities put great stress on the back.

Petitioner's physician, Dr. Neckrysh, and Respondent's §12 examining physician, Dr. Kornblatt, both opined that Petitioner is unable to return to work as a firefighter, although they disagreed minimally about Petitioner's physical restrictions. The Arbitrator has previously found Dr. Neckrysh's opinions more persuasive than the opinions of Dr. Kornblatt. The Arbitrator gives great weight to this factor.

iii) Petitioner was 53 years old at the time of his October 21, 2015 accidental injury. He had a statistical life expectancy of 29 years. The Arbitrator gives moderate weight to this factor.

iv) Petitioner has not returned to work as a firefighter. Petitioner's employability was evaluated by two separate certified vocational counselors. Jacky Ormsby evaluated Petitioner on his own behalf; Edward Steffan evaluated Petitioner on behalf of Respondent. Ms. Ormsby opined that for a variety of factors Petitioner was unemployable. On the other hand, Mr. Steffan opined that Petitioner was employable. The Arbitrator finds that the opinions of Ms. Ormsby are more credible and persuasive than the opinions of Mr. Steffan.

Petitioner claims that he is permanently and totally disabled in the odd-lot category. A claimant's burden is to show a diligent but unsuccessful attempt to find work or show that, due to age, skills, training, and work history, he will be unable to find employment in a stable labor market.

Ms. Ormsby adequately and persuasively demonstrated that due to physical restrictions, lack of education and transferable skills, and age petitioner would not be a competitive candidate for employment in a stable labor market. Mr. Steffan based his opinions on Petitioner's employability on unreasonable and unrealistic assessment of Petitioner's physical restrictions (those of Dr. Kornblatt), Petitioner's management and supervisory history, education, and bilingualism. As noted above, Dr. Neckrysh's opinions of Petitioner's physical restrictions were found to be more credible and reasonable than those of Dr. Kornblatt. The evidence is equally clear that Petitioner had no true facility with the Spanish language which would satisfy the requirements of bilingual job requirements. Mr. Steffan's reliance on Petitioner's supposed management and supervisory history is totally unfounded.

The Arbitrator gives great weight to the opinions of Dr. Neckrysh and Ms. Ormsby, which support a finding that Petitioner is unemployable at this time.

v) The evidence is clear that Petitioner had degenerative changes in his lumbar spine before any of the claimed the work-related accidents in this matter. Further, Petitioner had clearly sustained a serious injury to his lumbar spine in a work-related accident on June 24, 2014. The June 24, 2014 accident aggravated Petitioner's pre-existing degenerative condition to the point where he required extensive medical care, including a lumbar fusion from L3 to L5. Petitioner recovered sufficiently from the injuries from his June 24, 2014 accident to be released to full duty work as a firefighter. Here, the evidence showed that Petitioner sustained another aggravation to his lumbar spine which has now rendered him unable to return to work as a firefighter. Further, these later injuries have rendered Petitioner unemployable, and therefore, permanently and totally disabled, to which the Arbitrator ascribes great weight.

In light of all the evidence and the shift in the burden of proof, the Arbitrator finds Respondent failed to prove that Petitioner is not permanently and totally disabled. Therefore, in consideration of all the evidence, including the above five factors, the Arbitrator finds that Petitioner is permanently and totally disabled from employment.

M: Should penalties be imposed upon Respondent?

Respondent terminated benefits and refused to authorize payment for certain medical care and procedures provided to Petitioner. Respondent relied on opinions of its retained §12 expert Dr. Michael Kornblatt in terminating benefits and refusing to authorize medical care and treatment. Although the Arbitrator did not find Dr. Kornblatt's opinions persuasive or credible, it was neither frivolous nor vexatious for

Respondent to rely on Dr. Kornblatt's opinions. Therefore, Petitioner's request for §19(k) penalties is denied.

§19(l) of the Act provides for penalties for delay in payment of benefits. An employer has 14 days after receipt of a demand for payment of benefits in which to authorize payment or set forth in writing why payment is not made. The record is not clear of when Petitioner requested payment of the benefits which were not paid by Respondent or whether Respondent failed to notify Petitioner in writing why payment would not be made. Therefore, the Arbitrator finds that Petitioner failed to prove that he was entitled to §19(l) penalties.

In light of the foregoing, the Arbitrator also finds that Petitioner failed to prove he was entitled to attorneys' fees pursuant to §16 of the Act.

N: Is Respondent due any §8(j)2 credit?

Petitioner claims entitlement to TTD benefits from October 21, 2015 through March 29, 2016 (AX# 4). Respondent claims credits totaling $67,964.13 for payments pursuant to PEDA from October 22, 2015 through October 21, 2016.

PEDA provides for a continuation of full pay for firefighters injured in the line of duty. 5 ILCS 345. The Act provides that the employee shall continue to be paid on the same basis as before the injury, with no deductions from his sick leave credits or vacation during the time he is unable to perform his duties due to the results of the work injury, but not longer than 1 year in relation to the same injury. Any salary compensation due the injured employee from Workers' Compensation shall revert to the public entity employer during the time that continuing compensation is paid to him under PEDA (RX #12).

§8(j)2 of the Act provides:

> Nothing contained in this Act shall be construed to give the employer or the insurance carrier the right to credit for any benefits or payments received by the employee other than compensation payments provided by this Act, and where the employee receives payments other than compensation payments, whether as full or partial salary, group insurance benefits, bonuses, annuities or any other payments, the employer or insurance carrier shall receive credit for each such payment only to the extent of the compensation that would have been payable during the period covered by such payment.

The Arbitrator notes that PEDA is not an employer funded group health plan. The Arbitrator finds that Respondent failed to prove that it is entitled to a credit, but if any credit is due the credit is limited only to the amount equivalent to TTD benefits paid for the disputed periods of total temporary disability.

O: Did Petitioner exceed the two-healthcare provider rule set forth in §8(a) of the Act?

The Arbitrator finds that Petitioner did not exceed the two-healthcare provider rule set forth in §8(a) of the Act.

Petitioner received the emergent medical care at Ingalls Memorial Hospital immediately following his October 21, 2015. Upon discharge he was advised to follow up with is primary care physician, who was Dr. Robert Bonk. Petitioner followed up with Dr. Sergey Neckrysh at UIC Hospital. As noted above, Dr. Neckrysh had treated Petitioner for his compensable injury sustained on June 24, 2014. Dr. Neckrysh was Petitioner's first choice following the October 21 accident.

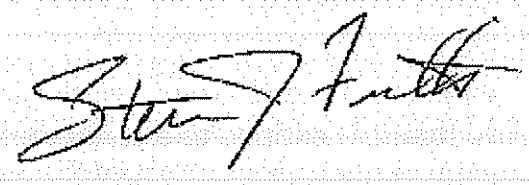
Petitioner also consulted Dr. Ebby Jido and Dr. Bonk following the October 21 accident. Dr. Bonk was a referral from the Ingalls emergency department, and therefore, was not a qualified choice, despite his previous care of Petitioner. Dr. Jido, on referral from Dr. Bonk, performed lumbar facet block injections at L3-4, L4-5, and L5–S1. Dr. Jido was part of the chain of referrals.

The Arbitrator does not address the choice issue relating to Petitioner's regimen of medicinal marijuana in light of the finding that that course of care and treatment was not reasonable under the Worker's Compensation Act.

P: Did Petitioner refuse to submit to recommended medical care in violation of §19(d) of the Act?

At the second §12 IME on February 29, 2016, Dr. Kornblatt recommended an "aggressive rehabilitation course" for Petitioner. Dr. Kornblatt was Respondent's retained expert. There was no doctor-patient relationship between Dr. Kornblatt and Petitioner. Dr. Kornblatt did not assume treatment of Petitioner. §19(d) of the Act does not apply to recommendations of retained §12 examining physicians.

Therefore, the Arbitrator finds that Petitioner did not refuse recommended medical care as construed under §19(d) of the Act.



Steven J. Fruth, Arbitrator

September 5, 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lawrence Williams,

Petitioner,

20IWCC0744

vs.

No. 17 WC 32993

McGraw Enterprises, Inc. d/b/a McDonald's,

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 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).

The issues in dispute at arbitration were causal connection and prospective medical care. Petitioner did not claim any unpaid medical bills.

Petitioner, who was 50 years old at the time of the arbitration hearing, testified that he was right hand dominant. He denied prior problems with his right shoulder. On August 1, 2017, Petitioner worked as a part-time maintenance person for Respondent. While lifting to empty out a garbage bin into a dumpster, Petitioner "heard something tear" in his right shoulder. He reported the accident, and Respondent sent him to Midwest Occupational Health Associates. After obtaining an MRI, the staff referred Petitioner to Dr. Chris Wottowa, an orthopedic surgeon. Petitioner understood from Dr. Wottowa that he needed surgery. Since then, Petitioner has been examined by Dr. James Emanuel (Petitioner's expert) and Dr. George Paletta (Respondent's expert).

At the time of the arbitration hearing, Petitioner worked part-time, light duty as a maintenance person at Popeye's Chicken. Petitioner described his problems as follows: "[M]y shoulder, I cannot lift it no farther than here," indicating he could not get his arm parallel to the ground. Petitioner continued: "That's as far as my shoulder goes, and there is a knot right here and a knot right here," indicating the back and top of his shoulder. Petitioner takes "a lot" of over-the-counter pain medication for the pain. Petitioner stated he has lost strength in his right arm, which impacts his ability to perform his job. Petitioner explained: "They might ask me to *** wring the mop out or empty the mop bucket to put fresh water in there, and it's hard for me to do that. *** [T]hey have to have the younger guys do it because I cannot do it." Petitioner continued: "[B]ecause every time if I lift something a certain way it hurts. If I move a certain way with my arm it hurts. So I just keep it still as much as I can." Petitioner would like to get additional treatment for his shoulder, so he could function better and work more hours.

On cross-examination, Petitioner affirmed that he has difficulty lifting his arm above shoulder level, pushing and pulling. Petitioner stipulated he was the individual in the surveillance videos obtained by Respondent.

The medical records from Midwest Occupational Health Associates show that on August 1, 2017, Petitioner presented with discomfort in his right shoulder after the work accident. Physical examination was significant for trace edema, tenderness and a positive Hawkins impingement test. X-rays showed moderate acromioclavicular and glenohumeral arthritis. The attending physician prescribed medication and imposed restrictions. On August 4, 2017, Petitioner reported no improvement. Physical examination was limited secondary to pain. The attending physician diagnosed: "Rotator cuff strain, biceps tendonitis, right shoulder. Suspect labral rotator cuff tear." An MR arthrogram was ordered. On August 9, 2017, Petitioner complained of persistent symptoms. The attending physician prescribed physical therapy. There was an insurance delay in approving the MR arthrogram and physical therapy. On August 24, 2017, Petitioner started physical therapy, and on September 7, 2017, he underwent an MR arthrogram. On September 11, 2017, Petitioner reported some improvement in the pain. Hawkins impingement test and empty can test were positive. "MRI results were received and the impression is as follows: 1) Supraspinatus tendinopathy with suspected full thickness tear at his most anterior aspect near the insertion. 2. Glenohumeral arthritis with humeral and bony glenoid subchondral cyst formation. 3) Hypertrophic degenerative changes in the AC joint with some encroachment on the subacromial space." Petitioner was referred to Dr. Wottowa at Springfield Clinic.

The medical records from Dr. Wottowa show that on October 18, 2017, he was unable to get a good physical examination because of pain and guarding.[1] Dr. Wottowa reviewed the imaging studies, disagreeing with the finding of rotator cuff tear. Dr. Wottowa's primary diagnosis was significant osteoarthritis, "down to bone-on-bone." Regarding causation, Dr. Wottowa stated: "I think as this is an acute exacerbation of this chronic degeneration of his shoulder, there is some hope that this would quiet down over a period of time." In the event Petitioner needed surgery, Dr. Wottowa recommended a total shoulder replacement.

There is a gap in treatment until May 3, 2018, when Petitioner saw Dr. Louis Graham at the SIU School of Medicine Clinics. Petitioner complained of significant, persistent pain since the work

[1]Earlier, on September 21, 2017, Petitioner saw Dr. Wottowa's physician's assistant.

accident. Physical examination was limited due to pain and guarding. Dr. Graham diagnosed osteoarthritis of the glenohumeral joint, stating the following regarding causation: "I think the most likely explanation for his right shoulder pain is that he had an aggravation of his underlying osteoarthritis and likely also strained a muscle in his shoulder after his injury at work." Dr. Graham recommended home exercises.

On February 12, 2018, Dr. Emanuel, an orthopedic surgeon, examined Petitioner at the request of his counsel. Dr. Emanuel testified by evidence deposition on January 28, 2019, that he diagnosed "degenerative arthritic changes of the glenohumeral joint with a partial thickness tear of the supraspinatus tendon in the rotator cuff. He had acromioclavicular joint arthritis. He had degenerative labral tearing and chondrosis of the glenoid surface." Dr. Emanuel opined that Petitioner had failed conservative treatment and recommended arthroscopic surgery with extensive debridement of the joint, possible debridement or repair of the rotator cuff, and possible decompression and distal clavicle resection. Dr. Emanuel did not think a shoulder replacement would be appropriate because of Petitioner's age. Regarding causation, Dr. Emanuel opined the work accident could have caused or contributed to Petitioner's need for treatment, explaining: "Something mechanically changed in his shoulder that has caused it to become symptomatic." On cross-examination, Dr. Emanuel agreed that Petitioner had advanced, extensive degenerative changes in the shoulder.

On June 11, 2018, Dr. Paletta, an orthopedic surgeon, examined Petitioner at Respondent's request. Dr. Paletta testified by evidence deposition on October 19, 2018, that Petitioner complained of persistent symptoms since the work accident. On physical examination, Petitioner "had pretty profound motion losses, a lot of grinding and popping at the shoulder, but good rotator cuff function." Dr. Paletta diagnosed advanced osteoarthritis of the shoulder, without any sign of acute injury. Dr. Paletta did not see a rotator cuff tear on the imaging studies. Dr. Paletta summarized: "He had endstage osteoarthritis of the right shoulder, meaning that he was basically down to essentially bone-on-bone." Regarding causation, Dr. Paletta opined: "[T]here's no causal relationship between that work incident and the underlying diagnosis of osteoarthritis," clarifying on cross-examination that Petitioner could have suffered an acute shoulder strain superimposed on his chronic osteoarthritic condition, which could have increased the symptoms related to the underlying condition, but not changed "the natural history in terms of accelerating the process itself."

The Commission has viewed the surveillance videos in evidence, which depict Petitioner's activities on April 12, April 13 and April 14, 2019. On April 12, 2019, Petitioner was videotaped at work at Popeye's. The probative footage shows Petitioner: cleaning the drive-thru sign, reaching with his hand above and below shoulder level; receiving a box that was handed to him from the back of a delivery truck and carrying it inside with both hands at waist level; and rolling a loaded trash bin to the dumpsters using both hands below shoulder level and apparently emptying the contents. The most probative footage was obtained on April 13, 2019. Petitioner was videotaped at work rolling a trash bin to a dumpster and emptying the contents without lifting the trash bin, and lifting the hood of his car before leaving work. The investigator then followed Petitioner to a residence. Petitioner lifted and closed the hood of his car. Next Petitioner was videotaped carrying a small chair (like a card table chair) in his right hand. Petitioner spray painted mainly with his right hand an object on the ground while sitting in the chair. Next, Petitioner used a hose to hose down a car, switching hands while doing that. Petitioner then proceeded to hand wash the car, also switching hands. There is footage of vigorous scrubbing with the right hand. While washing the roof, Petitioner's right hand was at shoulder level. After washing, Petitioner again hosed down the car and dried it with a cloth, using vigorous

20IWCC0744

motions with the right hand. On April 14, 2019, Petitioner was videotaped cleaning snow off a car using his right hand. Next, Petitioner secured a plastic sheet over another car's broken rear window, reaching above shoulder level and overhead.

The Arbitrator found causation. The Arbitrator awarded medical expenses of $18,191.37 pursuant to sections 8(a) and 8.2 of the Act and prospective medical care recommended by Dr. Emanuel. Respondent disputes causation and objects to the award of medical expenses, as medical expenses were not in dispute and there are no medical bills in evidence.

The Commission finds, based on the opinion of Dr. Paletta, which is supported by the surveillance videos, that Petitioner sustained a shoulder strain and temporary aggravation of the degenerative arthritis, which resolved by June 11, 2018. Further, the Commission agrees with Respondent that the award of medical expenses was in error. Accordingly, the Commission vacates the awards of past medical expenses and prospective medical care.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 25, 2020, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the awards of past medical expenses and prospective medical care are vacated.

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

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

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

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

DATED: DEC 17 2020
o-11/10/2020
SM/sk
44

Stephen Mathis

Douglas McCarthy

L. Elizabeth Coppoletti

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

WILLIAMS, LAWRENCE
Employee/Petitioner

Case# **17WC032993**

20IWCC0744

McGRAW ENTERPRISES INC D/B/A McDONALD'S
Employer/Respondent

On 3/25/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.80% 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:

0781 KEEFE & GRIFFITHS PC
DANIEL KEEFE
10 S BROADWAY SUITE 500
ST LOUIS, MO 63102

0332 LIVINGSTONE MUELLER ET AL
KENNETH BIMA
620 E EDWARD ST
SPRINGFIELD, IL 62705

20 IWCC0744

STATE OF ILLINOIS)
)SS.
COUNTY OF SPRINGFIELD)

☐ 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
ARBITRATOR DECISION
19(b)

Lawrence Williams Case #17 WC 032993
Employee/Petitioner

McGraw Enterprises Inc. d/b/a McDonald's
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 **Collinsville**, on **June 28 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ 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, 8/1/17, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the 52 weeks preceding the injury, Petitioner earned $11,289.20; the average weekly wage was **$217.10**.

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

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

Respondent shall be given no credits for TTD, TPD, Maintenance or other benefits.

ORDER

Respondent shall be given no credit for temporary total disability payments, as it has paid none.

Respondent shall pay reasonable and necessary medical services of $18,191.37, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for any medical treatment recommended by Dr. James Emanuel to include, without limitation, surgical intervention, therapy, and injections, as needed, and as provided in Section 8(a) and 8.2 of the Act, so long as such surgical intervention and injections occur within 2 years of 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 fro the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Charles W Watte

March 24, 2020

Signature of Arbitrator Date

MAR 25 2020

FINDINGS OF FACT

Petitioner Lawrence Williams, a 50 year-old right-handed man, began working at McDonald's in 2015 to perform maintenance. He testified that his job duties included unloading trucks, empty the garbage, clean, sweep, mop, pick up cigarette butts, and generally keep the restaurant clean. Tr. 11.

On 8/1/17, Petitioner testified that in the course of his job duties, he was taking the garbage out without the help of a coworker. As he was pushing the can over the lip of the dumpster, at about shoulder height, he heard and felt a tear in his right shoulder. He reported the injury immediately and filled out an incident report. Tr. 12-13.

Petitioner went to Midwest Occupational Health on 8/1/17, where his injury was documented. Physical examination showed some edema in the right shoulder, and "significant tenderness with palpation of the AC joint line and the proximal biceps insertion site." Impingement testing was positive for pain, and the empty can test could not be performed due to the amount of pain Petitioner experienced. He was given a general diagnosis of right shoulder pain, and placed on work restrictions to include no lifting, pushing or pulling over 5 pounds with his right arm, and no overhead activity with the right arm, and to be allowed to apply ice throughout the day for 20-30 minutes at a time. PX 2. Petitioner followed up on 8/4/17, at which time the assessment was a "[r]otator cuff strain, biceps tendonitis, right shoulder. Suspect labral rotator cuff tear." His restrictions increased to no use of his right arm and an MR arthrogram of the right shoulder was recommended. Id. Physical therapy was prescribed at the 8/9/17 follow-up. Id. The MRI was not approved by Respondent for either Petitioner's 8/22/17 or 9/1/17 visits, and at each visit, the MRI continued to be recommended. Id.

On 9/7/17, Petitioner underwent an MRI arthrogram of his right shoulder. PX 5. The report indicated Petitioner had supraspinatus tendinopathy with suspected full-thickness tear, glenohumeral arthritis with cyst formation, and hypertrophic degenerative changes in the AC joint that encroached on his subacromial space. Id.

Petitioner saw Dr. Christopher Wattowa, an orthopedic surgeon, on 9/21/17. PX 3. His impression indicated Petitioner suffered an "exacerbation of right shoulder glenohumeral joint osteoarthritis." (Emphasis added.) Id. Dr. Wattowa injected Petitioner's glenohumeral joint. Petitioner returned to Midwest Occupational Health on 9/25/17, explaining that the injection provided no real relief, and requested an expedited follow up with the orthopedic surgeon. PX 2. He returned to Dr. Wattowa on 10/18/17. PX 3. The doctor was unable to perform an adequate physical examination due to pain; Petitioner demonstrated only 30 degrees of forward flexion, and 30 degrees of abduction. Dr. Wattowa stated, "I think as this is an acute exacerbation of this chronic degeneration of this right shoulder ... from a surgical standpoint, the best option is going to be to probably replace his entire shoulder." (Emphasis added.) Id. Petitioner testified that he left Dr. Wattowa's care with the impression that he needed surgery to help his right shoulder. Tr. 15.

Claimant sought additional care on his own. He saw his primary doctor, Dr. Hansen, who referred him to SIU clinic, where he was evaluated by Dr. Louis Craham, M.D. on 5/3/18. PX 4. Dr. Craham's medical impression stated:

> Right shoulder pain: I think the most likely explanation for his right shoulder pain is that he had an aggravation of his underlying osteoarthritis and likely also strained a muscle in his shoulder after his injury at work. Right now, he is having significant chronic pain secondary to his injury. It is difficult to elicit an appropriate exam due to guarding that he has with his pain. I do not think he has adhesive capsulitis right now but [it] is difficult to completely rule out because of the exam today. I told him that he needs to continue to do range of motion or else he will lose range of motion [and] may develop adhesive capsulitis. ... He is a candidate for possible shoulder replacement in the future but he reports that they recommended waiting for many years due to his young age. PX 4.

Dr. George Paletta performed an IME at Respondent's request on 6/11/18, after which Respondent refused to provide any further treatment. Dr. Paletta testified on Respondent's behalf on 10/19/18. RX 1. Dr. Paletta agreed with all other doctors who either treated or evaluated Petitioner, that Petitioner had no problems in his right shoulder, and was able to perform all of his job duties (Id at 17-18) until his 8/1/17 work injury, after which he had persistent and disabling symptoms. Dr. Paletta further agreed with them when he testified that, irrespective of causation, Petitioner requires additional medical treatment for his right shoulder. Id at 18. He disagreed with them all, however, when he testified that the need for that treatment was not at least partially caused by Petitioner's 8/1/17 work injury. In addition to being unable to perform any of the four major provocative tests that are standard fare in shoulder evaluations, Dr. Paletta testified:

> Q So is it possible that a shoulder strain [from the 8/1/17 work injury] superimposed upon a highly arthritic shoulder could have accelerated the need for additional treatment?
>
> A Well, as I stated in my report, I think it is certainly possible that that could have increased symptoms related to the underlying condition, but I don't think it changed the natural history in terms of accelerating the process itself.
>
> Q So in Mr. Williams's case, it took a previously asymptomatic condition and made it symptomatic, and as long as he or the medical records are not just making things up, it's been consistently problematic since August 1st, 2017, correct?
>
> A That's the history he reported. Yes, sir.
>
> Q So do you think a reasonable conclusion is that Mr. Williams suffered a shoulder strain, that [that] shoulder strain made a previously symptomatic condition become symptomatic to the point where following the shoulder strain he need a total shoulder replacement?
>
> A Well, again, as I testified to already, I have no reason to contest the diagnosis of shoulder strain. I can't say that I necessarily agree with that, because by the time I saw him any shoulder strain would have resolved.
>
> I certainly agree that he has symptomatic endstage osteoarthritis, and that if that is symptomatic to the point where it's adversely affecting his life and his lifestyle, then a shoulder replacement would be the reasonable option. Id at 29-31.

Petitioner saw Dr. James Emanuel, a board certified orthopedic surgeon whose practice is 90% devoted to shoulder injuries (PX 1, p. 6) at the request of his attorney on 2/12/18. Dr. Emanuel testified on Petitioner's behalf on 1/28/19. PX 1. Dr. Emanuel agreed that prior to the 8/1/17 work injury, he was unable to identify any problems in Petitioner's right shoulder. Id at 9-10.

At the time of his exam, Dr. Emanuel recommended additional medical care:

> Well, he had failed therapy. He had failed a cortisone injection into the shoulder, failed meaning it did not help resolve his symptoms. That occurred following the work injury.
>
> I recommended an arthroscopic procedure on the shoulder with extensive debridement of the joint, possible debridement or repair of the rotator cuff as indicated, possibly decompression and distal clavicle resection. Id at 8-9.

He went on to testify that Petitioner's 8/1/17 accident might or could have caused or contributed to cause the current need for medical treatment. Id at 10. His rationale was based on a straightforward series of events:

> A [B]ased on his history, there's a guy that did not have any pain prior to this. He lifted a sixty-pound [garbage] trash container, pushing it up and in do so felt a crack or a crunch or something in his shoulder.
>
> That could come from the glenoid [labrum] itself. It could cause further tearing.
>
> It could come from flaking off more cartilage on the articular surface that's already been worn thin, but there's still some available.
>
> Three, it could be a [partial] thickness rotator cuff tear.
>
> Four, it could be the acromioclavicular joint.
>
> All of those can cause an acute, you know, crunch, crack, click resulting in immediate discomfort that just doesn't respond to you, know, anti-inflammatories, ice, therapy, and cortisone injections.
>
> Q And you can't at this point narrow it down between what might have happened amongst those various possibilities?
>
> A I can't. ... [But] something mechanically changed in his shoulder that has caused it to become symptomatic. Id at 13-14.

Dr. Emanuel addressed the option of a total shoulder replacement, and indicated that it did not seem reasonable to him, because Petitioner will need at least one, and possibly more, future replacements. Id at 11-12.

Petitioner has never had any prior problems, complaints, or treatment regarding his right shoulder; following the work injury, he has not reinjured it. He testified he had full range of motion, full strength, and did volunteer work, which included lifting and moving furniture at the Helping Hands Independent Living Program. After the injury, he could not continue to volunteer. Tr. 18-19. At hearing, he testified that he could not lift his right shoulder above shoulder height (Tr. 16), that he has knots at the back and top of his shoulder (Tr. 16-17), experienced pain all

the time, and since the injury, he has noticeable weakness in his dominant arm. Tr. 17. Petitioner, who is currently employed at Popeye's, after McDonald's terminated him, explained that his right shoulder had a large impact on how he was able to perform his job in maintenance: "They might ask me to, like wring the mop out or empty the mop bucket to put fresh water in there, and it's hard for me to do that. So I have to have – they have to have the younger guys do it because I cannot do it. ... [B]ecause every time if I lift something a certain way it hurts. If I move a certain with my arm it hurts. So I just keep it still as much as I can." Tr. 17-18. Both Drs. Emanuel and Patella agreed that at the times of their respective evaluations, Petitioner was limited and restricted with respect to his right shoulder.

At the hearing, Respondent introduced surveillance footage taken of Petitioner on April 8th and 9th, 2019. While the footage did show a few instances of Petitioner wiping surfaces that were near shoulder-height, he is only holding a towel to wipe. He also pulled rolling trash cans, using both hands, while they were down at his sides near his waist. The footage was largely unimpressive, and largely comports with Petitioner's testimony that he had to push his limitations in order to generate some income, even if it is uncomfortable.

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).

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).

The Arbitrator finds, based solely upon the transcripts because the Arbitrator did not preside over the trial, that Petitioner was credible because his testimony at trial did not conflict with the medical records. The testimony of the deposed physicians is also found to be credible because these physicians did not stretch their testimony to fit either the narrative of Petitioner or Respondent.

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

Petitioner bears the burden of proving by a preponderance of the evidence all of the elements of his claim. R & D Thiel v. Workers' Compensation Comm'n, 398 Ill. App. 3d 858, 867 (2010). Among the elements that the Petitioner must establish is that his condition of ill-being is causally connected to his employment. Elgin Bd. of Education U-46 v. Workers' Compensation Comm'n, 409 Ill. App. 3d 943, 948 (2011). The workplace injury need not be the sole factor, or even the primary factor of an injury, as long as it is a causative factor. Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193, 205 (2003).

"A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in a disability may be sufficient circumstantial evidence to prove a causal connection between the accident and the employee's injury." Int'l Harvester v. Industrial Comm'n, 93 Ill. 2d 59, 63-64 (1982). If a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. Schroeder v. Ill. Workers' Comp. Comm'n, 79 N.E.3d 833, 839 (Ill. App. 4th 2017).

In this case, Petitioner had significant degenerative changes in his shoulder that preexisted the work injury. However, even if that condition is, to use Dr. Paletta's words, "the major cause of his pain and dysfunction" (RX 1 p. 26), it was only after his 8/1/17 injury that his condition became at all symptomatic. There is no history of any prior right shoulder conditions, treatment, complaints, or limitations, and Petitioner was able to routinely lift sixty-pound trash cans above shoulder height. Since 8/1/17, he has been unable to do that and otherwise is restricted in the use of his shoulder.

All doctors to treat or evaluate Petitioner except for Respondent's expert, Dr. Paletta, agree that the work injury changed Petitioner's condition. Dr. Wattowa, an orthopedic surgeon, stated that Petitioner's injury constituted an acute exacerbation of a preexisting condition; Dr. Craham stated Petitioner "had an aggravation of his underlying osteoarthritis and likely also strained a muscle in his shoulder after his injury at work" (PX 4); Dr. Emanuel gave four explanations for what had happened. Dr. Emanuel postulated that the crunching/cracking Petitioner experienced in his shoulder at the time of the injury could have been either 1) further tearing of his glenoid labrum; 2) cartilage flaking off from an articular surface that has been

worn thin; 3) a partial thickness rotator cuff tear; or 4) an injury to the AC joint. PX 1, p. 13. Dr. Emanuel also testified the 8/1/17 work injury caused some type of mechanical change in Petitioner's shoulder such that his previously asymptomatic arthritis became symptomatic to the point where Petitioner required treatment.

Dr. Paletta's testimony was equivocal, and his report admitted that "the work activity could have resulted in an increase in symptoms related to the underlying [arthritis]. RX 1, Depo Ex. 2, p. 5. When coupled with his testimony that 1) Petitioner had asymptomatic osteoarthritis prior to 8/1/17, and 2) Petitioner "has symptomatic endstage osteoarthritis, and that if that is symptomatic to the point where it's adversely affecting [Petitioner's] life and his lifestyle, then [additional treatment is warranted]" (RX 1, p. 30), indicate that he agrees there has been a change in Petitioner's condition, and that change occurred immediately following his 8/1/17 work injury.

The Arbitrator finds the opinions of Drs. Wattowa, Craham, and Emanuel more persuasive than that of Dr. Paletta. The standard for medical causation is whether the work accident might or could have caused or contributed to cause Petitioner's current condition of ill-being. His current condition is symptomatic end-stage osteoarthritis, and the most reasonable explanation for what caused Petitioner's shoulder to become severely problematic in terms of pain and function is his 8/1/17 work injury, since there is nothing indicating a problematic right shoulder before the injury, and no subsequent event that could account for his current state.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the 8/1/17 work accident.

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

There is no disagreement among either the treating doctors or the evaluating experts that testified in this case that Petitioner needs additional medical treatment due to the level of dysfunction in his left shoulder. Furthermore, there is no disagreement that as Petitioner has found no relief with conservative modalities, that surgery is the only reasonable option.

Dr. Emanuel suggests an arthroscopic approach, and that is reasonable, since even if it fails, the more invasive option or a shoulder replacement, envisioned by Drs. Wattowa, Craham, and Paletta would still be available.

Based on the foregoing and the record taken as a whole the Arbitrator finds that Petitioner is entitled to prospective medical care as outlined by Dr. Emanuel, and Respondent is hereby ordered to authorize said treatment with Dr. Emanuel. There is one caveat because there is a genuine dispute among the treating physicians and the IME examiner as to what surgery is the best option and when such surgery should occur. Having found causation and the need for prospective surgery, said surgery and/or injections should be performed within the next two years after this decision consistent with Petitioner's argument that the need for prospective care arises with the accident and not the degenerative condition of Petitioner's shoulder. Since prospective care past two years – i.e. in the medium to distant future - would be more plausibly

linked to the degenerative changes over time and then not a distinct accident, that care, if initiated after two years from the date of decision, shall not be awarded. Should prospective care begin within the two year period and there be care related to the initiated care after two years, that care is approved, but there must be a surgery or injections within the two years.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David W. Wagner,

Petitioner,

vs.

20IWCC0745

NO: 18 WC 17063

Walgreens Distribution Center,

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 §8(j) credit and the propriety of "hold harmless" language, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. FINDINGS OF FACT AND PROCEDURAL HISTORY

The Arbitrator's decision delineates the facts of the case in detail. Petitioner was employed by Respondent as a Shipper/Loader. On April 24, 2018, he suffered a stipulated accident. While pushing a box and a trailer, Petitioner's foot got caught in a load strap causing him to trip and fall on a wood floor and landing on the front of his left knee. Petitioner suffered from ongoing symptoms thereafter. He underwent treatment while continuing to work, but eventually required a knee replacement surgery, performed by Dr. McIntosh, in September of 2018. Petitioner last sought treatment with Dr. McIntosh on November 2, 2018.

On the Request for Hearing form submitted at the arbitration hearing, Respondent disputed causal connection, its liability to pay medical expenses based on a lack of causal connection, and Petitioner's entitlement to a period of temporary total disability. The parties also placed the nature and extent of the injury in dispute. The Arbitrator ultimately awarded medical

20IWCC0745

expenses related to several physicians and hospitals in the arbitration decision filed on February 13, 2020. She found that these bills were for reasonable and necessary medical treatment and ordered that "Respondent shall hold Petitioner harmless for any and all health insurance subrogation claims paid by United Healthcare Insurance Company for reasonable and necessary medical services."

On March 24, 2020, Petitioner filed a timely Petition for Review disputing the "Section 8(j) credit and hold harmless awarded for medi[c]al expenses, but Respondent not entitled to such 8(j) credit or hold harmless[.]" Both parties filed briefs. In his brief, Petitioner argues that, with respect to the $64,220.69 in medical expenses, the Commission should award this amount and order Respondent to pay it directly to him. Petitioner states that this amount represents the amount paid by United Healthcare Insurance Company ("United") for medical care related to the instant accident. In its brief, Respondent agrees with Petitioner to an extent. Respondent agrees that the "hold harmless" language used by the Arbitrator with respect to expenses paid by United was in error. However, Respondent argues that the Commission should award all of the medical expenses identified in Petitioner's Exhibit 5, including the $64,220.69 paid by United, to be paid directly to the medical providers. No other issues are before the Commission on review.

II. CONCLUSIONS OF LAW

A. §8(j) Credit and "Hold Harmless" Language

The Arbitrator ordered that Respondent shall hold Petitioner harmless for any and all health insurance subrogation claims paid by United for reasonable and necessary medical services. In addition to the parties' agreement that such language is not appropriate here, the Commission finds no evidence supporting the Arbitrator's hold harmless award with respect to payments made by United.

Section 8(j) of the Act states in relevant 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. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments only to the extent of such credit. 820 ILCS 305/8(j)(1) (West 2017).

20IWCC0745

Petitioner and Respondent agree that Respondent did not contribute in whole or in part to United's group policy, which must be established before credit can be awarded under §8(j). There is no evidence in the record establishing any such contribution and none to support the hold harmless language with respect to payments made by United. Moreover, the Request for Hearing form indicates a stipulation by the parties that Respondent is entitled to §8(j) credit of $3,257.78 for medical expenses paid, and further credit $5,547.55 for nonoccupational indemnity disability benefits. Parties are bound by stipulations made within the Request for Hearing. See *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084 (2004). Thus, there is no indication that Respondent claimed or is entitled to a credit totaling $64,220.69 pursuant to §8(j) for payments made by United, or that the attendant hold harmless language is proper.

Accordingly, the Commission modifies the Decision of the Arbitrator to reflect an §8(j) credit as stipulated and strikes the "hold harmless" language from the Arbitrator's award with respect to payments made by United.

B. Medical Expenses

With regard to the medical bills, Respondent argues that the Commission should award all of these expenses identified in Petitioner's Exhibit 5, including the $64,220.69 paid by United, directly to the medical providers. On review, Respondent does not dispute liability for payment of the $64,220.69 that was previously paid by United, but disagrees that this amount should be paid to Petitioner. Among its arguments, Respondent asserts that the plain language of §8(a) of the Act and the legislative intent of the Illinois General Assembly suggests that these monies should be paid directly to the providers. Petitioner challenges Respondent's assertions arguing that the above-mentioned amount should be paid directly to him.

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

> The employer shall provide and pay the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or according to a fee schedule, subject to §8.2...for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury.... 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 2017).

The Commission finds that §8(a) requires Respondent to pay Petitioner the amount United paid to Petitioner's medical providers given Respondent's dispute of medical expenses prior to and at arbitration. These payments were made by United to the medical providers to cover medical expenses that Respondent does not now, but did previously, dispute. Had there been no dispute, payment of the bills could have been made by Respondent directly to the medical providers pursuant to §8(a) and reduced pursuant to the fee schedule or paid at a lower negotiated rate.

20IWCC0745

Accordingly, the Commission modifies the medical expenses award to include the $64,220.69 previously paid by United to be paid by Respondent to Petitioner.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the "hold harmless" language in the arbitration decision with respect to payments made by United is stricken.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to all reasonable and necessary medical expenses related to his left knee condition, including $64,220.69 previously paid by United, pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay $64,220.69 to Petitioner for medical expenses pursuant to §8(a) and §8.2 of the Act, representing the amount paid by United.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit in the amount of $3,257.78 for medical expenses paid pursuant to §8(j) and $5,547.55 for nonoccupational indemnity disability benefits.

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 removal of this cause to the Circuit Court by Respondent is hereby fixed at $65,100.00. 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: DEC 17 2020
o; 11/5/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WAGNER, DAVID W
Employee/Petitioner

Case# **18WC017063**

20IWCC0745

WALGREENS DISTRIBUTION CENTER
Employer/Respondent

On 2/13/2020, 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 1.51% 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:

5274 HASSAKIS & HASSAKIS PC
JAMES M RUPPERT
206 S NINTH ST SUITE 201
MT VERNON, IL 62864

0180 EVANS & DIXON LLC
MICHAEL A KARR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

20IWCC0745

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

David W. Wagner
Employee/Petitioner

Case # 18 WC 017063

v.

Consolidated cases:

Walgreens Distribution Center
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda Cantrell**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **January 8, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 24, 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 **$39,367.47**; the average weekly wage was **$757.07**.

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

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

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

Respondent shall be given a credit of **$3,257.78** under Section 8(a) of the Act for medical benefits paid to date and a credit of **$5,547.55** under Section (8)(j) of the Act for short-term disability benefits paid to date.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling **$6,587.91,** equating to **$1,090.00** due and owing to Midwest Emergency Good Samaritan, Inc., **$2,622.07** due and owing to Dr. Jeffrey B. McIntosh, **$2,230.29** due and owing to Crossroads Community Hospital, **$33.88** due and owing to Advanced Imaging Consultants, LLC, **$425.00** due and owing to Byrd-Watson South 9th Drug Co., and **$186.67** due and owing to NovaCare Rehabilitation, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall hold Petitioner harmless for any and all health insurance subrogation claims paid by United Healthcare Insurance Company for reasonable and necessary medical services.

Respondent shall be given a credit of **$3,257.78** under Section 8(a) of the Act for medical benefits that have been paid and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$504.71**/week for **5-6/7ths** weeks, for **April 25, 2018** and commencing **September 24, 2018** through **November 2, 2018**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$0** for TTD, $0 for TPD, and $0 for maintenance benefits, and **$5,547.55 in nonoccupational indemnity disability benefits,** under Section 8(j) of the Act, for a total credit of **$5,547.55**.

Respondent shall pay Petitioner permanent partial disability benefits to the extent of **35%** loss of use of the **left leg** pursuant to §8(e) of the Act.

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

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

Linda Cantrell, Arbitrator

2/11/20
Date

FEB 13 2020

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID W. WAGNER,
Employee/Petitioner,
v.
WALGREENS DISTRIBUTION CENTER,
Employer/Respondent.

Case No.: 18 WC 17063

STATEMENT OF FACTS

The parties agree that on April 24, 2018, Petitioner was employed as a Shipper/Loader at Walgreens Distribution Center when he sustained work-related injuries to his left knee. (AX1). This claim came before Arbitrator Linda Cantrell for trial in Mt. Vernon on January 8, 2020. The issues are causal connection, medical expenses, temporary total disability benefits, and nature and extent of the injury. All other issues have been stipulated.

MEDICAL HISTORY

Petitioner's injury was reported to Corvel at 3:14 p.m. central time, approximately 15 minutes following the accident. The Intake Report prepared by Corvel indicated Petitioner experienced limited range of motion and limited weight bearing due to pain, with a moderate rate of pain that was steadily worsening.

Petitioner presented to the emergency department of SSM Health Good Samaritan Regional Health Center on April 24, 2018 at 4:24 p.m. Petitioner provided a history of his accident and reported increased pain in his left knee with extension to the kneecap. Petitioner's left knee was tender during examination and slight swelling was noted. X-rays of Petitioner's left knee showed osteoarthritic changes in the medial compartment joint space and patellar spurring. Petitioner's left knee was placed in a knee immobilizer which allowed him to ambulate without difficulty. Petitioner was diagnosed with arthralgia and osteoarthritis of the left knee. He was prescribed Naproxen and ordered to follow up with his primary care physician or orthopedic surgeon, Dr. Jeffrey B. McIntosh. Petitioner was ordered to return to work on April 26, 2018.

Dr. McIntosh first examined Petitioner on May 8, 2018, noting a consistent history of the accident and Petitioner's history of left knee pain over the years that got progressively worse since the accident. Dr. McIntosh noted Petitioner's current pain was in the medial joint line and that Petitioner had some left knee pain "over the years in the inside of his knee." Dr. McIntosh's examination revealed minimal swelling, tenderness in the medial joint line, significant arthritis in the medial joint compartment, consistent with osteoarthritis. Dr. McIntosh diagnosed osteoarthritis

of the left knee exacerbated by a fall. Dr. McIntosh recommended continued use of the knee brace and performed an injection into Petitioner's left knee.

Petitioner underwent a left knee MRI on June 4, 2018 ordered by Dr. McIntosh. The MRI showed tricompartmental osteoarthritis worse in the patellofemoral and medical compartments, tricompartmental chondral loss, medical meniscus tearing/degeneration, osteophytes in the medial compartment and a ganglion cyst in the posterior margin of the lateral femoral condyle. On June 6, 2018, Dr. McIntosh opined the MRI revealed significant patellofemoral arthritis as well as femoral tibial joint arthritis, and a definitive tear of the medial meniscus. Dr. McIntosh noted ongoing swelling of the knee and pain in the medial and patellofemoral joints, which did not improve with bracing and an injection. Petitioner continued to work full duty. Dr. McIntosh obtained additional x-rays that showed a complete loss of joint space in the medial compartment. Dr. McIntosh diagnosed medial meniscus tear superimposed upon significant arthritis and recommended a total knee replacement.

On July 23, 2018, Petitioner underwent a Section 12 examination by Dr. Jason Young. Dr. Young documented an injury history of Petitioner falling onto the front of his left knee, causing left knee pain/swelling as a result. Dr. Young recorded Petitioner had intermittent knee pain, treated with an injection, and right hip surgery prior to April 24, 2018. Dr. Young reviewed Petitioner's care records from Good Samaritan Hospital and reported those records did not note any swelling, deformity, or lesions. Dr. Young reviewed Dr. McIntosh's office notes and MRI findings as read by Dr. McIntosh. Dr. Young reported that Petitioner complained of pain in the front and medial side of his knee, made worse with walking, inclines, and standing. Dr. Young noted Petitioner walked with an antalgic gain and Petitioner experienced catching, weakness, swelling and giving way affecting his left knee. Dr. Young's physical exam revealed mild varus of the left knee, peripatellar crepitus, tenderness in the patellar and medial compartments and pain with forced flexion range of motion testing. Dr. Young obtained left knee x-rays and opined they showed significant degenerative joint disease in the medial and patellofemoral compartments with bone on bone changes in both compartments. Dr. Young diagnosed left knee severe medial and patellofemoral compartment arthrosis.

Dr. Young reports that the pain in the front of Petitioner's knee subsided, but then he started complaining of more pain on the medial side of the knee. Dr. Young opined that the direct blow to Petitioner's knee did not cause, aggravate, or accelerate the arthritic condition in his left knee. Dr. Young opined Petitioner's left knee symptoms resulted from a chronic degenerative issue and a genetic predisposition to arthritic conditions. Dr. Young further opined that the accident caused an anterior knee contusion with some pain, but ultimately the pain he is experiencing now is related to arthrosis. Dr. Young opined that all care following Petitioner's emergent care on April 24, 2018 was not related to his work accident and was solely to treat Petitioner's pre-existing arthritic condition. Dr. Young opined that Petitioner's post-emergent care, including the proposed knee replacement surgery, was reasonable and necessary but was unrelated to the work injury.

On August 8, 2018, Dr. McIntosh performed another injection into Petitioner's left knee due to his "absolutely miserable" symptoms. Dr. McIntosh performed a left total knee replacement at Crossroads Community Hospital on September 24, 2018. On October 5, 2018, Petitioner progressed to the use of a cane for ambulation, and Dr. McIntosh aspirated fluid from the knee while prescribing physical therapy. On November 2, 2018, Dr. McIntosh noted "excellent range of motion and minimal swelling", but noted left knee weakness. Dr. McIntosh instructed Petitioner

to work on strengthening exercises and wanted Petitioner to return for a follow-up appointment. Petitioner never returned to Dr. McIntosh for further care after November 2, 2018.

Petitioner completed thirteen (13) sessions of physical therapy at NovaCare Rehabilitation from September 27, 2018 through October 31, 2018. Petitioner's October 31, 2018 therapy record indicates he rated his pain as a 1 out of 10, he had burning pain when standing and he had knee stiffness.

Dr. Young was deposed on May 24, 2019 (RX 1). Dr. Young's testimony was consistent with his IME report concerning Petitioner, and he reaffirmed the opinions contained therein. Dr. Young testified he was a board-certified orthopedic surgeon that focused his care on the shoulder, knee and elbow. Dr. Young testified that due to the amount of arthritis in Petitioner's knee, Petitioner's medial meniscus extruded from the medial joint, causing the meniscus to become macerated and torn. Dr. Young testified the level of arthritis and meniscal tearing in Petitioner's knee would take a long time to develop. Dr. Young testified Petitioner had a varus deformity in his left knee and that the varus deformity could not occur acutely and was "sort of the last stage of severe arthritis". Dr. Young opined that a direct blow to the front of the left knee does not cause meniscus tears as such tears occur from degeneration or from compression and a rotational component. Dr. Young testified that a direct blow to the front of the knee would not "typically" cause an aggravation of pre-existing knee arthritis.

On cross-examination, Dr. Young admitted that he had not reviewed the MRI imaging or the x-rays from Petitioner's care at Good Samaritan Hospital or Dr. McIntosh's office, nor had he reviewed the operative report or operative photographs. Dr. Young testified that Petitioner's arthritis caused "complete extrusions of the meniscus". Dr. Young acknowledged that a medial meniscus tear will more times than not cause swelling of the knee and pain. Dr. Young confirmed he believed some of petitioner's symptoms were coming from the medial compartment and patellofemoral compartment. Dr. Young agreed that Petitioner's medial meniscus tear was in the same compartment as his arthritis. Dr. Young did not see any signs of symptom magnification or malingering with respect to Petitioner. Dr. Young testified that a person can have medial joint line tenderness following a medial meniscus tear.

Dr. McIntosh was deposed on June 4, 2019. Dr. McIntosh's testimony was consistent with his medical records concerning Petitioner, and he reaffirmed the opinions contained therein. Dr. McIntosh testified that he was a board-certified orthopedic surgeon that performs 10-15 knee surgeries a month. Dr. McIntosh testified that swelling would generally accompany an acute injury and opined that the swelling Petitioner had on April 24, 2018 would be consistent with an acute injury. Dr. McIntosh testified an Apley's compression test tests for meniscus tears and that Petitioner's Apley's compression test on May 8, 2018 was specifically positive for a medial meniscus tear as opposed to a lateral meniscus tear. Dr. McIntosh testified that the MRI showed a meniscus tear and tricompartmental arthritis. Dr. McIntosh testified that he believed "that the fall, if it didn't cause the tear, it most likely made the tear worse", and explained that any type of twisting injury or sudden injury can tear the cartilage. Dr. McIntosh testified that a fall onto the front of the knee can cause a meniscus tear or make a pre-existing tear worse. Dr. McIntosh testified that his diagnosis on June 6, 2018 was medial meniscus tear superimposed upon the arthritis in the knee. Dr. McIntosh testified that what drives him to say Petitioner's knee was worse from the work accident was the fact that he had seen Petitioner several times before his injury and Petitioner had not expressed any complaints or concerns about his left knee during those

appointments. Dr. McIntosh testified that Petitioner would have been off work from the date of his operation through November 2, 2018. Dr. McIntosh testified that to the best of his recollection Petitioner's meniscus was not extruded from the knee joint and that such a finding would have been noted on the MRI. Dr. McIntosh opined that all of Petitioner's care for his left knee was reasonable, necessary and causally related to the April 24, 2018 work injury. Dr. McIntosh also found Petitioner to be credible and did not appreciate any signs of symptom magnification or malingering.

On cross-examination, Dr. McIntosh testified that he had provided care to Petitioner since November, 2010 and did not recorded any complaints of left knee pain leading up to April 24, 2018. Dr. McIntosh acknowledged that the arthritis in Petitioner's left knee that he saw in 2018 would take years to develop. Dr. McIntosh acknowledged that a meniscus tear is caused the majority of the time by some type of twisting of the knee. Dr. McIntosh testified that he could not "definitively" say the tears in the meniscus were caused by the work accident. On redirect, Dr. McIntosh testified that he had not reviewed any medical records prior to April 24, 2018 indicating that petitioner was having left knee pain and that some part of Petitioner's meniscus was torn as a result of the work accident. Dr. McIntosh stated that he believed the meniscus was torn from the injury because the knee was asymptomatic before April 24, 2018.

At arbitration, Petitioner testified that on April 24, 2018, he was pushing a box when his foot became caught in a strap, causing him to fall on his left knee with the front portion of his knee landing on the wood floor of the trailer. Petitioner could not recall if he twisted his knee during his fall. Petitioner reported his left knee injury and immediately sought medical treatment.

Petitioner testified that his knee swelled up right after his injury occurred. Petitioner admitted that he had occasional left knee pain prior to April 24, 2018, with it occurring once a month. Petitioner stated his pre-accident left knee pain was not constant and that he had never sought medical care for his left knee prior to April 24, 2018. Petitioner further testified that prior to April 24, 2018, he had not used a brace or took medications for his left knee and that these pre-accident knee symptoms never adversely affected his ability to work. Petitioner began working for Respondent in 1999 and was working full duty, 10-hour days, at the time of the accident. Petitioner testified he did not have any issues of his knee catching or giving way prior to April 24, 2018, nor did his knee symptoms wake him from sleep prior to April 24, 2018. Petitioner testified that after his injury on April 24, 2018, his knee was swollen, he had constant pain, his pain affected his ability to work, and he favored his left leg.

Petitioner testified that his employment requires stair climbing and standing which makes his knee sore over the course of the day (10-hour work days). He is always conscious of not hitting his knee as it is very painful. Petitioner testified he cannot kneel on his left knee and squatting is uncomfortable. Petitioner's left knee tires more quickly. Petitioner testified that his injury has affected his ability to interact with his 7-year old grandson who lives with him. Petitioner does not feel comfortable riding a bike or fishing because of fear of falling/tripping. He testified he enjoyed these activities prior to the accident. Petitioner testified he is not as happy as he used to be because of his restrictions. Petitioner testified that he elevates and rests his knee when he gets home from work and that sometimes he ices his knee.

Petitioner admitted he had occasional knee pain for a few years prior to April 24, 2018. Petitioner testified that he did not have an increase in his pre-existing left knee pain while

recovering from a right hip replacement in 2018. Petitioner acknowledged that he did not return to Dr. McIntosh after November 2, 2018 and has not seen any other doctor for his left knee since that date. Petitioner testified that he did not use a brace or medications for his left knee prior to April 24, 2018. Petitioner testified that he went back to work full duty for Respondent and that he has received a raise since returning to work.

CONCLUSIONS OF LAW

The Arbitrator finds Petitioner to be credible in all respects. No medical evidence or testimony was presented that showed Petitioner exhibited signs of symptom magnification or malingering. Therefore, the Arbitrator finds as follows:

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

As to the issue of causation, the Arbitrator finds Petitioner's current condition of ill being is causally related to the accident that occurred on April 24, 2018. The medical evidence supports Petitioner's left knee went from being relatively asymptomatic prior to April 24, 2018, to one that caused him to seek immediate medical attention, bracing, medication, injections, and ultimately a total knee replacement. Petitioner testified that he experienced periodic left knee pain (approximately one time per month), that was not severe enough to seek medical treatment. There was no evidence presented to contradict Petitioner's testimony with regard to prior left knee pain or treatment. Despite being under the medical care of orthopedic surgeon Dr. McIntosh since 2010, there is no evidence that Petitioner consulted or treated with Dr. McIntosh for symptoms involving his left knee.

Petitioner testified he did not experience swelling, catching, or giving way in his left knee prior to April 24, 2018, and he was able to work full-duty, 10-hour days per week, without difficulty or restriction. Petitioner testified he never used a knee brace prior to April 24, 2018. After his accident on April 24, 2018, Petitioner experienced constant left knee pain, swelling, catching, and giving way. He began using a knee brace and taking medication for inflammation and pain.

The Arbitrator finds Dr. McIntosh's testimony to be more credible than the testimony of Dr. Young. Dr. Young did not review any of the diagnostic studies, including the MRI imaging, multiple x-rays, operative report, or any post-operative records or reports. Dr. McIntosh found Petitioner had a positive Apley's compression test after the work accident suggestive of a torn medial meniscus. Dr. McIntosh and Dr. Young both testified that swelling of the knee would more times than not accompany a meniscus tear, and Petitioner had an immediate and permanent onset of swelling following the work accident. The impact to the front of Petitioner's knee from his fall appears to have aggravated the arthritic condition in his patellofemoral compartment. Dr. Young's opinion that Petitioner's fall onto the front of his knee caused an anterior contusion, which quickly resolved, with no aggravation or acceleration of his arthritic condition, is not credible. There were no contusions noted in the emergency room at Good Samaritan Hospital. Dr. Young reviewed Petitioner's care records from Good Samaritan Hospital and reported those records did not note any swelling, deformity, or lesions. Although these findings were noted on the physical examination section of the emergency room records, Petitioner reported swelling immediately following the accident as recorded in Corvel's Intake Report and in the Chief Complaint section of the emergency room records where slight swelling was noted.

Petitioner testified he has never treated for symptoms related to his left knee and no evidence was introduced to contradict his testimony. Petitioner sought treatment immediately following the accident and consistently treated for his symptoms until after his total knee replacement. Consistent with the evidence presented and Dr. McIntosh's opinions, the work injury of April 24, 2018 accelerated Petitioner's need for his total knee replacement. There is no evidence that a total knee replacement, or any surgical intervention or treatment, was recommended prior to April 24, 2018. Dr. McIntosh and Dr. Young agreed that the knee replacement was a reasonable care option in light of Petitioner's symptoms just a few months after April 24, 2018. The Arbitrator finds that the work accident, at the very least, was a factor that contributed to Petitioner's knee symptoms.

Based on the foregoing, the Arbitrator concludes that Petitioner's current condition of ill-being in his left knee is causally related to the work accident of April 24, 2018.

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

Based on the Arbitrator's finding that Petitioner's current condition of ill-being is causally related to the injury, and the medical testimony of Dr. McIntosh and Dr. Young that all of Petitioner's care following the April 24, 2018 accident was reasonable and necessary regardless of disputed causal connection, the Arbitrator finds that Petitioner's medical services were reasonable and necessary and Respondent shall be ordered to pay for all reasonable and necessary medical services incurred from April 24, 2018 through November 2, 2018, subject to the medical fee schedule. Further, Respondent disputed liability for payment of Petitioner's medical expenses on the basis Petitioner's condition of ill-being was not causally related to the accident of April 24, 2018.

The Arbitrator finds Respondent has not paid all charges relating to Petitioner's reasonable and necessary medical care for his left knee injury, and therefore orders Respondent to pay $1,090.00 due and owing to Midwest Emergency Good Samaritan, Inc., $2,622.07 due and owing to Dr. Jeffrey B. McIntosh, $2,230.29 due and owing to Crossroads Community Hospital, $33.88 due and owing to Advanced Imaging Consultants, LLC, $425.00 due and owing to Byrd-Watson South 9th Drug Co., and $186.67 due and owing to NovaCare Rehabilitation.

The Arbitrator further orders Respondent to hold Petitioner harmless for any and all health insurance subrogation claims that may or have been asserted by United Healthcare Insurance Company, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit of $3,257.78 under Section 8(a) of the Act for medical benefits paid to date.

ISSUE (K): What temporary total disability benefits are in dispute?

Based on the Arbitrator's finding that Petitioner's current condition of ill-being is causally related to the injury and that Respondent disputes payment of temporary disability benefits on the basis Petitioner's condition of ill-being is not causally related to the accident of April 24, 2018, the Arbitrator orders Respondent to pay temporary total disability benefits for the period April 25,

2018 and from September 24, 2018 through November 2, 2018, a period of 5-6/7ths weeks, at the rate of $504.71 per week, as provided in Section 8(b) of the Act.

The parties stipulated and Respondent is entitled to a credit of $5,547.55 for nonoccupational indemnity disability payments made pursuant to Section 8(j) of the Act. This credit applies against any TTD benefits due and owing Petitioner.

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 Petitioner continues to work full duty as a Shipper/Loader. He has been employed by Respondent since 1999 and currently works 10-hour work days. He testified his job duties require a lot of stair and ladder climbing; however, Petitioner did not testify he had difficulty performing these job duties. As Petitioner's current condition minimally interferes with the performance of his job, if at all, the Arbitrator gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 56 years old at the time of the accident. Petitioner does not have a substantial number of working years ahead of him. Nevertheless, Petitioner will have to work with his ongoing symptoms and limitations for the remainder of his work life. Petitioner's symptoms are likely to inhibit or prevent his ability to do his regular activities, including ascending and descending stairs and ladders which he testified he does frequently each work shift. 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 there is no evidence of reduced earning capacity contained in the record. Petitioner testified he is earning the same pay and is employed in the same position he was in prior to the accident. 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 the Petitioner was a credible witness. Petitioner testified at Arbitration that despite the improvement resulting from surgery, he continues to experience an inability to kneel, pain with squatting, increased soreness with climbing stairs and ladders, and soreness with standing for a 10-hour work shift. He does not take medication and has no appointments for future medical treatment. Petitioner elevates his left leg, rests, and occasionally ices his knee after work. He is conscious of not hitting his knee on objects as it causes great pain. His activities/hobbies are limited due to his injuries, including the inability to play with his 7-year old grandson who lives with him. Petitioner does not feel comfortable riding

a bike or fishing because of fear of falling/tripping. He testified he enjoyed these activities prior to the accident. Petitioner testified he is not as happy as he used to be because of his restrictions, physically and financially. Taking into consideration Petitioner's continued postoperative symptoms and restrictions, which he did not experience prior to the accident of April 24, 2018, and the physical demands of his job duties as they relate to his injuries, 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 the left leg, or 75.25 weeks, pursuant to §8(e) of the Act.

Linda Cantrell, Arbitrator

2/11/20
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Keith L. Maney, Sr.,

Petitioner,

vs.

20IWCC0746

NO: 17 WC 6466

United Road Services,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 31, 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.

20IWCC0746

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.

DEC 17 2020

DATED:
o: 11/19/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MANEY, KEITH L
Employee/Petitioner

Case# **17WC006466**

20IWCC0746

UNITED ROAD SERVICES
Employer/Respondent

On 10/31/2019, 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 1.61% 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
CHARLES G HASKINS JR
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

0210 GANAN & SHAPIRO PC
ELAINE NEWQUIST
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK

20IWCC0746

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Keith L. Maney
Employee/Petitioner

Case # **17WC006466**

v.

Consolidated cases: **None**

United Road Services
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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **October 9, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 20IWCC0746

On **10/29/2016**, 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.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established causation as to the need for treatment as to his head, hand and left ankle conditions. The Arbitrator further finds that Petitioner established causation as to his left shoulder care and his current post-operative left shoulder condition.

In the year preceding the injury, Petitioner earned $**82,256.60**; the average weekly wage was $**1,581.80**.

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

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

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

Respondent shall be given a credit of $**95,510.29** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**95,510.29**.

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

ORDER

The parties stipulated that Petitioner was temporarily totally disabled from October 31, 2016 through July 26, 2018, a period of 90 4/7 weeks, and that all temporary total disability benefits have been paid. Arb Exh 1.

Respondent shall pay Petitioner permanent partial disability benefits of $775.18/week for 100 weeks, because the injuries sustained caused the 20% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay reasonable and necessary medical services of $19,304.00 to Surgical Center at Columbia Orthopedics, as provided and subject to the limitations contained in Sections 8(a) and 8.2 of the Act.

For the reasons set forth in the attached decision, the Arbitrator directs Respondent to reimburse Petitioner for all of the claimed mileage expenses outlined in PX 1 other than the expenses associated with Petitioner's trips to Dr. Snyder and a pharmacy. The Arbitrator applies the IRS reimbursement rates (54 cents/mile, 53.5 cents/mile and 54.5 cents/mile, respectively) to the travel in 2016, 2017 and 2018.

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

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

Molly C Mason

Signature of Arbitrator

10/31/19

Date

OCT 31 2019

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Summary of Disputed Issues

The parties agree that Petitioner sustained an accident on October 29, 2016, while working as an automobile transport driver for Respondent. Petitioner testified he was performing a pre-trip inspection, using a flashlight, when he rolled his left ankle and fell, injuring his left shoulder, hand and face in addition to his ankle. Petitioner underwent conservative care for an ankle sprain and left shoulder surgeries on May 4, 2017 and January 11, 2018. Following therapy, work conditioning and a valid functional capacity evaluation, he resumed full duty for Respondent in late July 2018. He testified he was assigned to a "high rail" transport vehicle at this point. Because this vehicle had higher decks, he had to perform more of his work at shoulder level or above. He testified his left shoulder pain worsened as a result. This affected his ability to sleep, causing him to feel drowsy while driving. He last drove for Respondent on August 21, 2018 and resigned thereafter, via a telephone conversation with Brian Hartman, Respondent's terminal manager. He testified he told Hartman he could not continue working due to his shoulder pain and related sleep problems. Hartman testified that Petitioner told him he was resigning to pursue his outside ministry activities and because his wife wanted him "off the road." Hartman acknowledged he did not recall the entire contents of the five-minute conversation.

The disputed issues include causal connection, medical expenses, mileage expenses and nature and extent. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified he currently lives in Holts Summit, Missouri. T. 10. He holds a doctorate in theology and has been involved in ministry for a number of years. T. 13. He served in the U.S. Marine Corps between 1980 and 1982 and subsequently served in the National Guard for about six years. He received an honorable discharge. T. 13-14.

Petitioner testified he is right-handed. T. 11. He denied having any right shoulder problems before the work accident. He sprained his left ankle in the remote past, while playing sports in his youth. T. 12. He presented at the hearing with a walking stick. He denied using such a stick before the accident. T. 12.

Petitioner described Respondent as an auto transport company. He acknowledged working as a truck driver for Respondent during two intervals. He had worked for Respondent for about four or five years prior to the accident. He was assigned to Respondent's Chicago terminal but did not always have to go to this terminal to begin a route. Respondent allowed him to keep his assigned tractor and trailer near his home in Missouri. T. 24-25. His job duties included inspecting his transport truck, preparing the truck for loading by building "bridges," loading the vehicles onto the truck, applying straps to the wheels of those vehicles, attaching

the hooks on the straps to the decks, pushing and pulling a "tie down" bar to move a ratchet to tighten the straps and driving the transport truck to various locations, primarily dealerships, to make deliveries and pick-ups. T. 15-16.

Petitioner provided a detailed description of the vehicle loading process. He indicated this process involves "hundreds of steps." T. 16. The transport truck has five decks that the vehicles rest on during transport. The decks are moved hydraulically. Each deck has four "flippers." T. 20. The "flippers" are composed of metal or aluminum. T. 19. Each "flipper" is about 2 ½ to 3 feet long. T. 21. He estimated the weight of a "flipper" to be 25 pounds. Before he could drive any vehicle onto the truck, he had to "build bridges," essentially closing the gaps in each deck, by moving the "flippers." T. 20. The first vehicle to be loaded was the vehicle affixed above the truck's cab. The turn buckles are "up high" on this vehicle. He had to pull them from "way up above [his] head." T. 23. As he loaded the other vehicles, he had to work with his arms in front of him to push and pull tie-down bars in turn buckles to tighten the straps to ensure the loaded vehicles do not move during transport. T. 22-23. In some instances, he had to climb onto the truck and then hang on to the truck with one hand while using the other hand to tighten the straps. T. 18.

Petitioner testified his accident occurred at 5:30 AM on October 29, 2016, while he was performing a pre-trip inspection in McGirk, Missouri. His transport vehicle was already loaded with vehicles and was parked in a lot that was "mainly gravel." T. 26. He was shining a flashlight up, inspecting the straps, when he stepped on something and "rolled" his left ankle. T. 27. He started falling and put his left arm out to catch himself. T. 27. After he fell, he experienced severe pain in his left ankle, left shoulder, hand, chin and wrist. T. 27-28. He took a photograph [PX 7] of his hand, which was bleeding, and sent it via text message to Maureen Augerman, Respondent's dispatcher. T. 28. He managed to finish his assigned delivery route. T. 29.

Petitioner testified he first sought care after he returned home from finishing his route. At that point, he lived on a farm in California, Missouri, outside McGirk. No hospital was near his home. He had to travel fifteen miles to go to an Emergency Room in Jefferson City. T. 30.

Records in PX 3 reflect that Petitioner arrived at the Emergency Room of SSM Health St. Mary's Hospital in Jefferson City, Missouri, on the morning of October 31, 2016. PX 3, p. 1. The records set forth the following history:

> "Onset Sat morn he twisted his ankle and fell onto L arm. Pt states since then he has been having trouble with L arm and shoulder. Pt has abrasion to L hand."

The records also reflect that Petitioner rated his left ankle and left shoulder pain at 6/10. PX 3, p. 3. The examining provider, a certified nurse practitioner, noted tenderness to the anterior aspect of the left shoulder, with a decreased range of motion, tenderness to the lateral aspect of the left wrist and tenderness to the left lateral malleolus. PX 3, p. 4. Left wrist and right

hand X-rays showed no acute osseous abnormalities. Left shoulder X-rays showed a "small avulsion fracture extending lateral to the proximal humeral head, age indeterminate." Left foot and ankle X-rays showed no acute fracture or dislocation and small spurs along the posterior calcaneus. PX 3, pp. 5-7. The nurse practitioner placed Petitioner in a shoulder sling. She prescribed Norco as needed for pain. She directed Petitioner to remain off work for one week and follow up with orthopedics in Jefferson City. PX 3, pp. 7, 29.

Petitioner testified that a Broadspire nurse named Carla Heffner became involved in his care and attended his medical appointments. T. 32.

Petitioner saw Dr. Snyder, an orthopedic surgeon, on November 2, 2016. The doctor recorded the following history of the accident:

> "[Petitioner] is a 55-year-old gentleman who sustained a work-related injury on Saturday, October 29, 2016. He was at work when he stopped [sic] on something and twisted his ankle. He has severe inversion injury to his ankle. He went to try to catch himself and ended up extending his left upper extremity. He had trauma to the left wrist and left shoulder. He said the left shoulder jammed up."

The doctor noted that Petitioner denied any past history of left ankle or left shoulder problems. On left shoulder examination, he noted some bruising and soft tissue swelling, a painful arc of motion above 80 degrees, positive Hawkins and impingement signs and pain and weakness with resistance of the supraspinatus. On left wrist examination, he noted some mild pain with dorsiflexion and volar flexion. On left ankle examination, he noted bruising medially and laterally, marked tenderness to palpation of the syndesmosis, tenderness to palpation over the anterior talofibular ligament, negative anterior drawer testing and weakness in eversion and plantar flexion. PX 5, p. 2. With respect to the left shoulder, Dr. Snyder diagnosed an avulsion fracture of the left proximal humerus. He told Petitioner this "raises concern for the possibility of a rotator cuff tear." He prescribed an MRI and ongoing immobilization. With respect to the left ankle, he diagnosed a "Grade 3 syndesmosis sprain." He indicated he saw no evidence of a fracture on the X-rays. He placed Petitioner in a CAM walker and told him he would likely be able to transition to a brace in three to four weeks. He released Petitioner to seated duty and indicated he could use only his right hand. He directed Petitioner to return to him in three weeks. PX 5, pp. 1-2.

Petitioner testified that Respondent was not able to provide him with work within Dr. Snyder's restrictions. T. 32.

Petitioner returned to Dr. Snyder on November 23, 2016. The doctor noted that Petitioner had been using a CAM walker for three weeks and that his left ankle "feels much better now." He also noted that Petitioner's left shoulder pain had increased and that he had "lost range of motion." On left shoulder re-examination, he noted soft tissue swelling, a painful arc of motion above 20 degrees, a possibly positive impingement sign, a positive Hawkins sign

and weakness of the supraspinatus. On left ankle re-examination, he noted tenderness to palpation laterally, full dorsiflexion, full plantar flexion, no laxity to valgus stress and no pain with toe or heel walking. He obtained repeat left shoulder X-rays. He interpreted the films as showing slight movement of the avulsion fracture and "a little more displacement." He again recommended a left shoulder MRI. He discontinued the CAM walker and provided Petitioner with an ankle brace. He prescribed therapy. He described the left ankle prognosis as excellent. He released Petitioner to right-handed work and directed him to return after the MRI. PX 5, p. 4.

Petitioner underwent the prescribed left shoulder MRI the same day, November 23, 2016. The MRI, performed without contrast, showed mild rotator cuff tendinopathy, described as "chronic," a small partial-thickness intrasubstance tear of the subscapularis insertion, "early medial subluxation" of the long head of the biceps from the bicipital groove, "of indeterminate age," a posterior glenoid labrum tear "of indeterminate age," chronic mild to moderate glenohumeral osteoarthritis and chronic mild hypertrophic AC joint arthropathy. PX 5, pp. 10-11.

Petitioner testified that, following the MRI, he saw a different orthopedic surgeon, Dr. Tarbox, at the recommendation of Carla Heffner, the Broadspire nurse overseeing his care. Dr. Tarbox's office was in Columbia, Missouri. T. 33. He had to travel 50 miles to get from his home to the doctor's office. The trip was long because he had to go to Jefferson City, to cross a bridge over the Mississippi River, en route. T. 33-34.

Records in PX 6 reflect that Petitioner first saw Dr. Tarbox on January 18, 2017. T. 34. The doctor described Petitioner as a right-handed automobile transport loader and driver. He recorded a consistent history of the October 29, 2016 work fall and subsequent care. He noted that Petitioner was still wearing a sling, had not undergone any therapy to date and had last seen Dr. Snyder in late November. He also noted that Petitioner rated his left shoulder pain at 8/10 and indicated this pain was causing him to wake up during the night. He indicated that Petitioner also complained of some numbness and tingling in his fourth and fifth finger.

On initial left shoulder examination, Dr. Tarbox noted no deformity or swelling, tenderness to palpation throughout the shoulder, significant strength deficits secondary to pain and significantly positive Hawkins and impingement signs. He indicated it was difficult to assess stability secondary to guarding. He obtained left shoulder X-rays. He interpreted the films as showing some callus, tendinopathy and no signs of fracture. He interpreted the MRI as showing an intact supraspinatus, some injury to the posterior labrum, a possible injury to the anterior labrum and no edema in the humeral head.

Dr. Tarbox also indicated he examined Petitioner's right arm, neck and lower back. He noted no abnormalities in these body parts. There is no indication he examined the left ankle.

Dr. Tarbox indicated he reviewed the previous medical records. He addressed causation as follows:

> "I believe when he fell he injured the labrum. I don't see any signs of true fracture – however, I do see some calcific tendinitis laterally which may be a response from the fall. I do believe when he fell he sustained the injury to the left shoulder making this fall the prevailing factor."

He administered a left shoulder subacromial injection, discontinued the sling and directed Petitioner to begin therapy. He continued Petitioner on light duty. PX 6, pp. 2-5.

Petitioner began a course of therapy at Peak Sport and Spine California, in California, Missouri, thereafter. T. 35. On January 27, 2017, a therapist noted that Petitioner rated his worst left shoulder pain at 10/10 and denied carrying anything heavier than a coffee cup since the work accident. PX 6, p. 125. On February 10, 2017, a therapist noted that Petitioner reported compliance with home exercises and denied improvement. PX 6, pp. 123-124.

Petitioner returned to Dr. Tarbox on February 15, 2017 and reported no relief from the injection. The doctor's left shoulder examination findings were unchanged. There is no indication he examined any body part other than the left shoulder. He recommended a left shoulder arthroscopy with subacromial decompression and labral debridement. PX 6, pp. 6-8.

Petitioner testified he went to the Emergency Room at St. Mary's in Jefferson City on April 19, 2017 because he was experiencing severe left shoulder pain. T. 36. He went to the Emergency Room at Dr. Tarbox's direction. T. 36. The Emergency Room records (PX 4) reflect that Petitioner was waiting for surgery to be authorized and his pain was "starting to become unbearable." Petitioner indicated he had called Dr.Tarbox that day "and was advised to come to the ED for pain control." PX 4, p. 3. The Emergency Room provider prescribed Soma and Ultram. PX 4, p. 18.

Dr. Tarbox operated on Petitioner's left shoulder on May 4, 2017, performing an arthroscopy with subacromial decompression and extensive synovectomy. PX 6, p. 9.

At the first post-operative visit, on May 17, 2017, Dr. Tarbox removed the surgical sutures. He prescribed physical therapy and continued Norco for pain. He released Petitioner to light duty with no use of the left arm. PX 6, pp. 10, 141.

Petitioner began a course of therapy at Peak Sport and Spine Diamond Ridge, in Diamond Ridge, Missouri, on May 4, 2017. Petitioner testified that Dr. Tarbox recommended he undergo therapy at this facility. T. 38. The therapist described Petitioner as "very guarded" during range of motion activities. She noted that, after Petitioner left therapy, he was "observed being able to place his hand on top of his steering wheel in order to drive." PX 6, pp. 118-119.

On June 2, 2017, a therapist noted that Petitioner remained very guarded and continued to demonstrate outward signs of pain "regardless of degree of ROM." PX 6, pp. 116-117.

On June 19, 2017, a therapist noted that Petitioner was still reporting significant pain but was "tolerating motion a little better." PX 6, pp. 114-115.

On June 21, 2017, Dr. Tarbox noted that Petitioner was participating in therapy and still experiencing a fair amount of pain. He attributed this to the amount of synovitis seen during surgery. He started Petitioner on Celebrex and prescribed additional therapy. He imposed restrictions of minimal work at or above shoulder level and no lifting over 10 pounds with the left hand. PX 6, pp. 11-12, 140.

On July 19, 2017, Dr. Tarbox noted that Petitioner was making progress and "really starting to turn the corner." He prescribed additional therapy. He released Petitioner to light duty with no lifting above 10 pounds with the left hand. PX 6, pp. 13-14, 139.

On July 31, 2017, a therapist noted that Petitioner "arrived on motorcycle to today's visit" and reported increased pain secondary to putting weight on his shoulder to shift weight in a recliner the previous evening. PX 6, p. 106.

On August 21, 2017, a therapist noted that Petitioner "regularly drives motorcycle to therapy visits [and] does not demonstrate pain when arriving or departing from clinic on motorcycle." PX 6, p. 101.

On August 23, 2017, Dr. Tarbox noted that Petitioner remained symptomatic and rated his pain at 7/10. He also noted a couple of episodes of painful popping of the left shoulder. On re-examination, he noted tenderness to palpation, crepitation and 4+/5 strength. He referred Petitioner to Dr. Thornburg, who administered an intra-articular injection. PX 6, p. 40. T. 37. He directed Petitioner to continue therapy. He continued the work restriction. PX 6, pp. 16-18.

On September 27, 2017, Petitioner returned to Dr. Tarbox and reported only transient relief following the intra-articular injection. Petitioner continued to complain of 5/10 left shoulder pain and popping. After re-examining Petitioner, Dr. Tarbox prescribed a repeat MRI. PX 6, pp. 20-21.

The repeat MRI, performed without contrast on September 28, 2017, showed mild to moderate rotator cuff tendinopathy with associated calcific tendinitis and no discrete tear, mild tendinopathy of the subscapularis tendon with a small partial-thickness articular surface tear of the superior insertion, mild tendinopathy and subluxation of the long head of the biceps (unchanged from the prior MRI), moderate glenohumeral osteoarthritis and mild AC joint arthropathy and a "chronic tear of the posterior glenoid labrum, unchanged from the prior examination." The radiologist described the humeral head as "mildly dorsally subluxed in relationship to the bony glenoid, chronic and unchanged as compared to the prior examination." PX 6, pp. 127-128.

On October 11, 2017, Dr. Tarbox noted ongoing complaints of 5/10 left shoulder pain. He interpreted the repeat MRI as showing fluid within the joint, some fluid around the biceps anteriorly and some arthritis developing in the glenoid. He described the rotator cuff as intact. He indicated the MRI did not afford a good view of the biceps sitting in the groove. He recommended additional surgery, i.e., a left shoulder arthroscopy and possible biceps tenodesis. PX 6, pp. 22-23. T. 39.

Dr. Tarbox performed a second surgery, in Columbia, Missouri, on January 11, 2018. His post-operative diagnoses were left shoulder impingement, synovitis, Grade 3 chondromalacia humeral head, Grade 4 chondromalacia glenoid and labral tear. PX 6, p. 24. Petitioner testified the surgery was delayed because Broadspire initially did not authorize the procedure. T. 40.

On January 19, 2018, Dr. Tarbox noted that Petitioner stated he was "doing well" but still experiencing some pain. The doctor removed the sutures. He prescribed therapy and released Petitioner to work with no use of the left arm. PX 6, pp. 25, 26, 135.

On February 21, 2018, Dr. Tarbox noted that Petitioner remained symptomatic but was progressing in therapy. He prescribed therapy and continued the work restriction. PX 6, p. 27.

On March 19, 2018, Dr. Tarbox prescribed additional therapy and advanced Petitioner to a 20-pound weight restriction. PX 6, pp. 29-30.

On April 18, 2018, Dr. Tarbox noted that Petitioner had regained motion but was experiencing 3/10 to 10/10 pain. He prescribed work hardening followed by a functional capacity evaluation. PX 6, pp. 31-32.

Petitioner underwent a functional capacity evaluation at Select Physical Therapy on June 4, 2018. The evaluator noted the following deficits: "reduced range of motion into flexion and abduction as well as strength into abduction which affected [Petitioner's] ability to repetitively reach overhead and lift at shoulder level." She found Petitioner capable of meeting the heavy physical demands of his auto transport driver job based upon a job description provided by Respondent. She described Petitioner's performance as consistent. PX 6, pp. 64-75.

On June 6, 2018, Dr. Tarbox described Petitioner as "doing well" but still experiencing 3/10 pain. He noted the results of the functional capacity evaluation. On left shoulder re-examination, he noted active abduction and forward flexion to 170 degrees, external rotation to 70 degrees, internal rotation to L1 and 5/5 strength. He also noted "a little bit of tenderness at the extremes of motion." He released Petitioner to full duty, indicating Petitioner "may return to driving." He recommended home exercises and directed Petitioner to return in six weeks so he could "rate and release him." PX 6, p. 34. T. 42.

Petitioner testified he had to adhere to Respondent's protocol and undergo several drug tests before returning to work. T. 42.

On July 18, 2018, Dr. Tarbox noted that Petitioner had not yet returned to work due to some scheduling issues. The doctor noted that Petitioner was "doing well" but he went on to describe Petitioner's pain as "moderate to severe" with a rating of 7/10. He again released Petitioner to full duty. He directed Petitioner to return in six weeks. PX 6, pp. 35-36.

Petitioner testified he resumed working for Respondent thereafter. He made his first run on July 27, 2018. T. 43. Respondent assigned a "high rail" trailer to him. This kind of trailer has upright supports that are welded to a rail that is "way up high." The decks on a "high rail" do not lower as far down as the decks on other trailers that are referred to as "low sides" or "quick loaders." T. 44. Petitioner testified he has used both kinds of trailers during his career. He had to perform "more shoulder to over the head type work" on the "high rail" because of the way it was constructed. T. 44-45.

Petitioner testified he last drove for Respondent on August 21, 2018. T. 45. Between July 27 and August 21, 2018, his left shoulder was "hurting and throbbing" due to the "increased overhead work" associated with his assigned "high rail." He would feel severe pain, as if someone had plunged a dagger into his shoulder or shot him with a gun. This pain could last anywhere from several seconds to several minutes. It was "occurring all the time." At night, he would wake up every 45 or 90 minutes due to pain. T. 46. Due to his erratic sleep pattern, he began falling asleep while he was driving. T. 46.

Petitioner testified he resigned from Respondent in August 2017 due to his ongoing symptoms and resultant sleep problems. He resigned by calling Hartman from his home in California, Missouri. He told Hartman, "I can't continue working. I am going to have to resign." The conversation lasted about five minutes. T. 47. He and Hartman might have also discussed his ministry. This is a subject he has talked about with Hartman since he started working for Respondent. T. 51.

Petitioner testified that, at some later point, Respondent sent someone out to his house to pick up the tractor and trailer. T. 48.

Dr. Tarbox's last note is dated August 29, 2018. On that date, the doctor noted that Petitioner was having difficulty driving his transport truck "as he does so much lifting" but that Petitioner was "able to do so." He also noted that Petitioner rated his pain at 6/10 but was "doing well overall." On re-examination, he noted 5/5 strength and slightly positive Hawkins and Neer impingement signs. He released Petitioner from care and recommended he perform home exercises. PX 6, pp. 37-38.

Petitioner denied sustaining any new injuries to his left shoulder or left ankle after the work accident. T. 48.

Petitioner testified his hand is "good" now. T. 48. His left shoulder continues to hurt "24/7." The pain increases with increased activity. The pain still affects his sleep. His range of motion is decreased and his strength is greatly decreased. He experiences "a little bit" of left ankle pain when he walks two miles. T. 52.

Petitioner identified PX 1 as a group of mileage-related forms concerning his travel to various medical providers. He received these forms from Carla, the nurse assigned to his claim. His wife completed the forms. He sent the completed forms to Broadspire. The forms are dated October 2, 2018. T. 53-54.

Petitioner testified that, as of the accident, he lived on a 26-acre "hobby farm" in California, Missouri. He raised organic beef, free-range chickens and goats. T. 48-49. When he was not driving for Respondent, he spent time on the farm maintaining and repairing fencing and buildings. He also had to build chutes for loading and unloading the animals he raised. After his work accident, he had to adjust the way he performed tasks. He primarily used his right arm and used his left "maybe for balancing something." T. 50. For the most part, he could not use his left arm when working overhead. T. 50. He now lives in a subdivision in Holts Summit. He sold the farm and moved because he could not perform the tasks needed to keep the farm operational. T. 51.

Under cross-examination, Petitioner testified he initially began working for Respondent in August 2010. He continued working until April 2012 when he resigned. He did not recall whether he told Respondent at that point that he was resigning so that he could work for another company that would allow him to pursue his ministry. As of 2012, he was not assigned to any church or formal congregation. He performed "motorcycle ministry." He and other men would ride their motorcycles to "outlaw motorcycle clubs" and try to befriend and counsel the patrons. T. 56. He no longer rides a motorcycle. T. 56-57. In 2012, he engaged in ministry activities periodically. He did not have any set schedule. He also attended school and ministry retreats during that year. T. 57-58. When he first resigned from Respondent, in 2012, he told Respondent about his school and ministry activities. He also indicated he wanted to spend more time with his family. It was at this point that he was out on the road for three to four weeks at a time. T. 58. It was after he resigned in 2012 that he obtained his doctorate from Midwest College of Theology in Crocker, Missouri. It was probably around June 2012 that he obtained his doctorate. T. 60. During that same year, he worked as an automobile transport driver for a company called Jack Cooper. The driving he did for Jack Cooper was similar to the driving he did for Respondent. Respondent rehired him on October 10, 2012. T. 61. He continued working for Respondent thereafter, until his accident. T. 61. He drove various trucks for Respondent between 2012 and 2016. T. 62.

Petitioner testified that, after his initial post-accident Emergency Room visit, he did not undergo any additional treatment for his hands or chin. T. 63. He continued treatment for his left ankle until the end of 2016. T. 63. When the accident occurred, his vehicle was already loaded with cars. After he fell, he managed to perform his route. He unloaded four vehicles from the bottom of his truck in Kansas City. This involved hydraulically lifting the vehicles that

were higher up, unstrapping the four vehicles he was going to unload, raising the "belly decks," building a "bridge," climbing up into the truck and backing each of the four vehicles out of the truck. T. 64-65. After the first delivery in Kansas City, he made other deliveries in Wichita and a dealership that was between Wichita and Salinas, Kansas. He unloaded a total of eight vehicles. At that point, he was "out of time," in terms of the number of hours he had been driving so he went to a hotel, where he stayed overnight. He drove home the following morning. T. 65-66.

Petitioner acknowledged that, during the hearing, he was able to lift both arms overhead when demonstrating the tasks he performed for Respondent. T. 66.

Petitioner testified that, while undergoing the functional capacity evaluation in June 2018, he told the evaluator about some of the tasks he had been performing around his farm. Specifically, he mentioned doing some wiring, mowing the yard, digging a ditch and tending chickens. T. 67. At the end of the evaluation, the evaluator told him he was cleared to return to his job at Respondent. Two days later, he saw Dr. Tarbox and told him he had been cleared to return to work. Before he could resume driving, he had to undergo some mandatory drug testing. This took a while. Before he resumed driving, he performed some yardwork for Respondent. On July 18, 2018, he returned to Dr. Tarbox. The doctor noted he was scheduled to drive a route for Respondent the following week. Petitioner identified RX 1 as a photograph of the "high end" trailer he was assigned to use when he resumed driving on July 27, 2018. The trailer had three steps outside of the cab. He had to use these steps with every fuel stop, pre-trip inspection and delivery. T. 72. A "high end" trailer involves more flipping of the "flippers." A "low end" trailer does not have as many "flippers" on each deck. T. 74. While backing vehicles onto his truck, he had to put his left forearm on the cab door and put pressure on that arm while looking backward to make sure the vehicle was not crooked. Some drivers used their mirrors but he had to look back. T. 77-78. He made his last delivery for Respondent in Camdenton, Missouri, around 5:03 PM on August 21st and was home by 6:30 PM. T. 79. The following morning he drove the truck to an authorized diesel service facility to have work done. He then drove the truck home. He last saw Dr. Tarbox on August 29, 2018. The doctor knew he had been driving a transport truck but he might not have known all of his particular tasks. T. 81. He told Dr. Tarbox he was having difficulty lifting. When he used the term "lifting," he was referring to moving the "flippers" and the ramps. Dr. Tarbox discharged him from care that day. He has not returned to the doctor and has not seen any other doctors for his shoulder. T. 82.

Petitioner testified he called Brian Hartman, his terminal manager, around August 22, 2018. He could not recall whether he made this call before or after his last visit to Dr. Tarbox. He called Hartman to tell him he was resigning. He told Hartman he was resigning because of his shoulder and because he was having trouble sleeping. He had already been released to full duty when he called Hartman. Respondent arranged for an employee named "Eric" to come to his house to get the truck. When "Eric" came out, in September, he helped "Eric" jump the truck because the battery was dead. He did not tell Respondent he was resigning because his wife wanted him home more. T. 84. His wife never wanted him to drive so much. T. 84 There were times he went out on the road for three to four weeks at a time. T. 85. Since leaving

Respondent, he has attempted to drive a dump truck and has attempted to haul boats. He worked for an excavating company, driving a dump truck, for a few weeks. He then worked for a boat hauling company for a few weeks. He has not worked anywhere else since leaving Respondent. His wife works. T. 85-86.

On redirect, Petitioner acknowledged riding a motorcycle since his surgeries. He rode one-handed. He would pull the clutch in. If Dr. Tarbox indicated he rated his left shoulder pain at 7/10 on July 18, 2018 and at 6/10 on August 29, 2018, those ratings would be correct. T. 88. When he returned to work for Respondent after his surgeries, his wife was very concerned about him falling asleep while driving. When he talked with Brian Hartman via telephone, he told Hartman his wife was concerned about this. T. 89.

Brian Hartman testified on behalf of Respondent. Hartman testified he is currently Respondent's terminal manager. He has held this position since 2007. T. 99. He oversees yards in five locations. T. 92. He "manages the entire operation." Respondent's dispatchers report to him. T. 93.

Hartman testified that Respondent provides hauling for the automobile industry. Some of its drivers are employees while others are owner-operators. Respondent provides trucks to the employees. Petitioner was Respondent's employee from October 2016 forward. T. 93-94. He listened to Petitioner account of his job duties and agrees this account was accurate. The work Petitioner performed was physical in nature. T. 94-95. When Petitioner was released to return to full duty in the summer of 2018, he had to pass drug screenings per DOT regulations before he could resume driving. T. 95-96. There were some delays associated with this. Petitioner resumed driving for Respondent on July 27, 2018. Between that date and August 21, 2018, Petitioner made at least four trips for Respondent. T. 96. Before beginning a route, Petitioner typically drove his assigned truck empty from Missouri to a yard in the Chicago area. T. 97. Between July 27 and August 21, 2018, he was not advised of any problems associated with the routes Petitioner drove. T. 98.

Hartman testified he has talked with Petitioner "lots of times." He knew that Petitioner was pursuing ministry activities outside of his job. Petitioner initially left Respondent's employment in 2012, indicating he wanted to be home more to pursue his ministry work. T. 99. After Petitioner resumed working for Respondent later the same year, he took some time off work to attend conferences and work on his farm. T. 99. Drivers such as Petitioner could reject routes "within reason." T. 99-100. Petitioner never took long stretches of time off. T. 100.

Hartman testified he had no contact with Petitioner between August 22, 2018 and around September 18, 2018. Petitioner did not perform any work for Respondent during this time. It was on September 17th or 18th that he called Petitioner to find out what was going on and when Petitioner was coming back. At this point, Petitioner had been away from work a little longer than on previous occasions. T. 102. No one else was on the call, to his knowledge. After he asked Petitioner when he was coming back, Petitioner said he was "going to resign." Petitioner indicated his wife Victoria "wanted him off the road" and he planned to pursue his

ministry work. To the best of his recollection, nothing else was said. He sent another worker out to pick up Petitioner's truck. He has not spoken with Petitioner since they spoke by phone. T. 104. After Petitioner resigned, he contacted Respondent's human resources department to notify them of his resignation. Petitioner has not reapplied since then, to his knowledge. T. 105.

Under cross-examination, Hartman testified that, when Petitioner took time off in the past, Respondent knew where he was. During the times Petitioner worked for Respondent, he was generally a reliable employee. He does not recall Petitioner ever being written up. T. 107. To determine the date of his telephone conversation with Petitioner, he reviewed records concerning his written communication with the human resources department. He does not have those records with him. Respondent's counsel "might" have them. T. 107. Petitioner could have been wrong about the date when he testified the conversation took place in August. T. 108. Petitioner would typically drive south, to Kentucky or Tennessee, to make deliveries. He also went to Kansas. T. 108-109. There were times when Petitioner would be out on the road for several weeks at a time. T. 109. Petitioner promptly notified Respondent of his accident. Petitioner was able to complete his route without incident after the accident. T. 110. His telephone conversation with Petitioner lasted no more than five minutes. He cannot recall what Petitioner said other than he wanted to resign to get off the road and devote more time to his ministry. He does not have a transcript of the conversation. T. 111.

Petitioner was recalled to the stand. He listened to Hartman's testimony and agrees he and Hartman had one conversation concerning his resignation. He has no reason to dispute Hartman's testimony that his conversation took place in September rather than August. T. 113.

Arbitrator's Credibility Assessment

Petitioner was a lively, articulate witness. His description of the automobile transport loading process was detailed and credible.

A physical therapist who saw Petitioner between May and August 2017 noted guarding and inconsistent behavior on several occasions. None of Petitioner's treating physicians made similar observations. The therapist who performed the functional capacity evaluation in June 2018 described Petitioner's performance as consistent.

Brian Hartman, Respondent's terminal manager, did not take issue with Petitioner's description of his duties. He agreed that Petitioner's job was physical in nature. T. 95. He also acknowledged learning, via a five-minute telephone conversation, that Petitioner was resigning, although he indicated the call took place on September 17 or 18, 2018 rather than August 21, 2018, the date Petitioner identified. Significantly, he admitted that, during this conversation, Petitioner told him his wife "wanted him off the road." T. 104. Under cross-examination, Hartman testified that he determined the date of the conversation by reviewing records concerning the communication he sent to human resources after he spoke with Petitioner. He conceded he did not bring those records to the hearing. He also conceded he could not recall

all of the details of the conversation. T. 111. He gestured toward Respondent's counsel, indicating she might have the records. Respondent did not offer these records into evidence. Where a party fails to produce evidence in its control, and that evidence is not equally available to the other side, the presumption arises that the evidence would be adverse to that party. REO Movers, Inc. v. Industrial Commission, 226 Ill.App.3d 216, 223-224 (1st Dist. 1992).

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between his undisputed accident of October 29, 2016 and any of his claimed current conditions of ill-being?

Petitioner testified he injured several body parts when he fell on October 29, 2016. He acknowledged that his hand, which was cut, is now "fine." He claims permanency with respect to the left ankle and left shoulder.

With respect to the left ankle, the Arbitrator finds that Petitioner established causation as to a sprain that required an initial course of conservative care. On November 23, 2016, less than a month after the accident, Dr. Snyder noted that Petitioner described his ankle as "much better." The doctor dispensed a brace and told Petitioner to discontinue the previously prescribed CAM walker. None of the subsequent treatment records mention left ankle complaints, although Petitioner presented to the hearing with a walking stick and testified he still experiences a little stiffness after walking two miles.

With respect to the left shoulder, the Arbitrator finds that Petitioner established causation as to the need for an extensive course of care, including two surgeries, and as to his current post-operative condition of ill-being. In so finding, the Arbitrator relies on the following: 1) Petitioner's credible denial of any pre-accident left shoulder problems; 2) Petitioner's credible testimony concerning the mechanism of his fall and the immediate onset of symptoms; 3) the consistent history and complaints set forth in the Emergency Room records; 4) the left shoulder MRI results; 5) the causation-related opinions voiced by Dr. Tarbox, a surgeon selected by Respondent's carrier's nurse case manager; and 6) Petitioner's credible denial of any post-accident left shoulder reinjuries.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims two unpaid charges, each in the amount of $9,652.00, from The Surgical Center at Columbia. These charges relate to the left shoulder surgeries Petitioner underwent on May 4, 2017 and January 11, 2018. Each charge is associated with the CPT code 29826. Along with the bills, Petitioner submitted into evidence a chain of E-mail inquiries from Respondent's counsel to other individuals. PX 2. Respondent did not object to PX 2. The gist of the responses is that Respondent's carrier improperly cited a Medicare provision in declining to pay. On various dates, Benjamin Mikita, Director/Vice President of Comp Recovery, advised that the carrier drew an improper distinction between a surgeon's CPT code 29826 and a facility's CPT code 29826, asserting it was liable for the first but not the second. Mikita asserted

that, according to the Illinois Fee Schedule, "there is no established reimbursement amount for CPT code 29826 and, as such, payment is supposed to be 53.2% of billed charges. Applying this formula, he indicated that payment should be made in the amount of $5,134.86 plus $5,134.86, or $10,269.72.

There is no dispute in this case as to the reasonableness or necessity of either surgery. It was a nurse affiliated with Respondent's carrier who directed Petitioner to the physician who performed the surgeries.

Respondent maintains that the Arbitrator should defer ruling on the claimed charges but the parties, by placing permanency at issue, are clearly seeking finality. Our fee schedule inures to the benefit of employers, not claimants. The Arbitrator awards the claimed charges pursuant to the fee schedule.

Is Petitioner entitled to mileage expenses?

Petitioner claims reimbursement of $2,292.69 in mileage expenses relating to trips he made from his farm in California, Missouri to various providers and, in a couple of instances, pharmacies. [Petitioner does not claim any reimbursement for the trips he made from his home to the first physical therapy provider, which was located in California.] The trips outlined in the forms that comprise PX 1 vary in length from 1 mile to 91.4 miles, with the latter representing the round-trip distance between Petitioner's farm and the office of Dr. Tarbox, the surgeon recommended by the Broadspire nurse case manager.

The leading case on the issue of mileage expenses is General Tire & Rubber v. Industrial Commission, 221 Ill.App.3d 641 (5th Dist. 1991). The standard applied in that case is one of "reasonable necessity."

The Arbitrator, having considered Petitioner's testimony, PX 1 and General Tire, orders Respondent to reimburse Petitioner for the expenses relating to his travel other than the expenses relating to: 1) the trips between his home and Dr. Snyder's office in Jefferson City outlined on the second page of PX 1; and 2) the pharmacy-related trips of 2.7, 2.7 and 1.0 miles outlined on the fourth page of PX 1. Petitioner testified there are no hospitals in California, Missouri, but he did not testify there are no physicians there. He also did not claim that Respondent directed him to Dr. Snyder. As for the pharmacy-related trips, it appears to the Arbitrator that, on three occasions in March and April 2017, Petitioner went to a pharmacy in Jefferson City before driving home from a hospital or doctor's office in the same city. Petitioner did not establish the necessity of using this particular pharmacy and presented no case law supporting an award of travel expenses relating to the procurement of medicine or devices. The Arbitrator finds that Petitioner met the standard of "reasonable necessity" with respect to his trips to a hospital. No hospital was available in the town where he was then residing. With respect to the remaining trips, the Arbitrator finds that, by directing Petitioner's care, Respondent waived any argument concerning mileage reimbursement. Via the Broadspire nurse who directed Petitioner to Dr. Tarbox, Respondent occasioned Petitioner's 45-mile trips

to that physician. Nor did Respondent contradict Petitioner's testimony that Dr. Tarbox directed him to undergo an injection with Dr. Thornburg and post-operative physical therapy at a facility in Jefferson City instead of the facility in California where he went before his first surgery. T. 38. The Arbitrator infers that Dr. Tarbox was familiar with, and had obtained good results for his patients, from both Dr. Thornburg and the facility in Jefferson City. He found it "reasonably necessary" to refer Petitioner to these providers.

The Arbitrator relies on the IRS mileage rates, cited by both parties, in finding that travel performed in 2016 shall be reimbursed at the rate of 54 cents per mile, travel in 2017 at the rate of 53.5 cents per mile and travel in 2018 at the rate of 54.5 cents per mile.

What is the nature and extent of the injury?

This case is post-amendatory, since the accident occurred after September 1, 2011. Accordingly, the Arbitrator looks to Section 8.1b of the Act for guidance in determining the nature and extent of Petitioner's injury. That section sets forth five factors to be considered in assessing permanency, with no single factor predominating. The Arbitrator assigns no weight to the first factor, any AMA Guides impairment rating, since neither party offered such a rating into evidence. The Arbitrator gives weight to the second and third factors, Petitioner's age at the time of the accident and occupation. Petitioner was a 55-year-old automobile transport driver as of the accident. He pursued various ministry activities on the side. Following his surgeries and a functional capacity evaluation, he was released to full duty. He resumed his regular driving duties for Respondent on July 27, 2019. He made about four trips for Respondent before he resigned. When Petitioner last saw his surgeon, on August 29, 2018, the doctor noted a pain rating of 6/10 and symptoms associated with lifting but he did not impose any restrictions. For the reasons stated above, the Arbitrator finds credible Petitioner's testimony that he experienced increased symptoms and associated sleep problems when he resumed driving in July 2018. He associated the worsening of his pain with the use of a "high end" trailer. Respondent's terminal manager, Brian Hartman, did not contradict him on this point. Petitioner also testified that, when he told Hartman he was resigning, he indicated that part of his reason for doing so was the fact his wife was concerned about his pain-related sleep problems and the fact he was getting sleepy while driving. T. 89. Hartman acknowledged that Petitioner told him his wife "wanted him off the road." T. 104. This corroborates Petitioner's account, to an extent. Hartman also testified that, after his conversation with Petitioner, he sent a written communication to Respondent's human resources department concerning the resignation. Hartman indicated he relied on this writing to ascertain the date he spoke with Petitioner. He did not have the writing available at the hearing. The Arbitrator assigns some weight to the fourth factor, earning capacity. Dr. Tarbox released Petitioner to full duty and Petitioner performed full duty for a few weeks, albeit not without problems. Petitioner did not return to Dr. Tarbox but he also did not return to automobile transport driving. He "attempted" two other driving jobs, for brief periods, and was unemployed as of the hearing. As for the fifth and final factor, evidence of disability corroborated by the treatment records, the Arbitrator notes the MRI reports, the operative reports and Dr. Tarbox's examination findings and pain ratings.

The Arbitrator, having considered the foregoing, finds that, with respect to the left shoulder injury, Petitioner is permanently partially disabled to the extent of 20% loss of use of the person as a whole, representing 100 weeks of benefits under Section 8(d)2 of the Act.

Based on the foregoing causation analysis, the Arbitrator declines to award permanency for the face, hand or left ankle injuries.

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

Ljiljana Pelivanovic,

Petitioner,

vs.

Our Lady of Resurrection,

Respondent.

Case #: 10 WC 38521

Consolidated cases: 10 WC 38522
10 WC 44279
12 WC 10959
13 WC 23804

20IWCC0747

DECISION AND OPINION ON REVIEW

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

I. FINDINGS OF FACT

Petitioner, a hospital housekeeper, alleged she contracted Methicillin Resistant Staphylococcus Aureus ("MRSA") from cleaning hospital rooms which had been infected with that staph bacteria. Petitioner claims she was exposed to MRSA while working on: August 20, 2010 and September 3, 2010 (this claim, 10 WC 38521); October 21, 2010 (10 WC 44279); and March 19, 2012 (12 WC 10959).

Petitioner testified that about two weeks before September 3, 2010, while working, she first noticed blisters and bleeding on her face, the inside of her arms, and leg. Petitioner notified her supervisor, Ms. Chowaniec, of her condition and that she had been cleaning an infected patient's room. Petitioner testified that Ms. Chowaniec did not "want to hear it" and would not fill out an accident report. After Petitioner's shift ended on September 3, 2010, while still at the hospital, she noticed that her condition had gotten much worse. The blisters and bleeding were all over her face, neck, hands, and leg, like "chicken pox." She again reported her condition to Ms.

Chowaniec and stated she may have accidentally touched her face while cleaning at work, and then touched her skin. She advised Ms. Chowaniec that she had been cleaning ICU isolation rooms.

Petitioner sought treatment in the emergency room on September 4, 2010 and was admitted to the hospital for two nights. After her discharge, Petitioner saw her primary care physician, Dr. Guzina, who diagnosed her with MRSA. The MRSA diagnosis was confirmed by a positive culture. Petitioner was off work about three months.

Ms. Chowaniec filled out a report dated September 7, 2010 documenting Petitioner's complaints. The report documented Petitioner's report of accidentally touching her face with her gloves while cleaning an isolation room. Under the reports section, "cause of occurrence," Ms. Chowaniec wrote, "infection/isolation room." The report also indicated that Petitioner should be more careful and not contact her skin while cleaning.

Petitioner returned to work on October 21, 2010, after she was told she no longer had MRSA. However, while working on that date, she noticed the same symptoms she had previously experienced – bubbling and bleeding on her right hand, arm, face and leg. She reported the foregoing to her supervisor. Petitioner was again treated in the emergency room, and followed up with Dr. Guzina and Dr. Yeo, who had her admitted to Thorek Hospital. Petitioner was taken off work until January 20, 2011.

On March 19, 2012, Petitioner had yet another incident of similar symptoms on her skin while at work. She reported the incident to Ms. Chowaniec. She sought treatment in the emergency room, and then with Dr. Guzina, who took her off work. Dr. Guzina eventually released Petitioner to work on October 2, 2012.

Several physicians provided testimony regarding Petitioner's MRSA diagnoses and their relation, if any, to her work environment. Petitioner's treating physicians, Dr. Guzina, Dr. Firoozi, and Dr. Yeo, as well as Respondent's Section 12 examiner, Dr. Chiodo, were called as witnesses at evidence depositions.

Dr. Guzina, a board-certified internal medicine physician, testified that she first treated Petitioner for MRSA on September 14, 2010, after Petitioner had been diagnosed with that condition. Dr. Guzina saw Petitioner again on October 25, 2010 after she had returned back to work. Then, Petitioner reported that while cleaning hospital rooms on October 21, 2010, she noticed her face was swollen. Dr. Guzina instructed Petitioner to follow-up with an infectious disease specialist, although she continued to monitor the antibiotics Petitioner was taking. On January 20, 2011, Petitioner returned to work in an improved condition with no rashes.

Dr. Guzina testified that Petitioner returned to see her on March 22, 2012, with MRSA symptoms. Petitioner reported having cleaned a hospital room in which a scabies patient had been present. Upon exam, Dr. Guzina observed Petitioner had raised papillae and small open wounds

with scabs. Although Petitioner went to the ER before seeing Dr. Guzina and was given medication, the rashes on her arms, legs, face, upper chest, and buttocks had continued to worsen. Dr. Guzina took Petitioner off work, and started her on medications for MRSA.

Because Petitioner's MRSA diagnosis in September 2010 had been confirmed by a positive culture, Dr. Guzina testified that she found it unnecessary to obtain another culture to confirm Petitioner's infection from March 19, 2012 was MRSA. Dr. Guzina testified that once a patient has a positive culture for MRSA, it's reasonable to assume that all subsequent skin infections they develop should be treated as MRSA. After Petitioner's initial MRSA exposure at work, subsequent exposures would bring back her symptoms.

Dr. Firoozi, a board-certified dermatologist, testified that she first saw Petitioner on September 7, 2010. Petitioner gave a history of having worked in an isolation room that had been contaminated with MRSA two weeks before her office visit. Petitioner reported she had accidentally touched her face, ears, knee, and other parts of her body with contaminated gloves. At that time, Dr. Firoozi did not have any culture results and initially believed Petitioner had spider bites, the appearance of which were similar to MRSA lesions. She started Petitioner on antibiotics. When Dr. Firoozi next saw Petitioner on September 11, 2010, she diagnosed Petitioner with MRSA based upon her positive culture. Dr. Firoozi prescribed a different antibiotic and an antiseptic body cleanser. Petitioner's lesions improved on subsequent visits, and on October 21, 2010, Dr. Firoozi believed that most of her MRSA skin infection had resolved. She released Petitioner back to work that day, even though she believed Petitioner's right knee was probably still somewhat infectious. Dr. Firoozi opined that based upon Petitioner's reported history, she could have contracted MRSA from an exposure at work.

Dr. Yeo, a board-certified infectious disease specialist, testified that he first examined Petitioner for her MRSA diagnosis on November 2, 2010 as referred by Dr. Guzina. At his exam, Petitioner reported her condition had been present for weeks or months. Dr. Yeo noted that her lesions were dry and that she had been on antibiotics. She told him that she had cleaned patient rooms, isolation rooms, and ICU rooms. Dr. Yeo had Petitioner admitted to the hospital to begin "first line" intravenous antibiotics. He explained that Petitioner had been taking "second line" antibiotics which had improved her condition but not resolved it. After receiving the intravenous antibiotics, Petitioner's condition improved and on November 4, 2010 he discharged her.

Dr. Yeo opined that based on Petitioner's history, she likely contracted MRSA while working as a janitor cleaning the various hospital rooms. He opined that in 2010, the vast majority of MRSA cases were contracted in hospitals with only a handful happening outside of them. Dr. Yeo explained that people working in a hospital setting, nursing home setting, or a long-term care setting like Petitioner and himself already, "have MRSA in our skin." The MRSA can be "colonized" within an hour over a person's entire body, and a scratch or open wound can cause abscesses and lesions. Dr. Yeo stated Petitioner may have been sensitive to the harsh cleaning chemicals which might have caused a break in her skin, which then might have created an opportunity for a MRSA infection. He also believed Petitioner's scratching was a cause of the

abscesses/lesions. Dr. Yeo testified that he told Petitioner she had to stop scratching because she had lesions everywhere she had scratched.

Dr. Yeo testified that, in November 2010, he diagnosed Petitioner with MRSA based upon her previous positive culture. He stated that the blood test he had ordered to confirm MRSA came back negative because Petitioner had been on antibiotic treatment. Dr. Yeo opined that once a MRSA infection is diagnosed, every subsequent MRSA diagnosis most probably relates back to the initial exposure. He further explained that the treatment for MRSA will never alleviate a non-MRSA condition.

Dr. Chiodo, Respondent's Section 12 examiner, conducted two examinations of Petitioner at Respondent's request: on December 6, 2010 and June 28, 2012. He testified that he is board-certified in internal medicine, with several subspecialties. He also holds master's degrees, is a certified industry hygienist, and is an attorney. At his first examination of Petitioner, Dr. Chiodo testified that Petitioner gave a history of probably accidentally touching her face after cleaning an isolation room. She also reported having facial redness and swelling of her wrists on October 21, 2010, her first day back at work. Dr. Chiodo testified that he did not believe Petitioner had MRSA because she had not had a positive culture. He stated that if she actually did have MRSA, he did not believe Petitioner contracted it from her hospital workplace because MRSA is present in many different locations. He testified that there is nothing unique to hospitals that would be a cause of her contracting MRSA versus some other non-occupational cause.

At Dr. Chiodo's second exam on June 28, 2012, Petitioner reported she had two additional exposure episodes, on June 29, 2011 and on March 19, 2012. At that exam, Dr. Chiodo did not observe any MRSA lesions and noted there had been no blood tests, cultures, or environmental health records to confirm the presence of MRSA or scabies. Dr. Chiodo believed Petitioner developed a rash from anxiety. He believed that a positive culture was needed for a clinical diagnosis of MRSA, which should not be made by just looking at a lesion.

On cross examination, Dr. Chiodo acknowledged that he practices and teaches both medicine and law, and that while he is retained as an expert by plaintiffs, he is more often retained by insurance carriers. Dr. Chiodo admitted he did not ask Petitioner which rooms or areas in the hospital she had cleaned, or what she had done in the days and weeks before March 19, 2012. He admitted that if Petitioner did have MRSA, he had no opinion as to what caused it. He then opined that the most likely cause of Petitioner's MRSA was her cigarette smoking.

Dr. Chiodo opined that Petitioner's workplace was not a 51% or more cause of her MRSA infection. Dr. Chiodo testified it was not his job, or the job of Petitioner's treaters, to figure out what caused Petitioner's MRSA. He believed that without cultures to confirm the presence of MRSA, a skin condition is just a rash. Dr. Chiodo did not believe Petitioner had MRSA or scabies because no records confirmed that. He believed the problems Petitioner complained of were most likely psychosomatic.

II. CONCLUSIONS OF LAW

The Arbitrator denied all three of Petitioner's MRSA claims, finding that she did not prove accidental injuries or exposures. The Arbitrator based her findings upon Petitioner's lack of credibility, a lack of corroboration and speculation. The Arbitrator noted Petitioner's histories varied and lacked details, and that Dr. Guzina documented no date of occurrence or mention of a workplace exposure. The Arbitrator found that Petitioner's blood culture in November 2010 was negative for MRSA and believed that Petitioner's history, "reasonably suggests that Petitioner never even returned to work," on October 21, 2010, the date of her second alleged exposure.

The Arbitrator also found that both Drs. Firoozi and Guzina failed to give persuasive or credible testimony or opinions as to when and how Petitioner was exposed to MRSA in her workplace. The Arbitrator assigned little weight to Dr. Yeo's opinions, stating he saw Petitioner only once, in November 2010, and did not corroborate where, how or when Petitioner's MRSA exposures occurred. The Arbitrator believed Petitioner did not prove she was exposed to MRSA on March 19, 2012, because she initially reported she had been exposed to scabies, and because Dr. Guzina performed no testing to confirm MRSA.

The Commission views the evidence differently than the Arbitrator, and finds that Petitioner did prove that while working for Respondent, she was exposed to MRSA, which manifested on August 20, September 3, 2010, October 21, 2010 and March 19, 2012. In so doing, the Commission examines the testimony of Petitioner's treating physicians, and the objective medical evidence on which they relied in reaching their opinions. The Commission is not persuaded by the opinions of Dr. Chiodo, Respondent's Section 12 examiner, who had no understanding whatsoever of Petitioner's exposure at work to MRSA preceding her onset of symptoms and was not even aware that Petitioner had a positive MRSA culture.

Petitioner testified that her duties in August and September 2010 required her to clean and disinfect hospital rooms in which patients with MRSA had been present. She testified she gave notice of her skin lesions to her supervisor when she discovered them, whether or not she knew her infections were MRSA. Petitioner's lab report, dated September 5, 2010, confirmed that Petitioner had contracted MRSA. The foregoing is uncontroverted.

First, the Commission finds the opinions of Dr. Yeo, Petitioner's treating infectious disease specialist, highly persuasive and adopts his testimony and opinions. Dr. Yeo testified that when he examined Petitioner on November 2, 2010 on referral from Dr. Guzina, Petitioner reported cleaning patient rooms, isolation rooms, and ICU rooms. He also noted that Petitioner had dry MRSA lesions "everywhere." Dr. Yeo had Petitioner admitted to Thorek Hospital to receive a course of "first line" intravenous MRSA drugs, which ultimately proved effective in controlling her MRSA infection compared to prior treatments.

Dr. Yeo testified that MRSA is usually first contracted or "colonized" on exposed areas of the body, like the arms, legs or face. If a patient has MRSA colonization on a body part, it can be

spread to the entire body by touching other body parts. If a patient has MRSA colonization on their hand and touches their buttocks, that area would also become colonized. The first area of the body exposed to MRSA is not necessarily the first area to develop lesions. Lesions first develop where the skin has been opened. An open wound would allow a full-blown infection to set in. He testified that lesions can develop on any body part, not just at the initial exposed area. Dr. Yeo also explained that hospitals rooms were high MRSA risk environments and testified that the vast majority of MRSA cases in 2010 were contracted in hospital settings, with only a handful contracted outside of that setting. As for Petitioner's negative MRSA blood test on November 3, 2010, Dr. Yeo explained that Petitioner's results were negative because she had been on antibiotics at that time. He ultimately opined that the source of Petitioner's MRSA infections was the hospital in which she worked. Given the fact that Petitioner worked regularly in a hospital, cleaning isolation rooms and ICU rooms, and the uncontroverted evidence that some of those rooms had been occupied by infected patients, the Commission finds it plausible that she contracted MRSA from her workplace as opined by Dr. Yeo.

The Commission also finds the opinions of Dr. Guzina to be persuasive. Dr. Guzina was certain that Petitioner's infection was MRSA. She testified that Petitioner may have been more susceptible to MRSA infections because her immunity was lower. Dr. Guzina opined that once a patient has been diagnosed with MRSA, one should assume that subsequent skin infections were MRSA for the rest of their lives and treat them with MRSA drugs; not doing so would endanger the person's life. In Petitioner's case, her lesions resolved after receiving MRSA treatment. Had Petitioner's condition not been caused by MRSA in the first instance, Dr. Guzina explained that the lesions would not have resolved. In addition, Dr. Guzina's understanding of Petitioner's presentation, symptom onset, diagnostic test results, and exposure to rooms being cleaned due to infectious patients, further buttress the opinions of Dr. Yeo and a finding that Petitioner's MRSA infection, and subsequent manifestations, developed as a result of her exposures at work.

The Commission further finds the opinions and testimony of Dr. Firoozi to be persuasive. Like Dr. Guzina, Dr. Firoozi was aware of Petitioner's history of working in an isolation room contaminated by MRSA prior to developing her initial lesions. She confirmed that Petitioner had contracted MRSA, based upon her positive culture. Dr. Firoozi opined that, based on Petitioner's history of touching her face with infected gloves while cleaning an infected isolation room, her exposure to MRSA in her workplace could have been the cause of her infection. Although Dr. Firoozi reported Petitioner's initial MRSA infection had resolved by October 21, 2010, she acknowledged that Petitioner's right knee was, "probably still somewhat infectious," on that date, because a wound on it had not completely closed. Less than two weeks later on November 2, 2010, Petitioner saw Dr. Yeo who confirmed her improved, but symptomatic, MRSA condition requiring a hospital admission. Like Drs. Yeo and Guzina, Dr. Firoozi believed that Petitioner's exposure in the workplace to infected patient rooms, coupled with transmission modalities like touching of her body with infected gloves, could have been a cause of her MSRA. The Commission finds her opinion to be persuasive and plausible, particularly in consideration of Petitioner's lack of prior symptoms or treatment for MRSA, her post-August 2010 onset of symptoms, Ms. Chowaniec's report acknowledging Petitioner's reported transmission mechanism,

and the expert testimony of both Dr. Yeo and Dr. Guzina. Thus, the Commission finds that as of October 21, 2010, Petitioner was still experiencing a MRSA infection which she had contracted while working in August/September 2010.

In contrast, the Commission finds the opinions of Dr. Chiodo, Respondent's Section 12 examiner, to be wholly speculative and unsupported by the evidence. Dr. Chiodo did not believe it was relevant to know which hospital rooms Petitioner cleaned prior to her development of lesions. He also, without factual basis, attributed Petitioner's contraction of MRSA to anything but contaminated hospital rooms. After professing to have more education and knowledge about Petitioner's condition than her treating physicians, Dr. Chiodo then repeatedly and incorrectly testified that Petitioner's MRSA diagnosis was never confirmed by a culture. The record, however, clearly reflects a September 5, 2010 lab report showing a positive culture for MRSA. Incredibly, Dr. Chiodo also testified that there is nothing unique to hospitals that would be a cause of Petitioner's MRSA versus some other non-occupational cause and, without factual support on which to base his medical conclusion, claimed that if Petitioner did have MRSA, her cigarette smoking was the "likely" cause. The Commission will not disregard positive diagnostic test results, the opinions of several treating physicians, and the uncontroverted evidence that Petitioner cleaned contaminated hospital rooms prior to her first manifestation of symptoms to find Dr. Chiodo's opinions persuasive in this case.

Dr. Chiodo's additional opinion that Petitioner's antibiotic treatment was unwarranted following her March 2012 occurrence is contradicted by the fact that Petitioner's lesions improved following that treatment; Dr. Guzina noted Petitioner's improved condition on April 16, 2012. Petitioner's lack of MRSA lesions at Dr. Chiodo's June 28, 2012 exam fails as proof that she did not have lesions on March 19, 2012. His reference that there was no indication that she had, "mythical open lesions," is contrary to the clinically documented medical evidence of Petitioner's treating physicians. Dr. Chiodo's further claim that the most likely cause of Petitioner's "rashes" was psychosomatic is unsupported by any evidence and unpersuasive.

The Commission also notes additional considerations that erode Dr. Chiodo's credibility. Dr. Chiodo acknowledged that 90% of his income stemmed from insurance carriers and his work as an expert witness. Moreover, despite also being a practicing attorney, Dr. Chiodo concluded that Petitioner's workplace was not 51% or more the cause of her contracting MRSA (a condition he did not believe she had in the first place), a conclusion based on the incorrect legal standard. For a workplace injury or exposure to be compensable, it need only be a cause of *a* claimant's condition; not the primary cause. *Sisbro, Inc. v. Indus. Comm'n,* 797 N.E.2d 665, 672 (2003). The Commission concludes that Dr. Chiodo's opinions are based on speculation, in light of the facts in this case and his lack of understanding of those facts. The medical bases for his opinions, and his medical-legal conclusions, are wholly lacking in persuasiveness and credibility. The Commission accords no credence to the opinions of Dr. Chiodo in this case.

Ultimately, the Commission finds Petitioner proved she contracted her first MRSA infection as a result of one or more exposures which occurred in the course and scope of her

employment and manifested on August 20 and September 3, 2010. Petitioner testified that she had cleaned specific isolation rooms in the hospital, often identifying them by room number, in which infected patients had been present. Respondent offered no evidence contradicting that testimony and, to the contrary, Ms. Chowaniec's accident report confirmed Petitioner's work in an isolation room and the transmission method deemed competent to cause a MRSA infection, as explained by Petitioner's treating physicians. The Commission further finds that Petitioner still had a MRSA infection on October 21, 2010, which related back to her initial MRSA infection. In so finding, the Commission relies upon the testimony and opinions of Dr. Firoozi, and also, upon Dr. Yeo's opinion that Petitioner had MRSA on November 2, 2010.

In concluding that Petitioner's March 19, 2012 infection was MRSA, relating back to her August 20 and September 3, 2010 exposures, the Commission relies upon the testimony of Dr. Yeo, who opined that subsequent infections relate back to the initial exposure in patients diagnosed with MRSA. The Commission further relies upon the testimony of Dr. Guzina, who, before making her MRSA diagnosis, examined Petitioner and researched medical literature. Dr. Guzina opined similarly to Dr. Yeo that once Petitioner had been exposed to MRSA, further exposures would bring back her symptoms.

Because the Commission finds that Petitioner's MRSA conditions on October 21, 2010 and March 19, 2012 each relate back to her initial MRSA exposure or exposures in August and September, 2010, given the evolution of the disease and its presentation over time as explained by her treating physicians, the Commission awards Petitioner her medical bills incurred in connection with all three of her MRSA claims, in case number 10 WC 38521. The Commission further awards Petitioner, in case number 10 WC 38521, temporary total disability benefits for the periods: September 4, 2010 through October 20, 2010; October 22, 2010 through January 20, 2011, and March 20, 2012 through October 2, 2012.

As a result of Petitioner's work-related MRSA infections, she suffered numerous skin injuries to multiple body parts on multiple subsequent dates. She was advised to not return to her prior job in the hospital; a job she had held since 2001. However, Petitioner has not proven a loss of trade. She has not been advised to avoid work as a housekeeper or maid or janitor in non-medical settings, such as hotels, office buildings or residences. Accordingly, the Commission finds Petitioner entitled to permanent partial disability in the amount of 10% loss of person as a whole pursuant to §8(d)2 of the Act, in claim number 10 WC 38521. Because the Commission finds Petitioner's MRSA conditions on October 21, 2010 and March 19, 2012, were continuations of the MRSA she contracted during her August and September 2010 work exposures, and not new occurrences on those dates, it denies additional benefits in claim numbers 10 WC 44279 and 12 WC 10959.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator in this case, filed March 4, 2019, is hereby reversed. The Commission finds Petitioner has proven that her MRSA conditions of ill-being on August 20, 2010, September 3, 2010, October

21, 2010 and March 19, 2012, were causally related to her accidental exposure arising out of and in the course of her employment with Respondent in August and September 2010.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $303.47 per week for 47-6/7 weeks, commencing September 4, 2010 through October 20, 2010; October 22, 2010 through January 20, 2011; and March 20, 2012 through October 2, 2012, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the outstanding reasonable and necessary medical expenses incurred in treating her MRSA conditions from August 20, 2010 through October 2, 2012, as provided by §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $273.12 per week for a period of 50 weeks, as provided in §8(d)2 of the Act, for the reason that Petitioner's MRSA injuries caused the 10% percent disability to the person 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.

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 $47,000.00. 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: DEC 18 2020
o-10/22/20
MP/mcp
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PELIVANOVIC, LIILJANA
Employee/Petitioner

Case# **10WC038521**

10WC038522
10WC044279
12WC010959
13WC023804

OUR LADY OF RESURRECTION
Employer/Respondent

20IWCC0747

On 2/19/2019, 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:

0014 ARNOLD & KADJAN LLP
PAUL EGAN
35 E WACKER DR SUITE 600
CHICAGO, IL 60601

2461 KEEFE CAMPBELL BIERY & ASSOC
PANKHURI PARTI
118 N CLINTON ST SUITE 300
CHICAGO, IL 60602

20 IWCC0747

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

LILLIANA PELIVANOVIC
Employee/Petitioner

v.

OUR LADY OF THE RESURRECTION
Employer/Respondent

Case # **10** WC **38521**

Consolidated cases: **10 WC 38522**
10 WC 44279
12 WC 10959
13 WC 23804

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of Chicago on **November 13, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

20IWCC0747

FINDINGS

On **8/20/2010 & 9/03/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accidents **was** given to Respondent. Having found no accident in case number 10 WC 38521, all other issues are rendered moot.

In the year preceding the injury, Petitioner earned **$23,670.40**; the average weekly wage was **$455.20**.

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

ORDER

Having found no accident in case number 10 WC 38521, all other issues are rendered moot.

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

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

Signature of Arbitrator

2-19-2019
Date

FEB 19 2019

20 IWCC0747

FINDINGS OF FACT

Background

Liliana Pelivanovic ("Petitioner") alleged injuries arising out of and in the course of her employment with Our Lady of Resurrection ("Respondent") on various dates of accident. Petitioner gave an opening statement indicating that the April 17, 2010 claim involved a back injury; that the August 20, 2010, September 3, 2010, October 21, 2010 and March 19, 2012 claims involved MRSA and that the August 15, 2011 involved the throat. The matters were previously consolidated and the parties held a trial on all claims and any and all issues on November 13, 2018. The following is a recitation of the facts adduced at trial.

Testimonial and Other Evidence

Petitioner testified she was born in Serbia on April 7, 1952 and said she spoke little English. Petitioner testified she currently was married and did not have any children. She testified that since 2001 she worked for Respondent in the environmental department. Her duties included cleaning floors, housekeeping, wiping beds, mopping floors, wiping cabinets, picking up garbage, cleaning beds, disinfecting the ER, vacuuming and cleaning washrooms.

Date of Accident April 17, 2010 – 10 WC 38522 (low back)

Petitioner testified she was first injured on April 17, 2010 while she was working in surgery. She testified that there was a lot of linen in the bag and when she pulled the bag, she felt a click. She called her group leader Javier and he helped take half out and drop it in the shoot. Petitioner said she had no prior back pain. Petitioner said she went to the ER within the hospital and then saw her personal doctor, Dr. Tatjana Guzina. Petitioner said she then saw Dr. Foreman at IBJI for therapy to her back. Petitioner testified she was first allowed to return to work at a light-duty job with restriction of not lifting more than 20 pounds. She testified the restrictions were for about a month and they helped a little bit. Petitioner testified that she did not have any problems with her back prior to the incident in April 2010. She testified her back problems continued for two-three years after the incident and she was still having issues with her back, which required her to take pain pills.

On cross examination, Petitioner admitted she informed Dr. Forman that she had hurt her back while pulling linens. She testified she underwent therapy for her lower back pain and was ultimately discharged. Petitioner testified at discharge, she was released light duty and then returned to full duty 30 days thereafter. To her knowledge all the medical bills for her lower back treatment had been paid by workers' compensation.

Records show on April 14, 2010, Petitioner presented to Respondent's emergency room where she gave a history of lifting a heavy linen bag at work. Px5. She complained of back pain. She was diagnosed with a strain, given medications, taken off work for two days and advised to follow up with her doctor. On April 17, 2010, an employee incident report noted Petitioner injured her back when she pulled heavy linen up. Rx1.On April 19, 2010, her primary doctor, Dr. Guzina, simply noted Petitioner could not work. Px7. On April 20, 2010, Petitioner first saw Dr. Edward Foreman of IBJI. Px4. She gave a similar history of lifting a bag of garbage and injuring her low back. The doctor diagnosed strain and recommended medications, therapy and that she be off work. She was diagnosed with a strain. Thereafter, Petitioner began therapy at IBJI. Px4. On May 11, 2010, Petitioner followed up with Dr. Foreman. Px4. His impression was low back pain and he recommended Petitioner continue with therapy. On May 19, 2010, therapists noted Petitioner reported 90% improvement. Additional therapy was recommended. On May 13, 2010, Petitioner underwent an MRI of the low back. On June 25, 2010, Petitioner was discharged from therapy and recommended to start work

conditioning. She rated her pain 8/10 and continued to complain of low back pain and pain down the left leg. Petitioner began work conditioning on June 29th and was discharged from work conditioning on July 6th. That same day, Petitioner saw Dr. Foreman who released Petitioner to work. Petitioner's last visit with Dr. Foreman was on August 3, 2010, where he noted Petitioner presented with negative SLR. His impression was chronic low back pain. He released Petitioner to return to work starting August 4th with no lifting greater than 30 pounds. She was to follow up as needed. Px4.

Dates of Accident August 20, 2010 and September 3, 2010 – 10 WC 38521 (MRSA)

Petitioner next testified that on September 3, 2010 she was punched out of work at 11:30pm when she noticed blisters and bleeding on her face, neck, ears, both hands, arms and all over, like chicken pox. She first noticed similar markings 2 weeks prior while at work. Petitioner testified she was diagnosed with MRSA and was taken off work.

After getting discharged from the hospital, Petitioner testified she followed up with her doctor – Dr. Guzina at which time she underwent some tests and was diagnosed with MRSA. Petitioner testified she was taken off work after September 3, 2010 as her doctor told her she would not return to work without being cured.

Petitioner testified she was taken off work in September 2010 and was off work for three or four months. She returned to work after three months when she did not have MRSA. Petitioner testified she did not return to work for one day and was not working in September, October, and November and then came back before Christmas in December. Petitioner testified she was not allowed in the hospital for three months until she was cured from MRSA. She also testified that she did not return to work for one day at which time she had another outbreak.

Petitioner identified Px1 as photos taken in September 2010 at the hospital and at her home. She testified the photographs were a fair representation of her symptoms. Petitioner also testified the blemishes in the photos were similar to the ones she had experienced two weeks before September 3, 2010. The blemishes also represented the ones she experienced later in October 2010 and March 2012. Petitioner testified she did not have any problems with MRSA before the first incident that occurred two weeks before September 3, 2010.

On cross examination, Petitioner testified the MRSA lesions had been present for 10-14 days prior to September 3, 2010 and had looked exactly the same for that time-period. She testified to waiting for these 14 days because her manager did not let her go to the ER or fill out a report. Petitioner admitted her report was filled out on September 5 or September 6, 2010 and indicated the symptoms had been present since September 3, 2010.

On September 4, 2010, Petitioner presented to Resurrection for suspected vasalitis [sic]. Px10. Various medical notes recorded rash to the elbow, face and buttocks. The left elbow and left ear had black scabs with no oozing. Other notes remarked various symptoms were present for 2 weeks that spread to the face and another that facial lesions were present for one day. Another record noted an elbow lesion present for 1 week.**there is no mention of any exposure at work.&** Petitioner followed up with dermatology.

Records show that on September 7, 2010, an employee report of work injury or illness was completed, noting that on September 3, 2010, Petitioner believed she probably touched her face accidentally while wearing her gloves. Px10:91, Rx4. Petitioner also followed up with Dr. Firoozi, who wrote that Petitioner worked in ICU and presumably came in contact with cleaning products. Px10:96. The doctor noted blood tests were not back yet. On September 11, 2010, results were positive for MRSA. Px10:97. Petitioner was given medication.

On September 14, 2010, Petitioner presented to Dr. Guzina, who noted Petitioner had an infection in her cheek and had already been treating for MRSA. See, Px7, 14. Dr. Guzina also testified in this matter regarding her treatment of Petitioner and her opinions. Px14. At the September 2010 visit, the doctor advised Petitioner to continue her course of treatment. Dr. Guzina testified that her role was largely one of providing follow up and coordinating care with other doctors. On September 21st and 28th, 2010, Petitioner followed up at Resurrection and lesions were healing. Medications were refilled. Px10:98. On October 7th and 12th, medications were again refilled. Px10.

Date of Accident October 21, 2010 – 10 WC 44279 (MRSA)

Petitioner then testified she did go back to work on October 21, 2010 for one day. She worked a few hours and noticed the same bumps and blisters on her face, legs and arms. She again reported this to Monica. Petitioner treated within the emergency room and then following up with Dr. Guzina. Petitioner testified Dr. Guzina referred her to Dr. Yeo and saw him at Thorek Hospital. Petitioner was admitted to Thorek Hospital for two nights and three days at which time tests were again undertaken to determine what the blemishes were. Petitioner testified she believed the tests were to check for MRSA. Petitioner testified she was taken off work again in October 2010 and she remained off work until *January* 20, 2011. Petitioner testified during the period she was off work her symptoms did not improve and remained the same. Petitioner also testified that she had been taken off work in September 2010 and did not return to work until *December*.

On cross examination, Petitioner testified that after being taken off work in September 2010, she returned on October 21, 2010, worked for a couple of hours, was sent to the ER again, and then did not work until January 20, 2011. Petitioner admitted she had returned to work on October 21, 2010 because Dr. Firoozi had allowed her to. Petitioner testified she presented to work at 3:00pm and then filled out the report at 3:50pm because the blisters had returned on her body. She testified on October 21, 2010, Dr. Firoozi had allowed her to return to work and then on October 25, 2010 Dr. Guzina took her off work again. Petitioner testified she did not return to Dr. Firoozi because "they" did not send her. Petitioner testified she was aware her blood was tested for MRSA in November 2010 by Dr. Yeo but was not aware the results were negative for MRSA. Petitioner admitted Dr. Guzina took her off work for her non-work-related health issues at times and it was possible the time off work was due to her arthritis symptoms may have overlapped with the time she was also off work for her alleged MRSA symptoms. On cross, Petitioner testified she had taken pictures of her breakout from October 2010 but had not included them in evidence.

On October 21, 2010, Petitioner returned to Resurrection. Px10:102. All lesions were healed. MRSA was believed to be resolved. The right knee was swollen but not completely closed. Petitioner was allowed to return to work. That same day, Petitioner returned with facial and wrist swelling. Px10. History noted that Petitioner was seen in employee health feeling well. *Id.* at 110. After leaving employee health, 10 minutes later, Petitioner developed facial and wrist symptoms. The plan was for blood cultures to be taken. *Id.*, Rx5. An incident report noted Petitioner was pulling garbage when her face started feeling red. Rx5.

On October 25, 2010, Petitioner returned to Dr. Guzina relating that she had returned to work recently on October 21st and there she noticed something on her face. The doctor testified that it looked swollen. Dr. Guzina prescribed antihistamine, noting she believed the face swelling was a skin reaction to the MRSA antibiotics Petitioner had already been taking. On November 3, 2010, blood testing was negative for MRSA. Rx6. On November 11, 2010, Petitioner returned to Dr. Guzina, who noted Petitioner was still off work. Px14. On November 16, 2010, Petitioner followed with Dr. Guzina for blood tests. Px14. The doctor referred her to a rheumatologist. Px14. On December 27, 2010, Petitioner informed Dr. Guzina she had stopped taking her MRSA medications. Px14. The doctor reasoned Petitioner could now begin taking the recommended steroid

medications per the rheumatologist's recommendations. Petitioner was still off work as of this visit in order to finish antibiotics for the and she was to return to work on January 20, 2011. *Id.* at 15-16.

On January 17, 2011, Petitioner followed up with Dr. Guzina who noted Petitioner had finished her MRSA medications. Px14. On April 10, 2011 an incident report documented that Petitioner complied of a rash/bubbles maybe after touching a counter. Px10:115, Rx12. She was sent to the ER. On May 5, 2011, Petitioner followed up with Dr. Guzina. Px14. The doctor testified Petitioner had a new rash on her forearm from either gloves or an exposure to something. She testified "we didn't know." Petitioner was to continue her treatment for her autoimmune disease that she presumably had. *Id.* at 18.

On June 29, 2011, another employee report of work injury/illness noted that after cleaning an isolation room, Petitioner washed her hands and noticed in the mirror facial redness. Px10:118, Rx12. She could not recall getting cleaning product in her face. *Id.* at 121. Another noted documented she sprayed cleaning product and her face was the only part of the body exposed. *Id.* at 123. Skin dermatitis was suspected. *Id.* at 122.

On June 30, 2011, Petitioner followed up with Dr. Guzina with another episode of the face rash again at work. Px14. Petitioner was not being followed by the rheumatologist anymore. Dr. Guzina recommended Petitioner see a dermatologist. The doctor thought that Petitioner had been working as of that visit. On July 11, 2011, Petitioner followed up with Dr. Guzina. Px14. She was negative for MRSA but still had a rash on her face. On August 22, 2011, Petitioner returned to Dr. Guzina reporting that she had another episode at work where she swallowed something in the throat. *Id.* at 20. Petitioner followed up with Dr. Guzina in December 2011 complaining of eyelid swelling and difficulty getting up, which the doctor said could be symptoms associated with a rheumatologic condition. *Id.* at 23.

Date of Accident August 15, 2011 – 13 WC 23804 (Choking Incident)

Petitioner testified in 2011 she was involved in another work accident when a co-worker slapped her on her back, causing her to choke on a candy. Petitioner testified a doctor took the candy out and she stayed one day in the hospital. She stated she was given 2-3 days due to the stress from choking. She eventually followed up with a specialist. Petitioner said she noticed pain with swallowing water that lasted one week. She was able to return to work. Petitioner testified that she did not have any problems with her throat prior to the incident in which she choked on a lozenge.

On cross examination, Petitioner admitted she ate candies outside of work as well and also ate candy outside of work while talking to her friends. Petitioner testified she missed three days of work after the candy was taken out of her throat but that her doctor only took her off work for one day. Petitioner testified she was seen by a Polish doctor a couple of days after the incident because she had been instructed to do so at the ER.

On August 15, 2011, employee incident reported noted that Petitioner bent down to grab a bucket and had a mint candy in her throat that got stuck. Rx8. Records show that on August 15, 2011, Petitioner presented to the emergency room. Px6. History noted that Petitioner accidentally swallowed or choked on a candy while sucking on it. There is no mention of a coworker or being slapped on the back. And endoscopic failed to show any foreign body or candy. Petitioner was noted not to be in any distress despite Petitioner having testified that she was taking off work due to the stress of the alleged incident. Further, there is no note taking off work as a result of this incident. Based on Petitioner's lack of credibility corroborating her version of the events and based upon the medical records billing to corroborate her version of the events, the Arbitrator fines that Petitioner feel to prove Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent.

Date of Accident March 19, 2012 – 12 WC 10959 (MRSA)

Petitioner testified she had another outbreak of MRSA in March 2012, which presented in the same way as in September with bubbling, blistering, and bleeding. Petitioner testified she was seen in the ER again and she also filled out a report with her manager. Thereafter, Petitioner testified, she followed up with Dr. Guzina and was taken off work again. Petitioner testified she was allowed to return to work but every time she came back to Resurrection she would get MRSA. Petitioner testified she was told by her doctor that she could not return to working for the hospital anymore. Petitioner testified if the MRSA outbreaks had not happened then she would not have stopped working in 2012. Petitioner testified since March 2012 she had not returned to work but had had additional outbreaks of MRSA. Petitioner testified at the time of each outbreak she followed up with Dr. Guzina and was given pills and cream for treatment.

On cross examination, Petitioner testified that last time she saw Dr. Guzina for MRSA issues was in October 2012 and at the time she was also treating for her arthritis. Petitioner testified since she had stopped working for Resurrection, she had four or five more breakouts of MRSA. Petitioner testified she had not returned to Resurrection prior to these four-five breakouts. Petitioner testified each time the symptoms were similar to the bubbles like the ones shown in Px1. Since she stopped working, she has not looked for work because her doctor told her she could not return to work in a hospital. Petitioner admitted her doctor had not stopped her from returning to work anywhere else. On cross, Petitioner also testified there are no pictures of her breakout from March 2012.

On March 19, 2012, Petitioner presented to Resurrection where it was noted Petitioner was exposed to scabies and presented with a rash. Px11, Rx9. There were bumps on the arms and between fingers noted. There was a rash on her face. Dr. Guzina testified that Petitioner's next complaint of MRSA was on March 22, 2012, when she related to Dr. Guzina that she was cleaning a room where scabies was present and then developed a rash. Px14:24. Petitioner was diagnosed at the emergency room with scabies. Petitioner was tested at Thorek on this date. Px8. Petitioner related in occurred 3 days prior. Petitioner was started on medications for MRSA type infection and followed up. In June 2012, Dr. Guzina updated her chart, testifying that her research showed that p-ANCA titer can by caused by a trigger, which can be many things. She said "it" could cause hypersensitivity vasculitis. *Id.* at 28. This could be diagnosed with a biopsy which was never obtained. *Id.*

Dr. Guzina testified that to a reasonable degree of medical certainty, she believed the source of Petitioner's MRSA was the workplace. *Id.* at 29-30. Dr. Guzina's prognosis was that Petitioner was improving. The doctor testified she did not think she ever returned Petitioner to return to work after the last visit. On cross, Dr. Guzina admitted that there were no blood cultures done to confirm MRSA at the last, most recent visits with Petitioner. Dr. Guzina testified she based her conclusion on the history provided by Petitioner, explaining that exposure causes titers to elevate, which can remain elevated for long periods thereby lowering immunity. Dr. Guzina testified that she knew Petitioner had MRSA in March 2012 because Petitioner got better with antibiotics prescribed to treat MRSA. *Id.* at 41-42. Dr. Guzina testified that she learned that hypersensitivity vasculitis can be triggered by MRSA. Dr. Guzina further testified that once an individual has been diagnosed and treated for MRSA, any further skin infection is automatically treated as if it was MRSA. *Id.* at 50-51, 55. The doctor testified that Petitioner had MRSA on her forearms, where her gloves ended. *Id.* at 57. Dr. Guzina testified Petitioner was off work from September 14, 2010 until October 21, 2010. *Id.* at 62. Petitioner then had symptoms again on October 25, 2010. Petitioner then returned to work on January 20, 2011 and again had symptoms on June 30, 2011. Thereafter, Petitioner went off work again until July 11th or 15th.

Documents show Petitioner was taken off work by Dr. Guzina from March 9, 2012 through October 2, 2012. Px9. Dr. Guzina eventually wrote that Petitioner was permanently disabled. Id.

Petitioner testified she saw Dr. Chiodo at the request of her employer and at the appointment he did not examine her and only looked at the photographs. She testified she was in Dr. Chiodo's office for one hour but his examination of her only lasted for a minute or thirty seconds. The rest of the time Dr. Chiodo asked her questions and looked at her medical records of Petitioner.

Deposition Testimony of Dr. Ernest P. Chiodo

The evidence deposition of Dr. Ernest Chiodo was taken on January 30, 2013. Rx11. Dr. Chiodo testified he board certified in internal medicine, occupational medicine, public health, and general preventative medicine. He is also certified in engineering and public health discipline and in industrial hygiene, which was the discipline that quantified and controlled various occupational and environmental hazards, including exposure to air toxins. Dr. Chiodo testified he had performed an independent medical evaluation on Petitioner on December 6, 2010 and a repeat examination on June 28, 2012. Dr. Chiodo testified that he did not believe Petitioner had a MRSA infection because no record he found actually stated this. However, even if she did, he did not believe it was caused by her work at the hospital. He testified at length how one can contract MRSA, how and where it spreads and treatment for this infection. Dr. Chiodo gave opinions on where he believed Petitioner's MRSA may have originated from.

Deposition Testimony of Dr. Taraneh Firoozi

The evidence deposition of Dr. Taraneh Firoozi was taken on May 25, 2012. Px12. Dr. Firoozi testified he is a dermatologist licensed to practice medicine in the state of Illinois. He first saw Petitioner on September 7, 2010 after she made an appointment, but it was his understanding she was referred to him because she brought in the Employee Report of Injury/Illness. Petitioner provided a history of working in an isolation room which was contaminated by MRSA two weeks prior to the time she presented for the appointment, when she accidentally touched her face with her contaminated gloves. Dr. Firoozi performed a physical exam of Petitioner which revealed multiple ulcers on left ear, right knee, and right cheek. He thought the symptoms were a result of spider bites. Dr. Firoozi testified Petitioner returned on September 11, 2010 and it was his recollection she did not look better. Dr. Firoozi continued Doxycycline because the culture showed the antibiotic was sensitive to Doxycycline while also starting her on sulfur drugs. Dr. Firoozi diagnosed MRSA based on culture results and he therefore ruled out spider bites and contact dermatitis. Petitioner returned on September 21, 2010 and the lesions were healing with necrotic bases. Dr. Firoozi saw Petitioner on October 21, 2010 and noted the MRSA infection had resolved. He allowed Petitioner to return to work on that day as he had kept her off work prior to this. He did not see Petitioner again. Dr. Firoozi testified it was his opinion that Petitioner's MRSA infection *could have been* caused by the events she related to him on September 7, 2010 and included in the report dated September 4, 2010.

Deposition Testimony of Dr. Tatjana Guzina

The deposition testimony of Dr. Tatjana Guzina was taken on June 19, 2012. Px14. Dr. Guzina testified she was board certified in internal medicine. Dr. Guzina's ultimate conclusion was that Petitioner's MRSA was caused by her workplace. Dr. Guzina acknowledged that testing in July 2011 was negative for MRSA. Dr. Guzina testified that in March 2012, she saw Petitioner again, who was reporting scabies. Dr. Guzina testified she started Petitioner on MRSA medications again and that Petitioner eventually got better. Based on this, Dr. Guzina concluded that Petitioner was again exposed to MRSA.

Deposition Testimony of Dr. Sein-Khiong Yeo

The deposition testimony of Dr. Sein-Khiong Yeo was taken on December 20, 2012. Px13. Dr. Yeo is board certified in infectious diseases. He first encountered Petitioner on November 2, 2010 when she was referred to him by Dr. Guzina for a skin condition. Dr. Yeo testified Petitioner told him Resurrection Hospital was developing cultures for MRSA, she was on antibiotics, and was feeling better but was referred to dermatology and told to stop the antibiotics, which had caused the lesion to get worse. Dr. Yeo testified he thought the condition was pure MRSA folliculitis and micro-abscess and so he started Petitioner on Vancomycin. Dr. Yeo testified after seeing Petitioner on November 2, 2010 he did not see her again. He testified as Petitioner was a housekeeper and janitor in the hospital setting, it could throw her into the high-risk category to contract MRSA. Dr. Yeo testified it was his opinion that as Petitioner was a housekeeper and cleaning patient rooms, it increased her chances of contracting MRSA. Dr. Yeo discharged Petitioner on November 4, 2010 with the discharge diagnosis being of MRSA. On cross examination, Dr. Yeo discussed a variety of hypothetical scenarios and settings where one might contract and develop MRSA.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

The Arbitrator had an opportunity to observe Petitioner and her testimony. The Arbitrator finds Petitioner's testimony was not intentionally misleading however her testimony is inconsistent with the medical record and was speculative at times.

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

A. Dates of Accident August 20, 2010 and September 3, 2010 – 10 WC 38521 (MRSA)

After hearing the trial testimony and reviewing the evidence in the record the Arbitrator concludes Petitioner has failed to show that on either August 20, 2010 or on September 3, 2010 she was involved in an accident that arose out of and in the course of her employment with Respondent. The Arbitrator has reviewed extensive testimonies and medical evidence on whether Petitioner contracted MRSA at Respondent's place of work that would arise out of an in the course of that employment. The Arbitrator further notes that the conclusion as to accident in this case is based primarily on one of lack of credibility, lack of corroboration and speculation.

First, the Arbitrator denies Petitioner's claim for 10 WC 38521 as she selected two dates of accident, presumably surmising that her exposure to MRSA may have been either date. Petitioner never gave credible testimony explaining her decision to select these two dates on one claim as alleged accident or exposure dates. Second, Petitioner's histories of how she became or believed she became exposed varied as shown in the evidence. For example, she testified that she noticed blisters and bleeding when she punched out on September 3, 2010 but also noticed similar markings 2 weeks prior. Petitioner never provided testimony as to what area of the workplace she worked two weeks prior. In her initial medical record at Resurrection, varied lengths of time for the presence of these symptoms included 1 week and 2 weeks. See, Px10. There is no mention of any workplace exposure at this initial visit. Then, when Petitioner finally completed a report on September 7th, Petitioner speculated that she thought she may have touched her face accidentally while wearing gloves. Px10:91, Rx4. However, Dr. Firoozi noted Petitioner presumably came into contact with cleaning products. Petitioner did not relate any specific date this would have occurred to Dr. Firoozi. Px10:96. Again, no mention of MRSA is made and no mention of either of the two alleged accident dates are noted. After being diagnosed

with MRSA, Petitioner saw Dr. Guzina on September 14th, where no mention of any workplace exposure is noted and neither date of alleged accident is noted.

Finally, both Drs. Firoozi and Guzina failed to give persuasive or credible testimony or opinions as to when and how in the workplace it was that Petitioner was exposed to MRSA. Both doctors failed persuasively reconcile the varying dates and histories noted in the record. The Arbitrator assigns little weight to these opinions as it relates to the issues of accident and causation. Likewise, the Arbitrator must assign little weight to the opinions of Dr. Yeo as he saw Petitioner only once in November 2010 and did not corroborate where or how the exposure occurred, on what date(s) an exposure occurred but rather simply concluded her MRSA exposure "probably occurred" at work. Px13. Based on the foregoing, the Arbitrator denies Petitioner's claim in 10 WC 38521. All other issues related to this claim are moot.

B. Date of Accident October 21, 2010 – 10 WC 44279 (MRSA)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove accidental injuries/exposure arising out of and the in the course of her employment occurring on October 21, 2010 with Respondent. Again, the conclusion to deny this claim is based primarily on a lack of credibility, corroboration and speculation.

Petitioner initially gave testimony that she did not work for approximately 3 months following her initial alleged MRSA exposure. Eventually, Petitioner testified that she returned to work for one day on October 21, 2010 and noticed symptoms once again. This became the basis of claim 10 WC 44279. Specially, she testified she returned to work for only a couple of hours when she noticed bubbling and bleeding on her hands, face, and legs. The Arbitrator finds this testimony is not only internally inconsistent, as she testified she did not work for 3 months, but also is contradicted by a preponderance of the evidence. Records showed that Petitioner treated with Resurrection on October 21, 2010, where MRSA was believed to be resolved. Px10:102. She was permitted to return to work. Petitioner then returned to Resurrection, complaining of facial and wrist swelling. Upon her return, the history noted that after Petitioner left employee health, 10 minutes later she noticed facial and wrist symptoms. *Id.* at 110. Again, no mention is made of any specific exposure to any unit, floor, department or room number she may have worked in or what she was doing. Petitioner also failed to give any specific details regarding same. The Arbitrator finds this initial history compelling, as it reasonably suggests that Petitioner never even returned to work but rather noticed symptoms after leaving employee health – the very same visit noted earlier on that date. Thus, this history is most consistent with Petitioner's initial testimony that she never worked for 3 months following her first alleged exposure. Even if she did work as alleged, an incident report noted Petitioner was pulling garbage when her face started feeling red. Rx5. This is not consistent with the history noted in Resurrection's records when Petitioner returned a second time. *See*, Px10:110. Further, Petitioner never gave such testimony. Notably, blood cultures taken in November 2010 were negative for MRSA, which would suggest that no exposure in fact occurred.

Based on the foregoing, the Arbitrator denies Petitioner's claim in 10 WC 44279. All other issues related to this claim are moot.

C. Date of Accident August 15, 2011 – 13 WC 23804 (Choking Incident)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove she sustained accidental injuries arising out of and the in the course of her employment occurring on August 15,

2011 with Respondent. The denial of this claim is based primarily on a lack of credibility, corroboration and speculation.

The Arbitrator finds Petitioner's version of events as related by her during her testimony were contradicted by both the injury report and the information contained in the medical records entered into evidence. Petitioner testified that on this date, a candy got stuck in her throat after a co-worker slapped her on her back. Petitioner testified that as she could not breathe, she was seen in the ER and underwent a procedure to dislodge the candy from her throat. However, the incident report noted that Petitioner bent down to grab a bucket and had a mint candy in her throat that got stuck. Rx8. There is no mention of a co-worker. Further, emergency room records noted that Petitioner accidentally swallowed or choked on a candy while sucking on it. There is no mention of a coworker or being slapped on the back or bending over. Further, contrary to Petitioner's testimony that candy had to be dislodged, an endoscopy failed to show anything. Finally, even if an incident occurred, under any of these scenarios, Petitioner failed to prove that this constituted an employment risk or that she was exposed to some other risk to a greater degree than the general public. Based on the foregoing, the Arbitrator denies Petitioner's claim in 13 WC 32804. All other issues related to this claim are moot.

D. Date of Accident March 19, 2012 – 12 WC 10959 (MRSA)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove accidental injuries/exposure arising out of and the in the course of her employment occurring on March 19, 2012 with Respondent. The denial of this claim is based primarily on a lack of credibility, corroboration and speculation.

Petitioner testified she had another "outbreak" of MRSA and it presented in the same manner as previously alleged, with bubbling, blistering, and bleeding. Again, this is contradicted by the information contained in Petitioner's medical records and the report of injury/illness filled out by her. In the injury report Petitioner claims she had started cleaning the isolation room when her face and hands started showing a rash. Rx9. Petitioner saw Dr. Guzina following this alleged incident, telling the doctor she was exposed to scabies rather than MRSA. Despite this, Dr. Guzina later testified she was certain Petitioner was suffering from MRSA because Petitioner improved with MRSA-type medications. Dr. Guzina admitted no testing was done to confirm this but insisted no testing was necessary. Dr. Guzina further concluded this alleged exposure to MRSA was from work but Dr. Guzina was never asked to reconcile either the incident report noting cleaning an isolation room or the alleged exposure to scabies. The Arbitrator assigns little weight to the testimony and opinions of Dr. Guzina as they based on a faulty understanding the of the histories surrounding this alleged incident. Based on the foregoing, the Arbitrator denies Petitioner's claim in 12 WC 10959. All other issues related to this claim are moot.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Having reviewed all evidence, the Arbitrator concludes Petitioner's current condition of ill-being as it relates to her low back/lumbar spine is causally related to her April 17, 2010 work

accident. Petitioner presented credible and corroborating evidence that she injured herself at work while lifting a bag of linen. The Arbitrator does not find the histories inconsistent. Respondent presented no contrary evidence. Therefore, Petitioner's low back is causally related to her April 17, 2010 accident.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Respondent presented into evidence the medical bills payment ledger showing $10,167.35 was paid for the treatment undergone by her. Rx10. Petitioner testified that to her knowledge all her medical bills related to the April 17, 2010 incident had been paid. However, Petitioner introduced into evidence a summary and corresponding bill totaling $12,043.00 between April 20, 2010 and August 3, 2010 and the corresponding medical financial history confirms an outstanding balance of $276.00. As such after analyzing the full set of medical bills the Arbitrator finds that Respondent has paid all reasonable and related medical bills of Petitioner as it pertains to the April 17, 2010 work incident.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Evidence shows Respondent paid TTD benefits to Petitioner for the time-period of April 22, 2010 until July 11, 2010 in the amount of $3,427.11. Rx10. Petitioner testified she was taken off work by her doctor on April 22, 2010 and she remained off work until she was allowed to return to light duty work on July 11, 2010. Based on the evidence presented the Arbitrator finds TTD benefits were paid by Respondent for this time and no additional benefits are due to Petitioner.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. The Arbitrator finds Petitioner sustained only a minor back strain as a result of the alleged incident and was found capable of returning to full duty work within three months. Petitioner gave no testimony as to the effects of her back injury. As such the Arbitrator finds Petitioner did not sustain any permanent partial disability as a result of the alleged incident.

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

Ljiljana Pelivanovic,

Petitioner,

vs.

Our Lady of Resurrection,

Respondent.

Case #: 10 WC 38522

Consolidated cases: 10 WC 38521
10 WC 44279
12 WC 10959
13 WC 23804

20IWCC0748

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, 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 testified that on April 17, 2010, she worked as a housekeeper for Respondent hospital. On that date, she injured her low back while lifting heavy linens in the course and scope of her employment. Petitioner was off work for three months, during which time she underwent treatment including medications, physical therapy and work hardening, before being released to work. The parties stipulated that Petitioner was off work for 11-4/7 weeks, from April 22, 2010 through July 11, 2010, and that Respondent had paid Petitioner $3,427.11 in TTD benefits.

The Arbitrator found that Petitioner did prove she sustained a causally related accident of that date, but that all of her TTD and reasonable and necessary medical services had been paid. The Arbitrator gave Respondent a credit of $3,427.11 for the TTD it has paid. However, the Arbitrator denied an award of permanency for this accident, finding that Petitioner sustained only a minor back strain.

20IWCC0748

The Commission views the evidence somewhat differently than the Arbitrator. Following Petitioner's accident, she underwent a lumbar MRI taken on May 13, 2010, which revealed mild spondylosis, multi-level disc protrusions, foraminal stenosis at L5-S1, mild scoliosis and mild ventral wedging of L1. When Petitioner did return to work, she was under restrictions. At arbitration, she testified that she continued to experience back pain for approximately two years after returning to work. From time to time, she still experiences back pain, for which she has to take over the counter pain medications.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 19, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $303.47 per week for 11-4/7 weeks, for the period of April 22, 2010 through July 11, 2010.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $273.12 per week for a period of 15 weeks, as provided in §8(d)2 of the Act, for the reason that the injury to Petitioner's low back caused the 3% percent disability to the person 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.

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 $4,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 18 2020
o-10/22/20
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PELIVANIVOC, LIILJANA
Employee/Petitioner

Case# **10WC038522**

12WC010959
10WC038521
13WC023804
10WC044279

OUR LADY OF RESURRECTION
Employer/Respondent

20IWCC0748

On 2/19/2019, 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:

0014 ARNOLD & KADJAN
PAUL EGAN
35 E WACKER DR SUITE 600
CHICAGO, IL 60601

2965 KEEFE CAMPBELL BIERY & ASSOC
PANKHURI PARTI
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

20 IWCC0748

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

LILLIANA PELIVANOVIC
Employee/Petitioner

v.

OUR LADY OF THE RESURRECTION
Employer/Respondent

Case # **10** WC **38522**

Consolidated cases: **12 WC 10959**
10 WC 38521
13 WC 23804
10 WC 44279

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of Chicago on **November 13, 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. [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

20IWCC0748

FINDINGS

On **4/17/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$23,670.40**; the average weekly wage was **$455.20**.

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

Petitioner ***has*** received all reasonable and necessary medical services. Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services. Respondent shall be given a credit of **$3,427.11** for TTD, for a total credit of **$3,427.11**.

ORDER

Petitioner's request for TTD is denied as all benefits were paid.

Petitioner's request for medical bills is denied as all benefits were paid.

Petitioner failed to prove she sustained any permanent disability as a result of her 4/17/2010 work accident.

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

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

Signature of Arbitrator

2-19-2019
Date

FEB 19 2019

FINDINGS OF FACT

Background

Liliana Pelivanovic ("Petitioner") alleged injuries arising out of and in the course of her employment with Our Lady of Resurrection ("Respondent") on various dates of accident. Petitioner gave an opening statement indicating that the April 17, 2010 claim involved a back injury; that the August 20, 2010, September 3, 2010, October 21, 2010 and March 19, 2012 claims involved MRSA and that the August 15, 2011 involved the throat. The matters were previously consolidated and the parties held a trial on all claims and any and all issues on November 13, 2018. The following is a recitation of the facts adduced at trial.

Testimonial and Other Evidence

Petitioner testified she was born in Serbia on April 7, 1952 and said she spoke little English. Petitioner testified she currently was married and did not have any children. She testified that since 2001 she worked for Respondent in the environmental department. Her duties included cleaning floors, housekeeping, wiping beds, mopping floors, wiping cabinets, picking up garbage, cleaning beds, disinfecting the ER, vacuuming and cleaning washrooms.

Date of Accident April 17, 2010 – 10 WC 38522 (low back)

Petitioner testified she was first injured on April 17, 2010 while she was working in surgery. She testified that there was a lot of linen in the bag and when she pulled the bag, she felt a click. She called her group leader Javier and he helped take half out and drop it in the shoot. Petitioner said she had no prior back pain. Petitioner said she went to the ER within the hospital and then saw her personal doctor, Dr. Tatjana Guzina. Petitioner said she then saw Dr. Foreman at IBJI for therapy to her back. Petitioner testified she was first allowed to return to work at a light-duty job with restriction of not lifting more than 20 pounds. She testified the restrictions were for about a month and they helped a little bit. Petitioner testified that she did not have any problems with her back prior to the incident in April 2010. She testified her back problems continued for two-three years after the incident and she was still having issues with her back, which required her to take pain pills.

On cross examination, Petitioner admitted she informed Dr. Forman that she had hurt her back while pulling linens. She testified she underwent therapy for her lower back pain and was ultimately discharged. Petitioner testified at discharge, she was released light duty and then returned to full duty 30 days thereafter. To her knowledge all the medical bills for her lower back treatment had been paid by workers' compensation.

Records show on April 14, 2010, Petitioner presented to Respondent's emergency room where she gave a history of lifting a heavy linen bag at work. Px5. She complained of back pain. She was diagnosed with a strain, given medications, taken off work for two days and advised to follow up with her doctor. On April 17, 2010, an employee incident report noted Petitioner injured her back when she pulled heavy linen up. Rx1.On April 19, 2010, her primary doctor, Dr. Guzina, simply noted Petitioner could not work. Px7. On April 20, 2010, Petitioner first saw Dr. Edward Foreman of IBJI. Px4. She gave a similar history of lifting a bag of garbage and injuring her low back. The doctor diagnosed strain and recommended medications, therapy and that she be off work. She was diagnosed with a strain. Thereafter, Petitioner began therapy at IBJI. Px4. On May 11, 2010, Petitioner followed up with Dr. Foreman. Px4. His impression was low back pain and he recommended Petitioner continue with therapy. On May 19, 2010, therapists noted Petitioner reported 90% improvement. Additional therapy was recommended. On May 13, 2010, Petitioner underwent an MRI of the low back. On June 25, 2010, Petitioner was discharged from therapy and recommended to start work

conditioning. She rated her pain 8/10 and continued to complain of low back pain and pain down the left leg. Petitioner began work conditioning on June 29th and was discharged from work conditioning on July 6th. That same day, Petitioner saw Dr. Foreman who released Petitioner to work. Petitioner's last visit with Dr. Foreman was on August 3, 2010, where he noted Petitioner presented with negative SLR. His impression was chronic low back pain. He released Petitioner to return to work starting August 4th with no lifting greater than 30 pounds. She was to follow up as needed. Px4.

Dates of Accident August 20, 2010 and September 3, 2010 – 10 WC 38521 (MRSA)

Petitioner next testified that on September 3, 2010 she was punched out of work at 11:30pm when she noticed blisters and bleeding on her face, neck, ears, both hands, arms and all over, like chicken pox. She first noticed similar markings 2 weeks prior while at work. Petitioner testified she was diagnosed with MRSA and was taken off work.

After getting discharged from the hospital, Petitioner testified she followed up with her doctor – Dr. Guzina at which time she underwent some tests and was diagnosed with MRSA. Petitioner testified she was taken off work after September 3, 2010 as her doctor told her she would not return to work without being cured.

Petitioner testified she was taken off work in September 2010 and was off work for three or four months. She returned to work after three months when she did not have MRSA. Petitioner testified she did not return to work for one day and was not working in September, October, and November and then came back before Christmas in December. Petitioner testified she was not allowed in the hospital for three months until she was cured from MRSA. She also testified that she did not return to work for one day at which time she had another outbreak.

Petitioner identified Px1 as photos taken in September 2010 at the hospital and at her home. She testified the photographs were a fair representation of her symptoms. Petitioner also testified the blemishes in the photos were similar to the ones she had experienced two weeks before September 3, 2010. The blemishes also represented the ones she experienced later in October 2010 and March 2012. Petitioner testified she did not have any problems with MRSA before the first incident that occurred two weeks before September 3, 2010.

On cross examination, Petitioner testified the MRSA lesions had been present for 10-14 days prior to September 3, 2010 and had looked exactly the same for that time-period. She testified to waiting for these 14 days because her manager did not let her go to the ER or fill out a report. Petitioner admitted her report was filled out on September 5 or September 6, 2010 and indicated the symptoms had been present since September 3, 2010.

On September 4, 2010, Petitioner presented to Resurrection for suspected vasalitis [sic]. Px10. Various medical notes recorded rash to the elbow, face and buttocks. The left elbow and left ear had black scabs with no oozing. Other notes remarked various symptoms were present for 2 weeks that spread to the face and another that facial lesions were present for one day. Another record noted an elbow lesion present for 1 week.**there is no mention of any exposure at work.&** Petitioner followed up with dermatology.

Records show that on September 7, 2010, an employee report of work injury or illness was completed, noting that on September 3, 2010, Petitioner believed she probably touched her face accidentally while wearing her gloves. Px10:91, Rx4. Petitioner also followed up with Dr. Firoozi, who wrote that Petitioner worked in ICU and presumably came in contact with cleaning products. Px10:96. The doctor noted blood tests were not back yet. On September 11, 2010, results were positive for MRSA. Px10:97. Petitioner was given medication.

On September 14, 2010, Petitioner presented to Dr. Guzina, who noted Petitioner had an infection in her cheek and had already been treating for MRSA. See, Px7, 14. Dr. Guzina also testified in this matter regarding her treatment of Petitioner and her opinions. Px14. At the September 2010 visit, the doctor advised Petitioner to continue her course of treatment. Dr. Guzina testified that her role was largely one of providing follow up and coordinating care with other doctors. On September 21st and 28th, 2010, Petitioner followed up at Resurrection and lesions were healing. Medications were refilled. Px10:98. On October 7th and 12th, medications were again refilled. Px10.

Date of Accident October 21, 2010 – 10 WC 44279 (MRSA)

Petitioner then testified she did go back to work on October 21, 2010 for one day. She worked a few hours and noticed the same bumps and blisters on her face, legs and arms. She again reported this to Monica. Petitioner treated within the emergency room and then following up with Dr. Guzina. Petitioner testified Dr. Guzina referred her to Dr. Yeo and saw him at Thorek Hospital. Petitioner was admitted to Thorek Hospital for two nights and three days at which time tests were again undertaken to determine what the blemishes were. Petitioner testified she believed the tests were to check for MRSA. Petitioner testified she was taken off work again in October 2010 and she remained off work until *January* 20, 2011. Petitioner testified during the period she was off work her symptoms did not improve and remained the same. Petitioner also testified that she had been taken off work in September 2010 and did not return to work until *December*.

On cross examination, Petitioner testified that after being taken off work in September 2010, she returned on October 21, 2010, worked for a couple of hours, was sent to the ER again, and then did not work until January 20, 2011. Petitioner admitted she had returned to work on October 21, 2010 because Dr. Firoozi had allowed her to. Petitioner testified she presented to work at 3:00pm and then filled out the report at 3:50pm because the blisters had returned on her body. She testified on October 21, 2010, Dr. Firoozi had allowed her to return to work and then on October 25, 2010 Dr. Guzina took her off work again. Petitioner testified she did not return to Dr. Firoozi because "they" did not send her. Petitioner testified she was aware her blood was tested for MRSA in November 2010 by Dr. Yeo but was not aware the results were negative for MRSA. Petitioner admitted Dr. Guzina took her off work for her non-work-related health issues at times and it was possible the time off work was due to her arthritis symptoms may have overlapped with the time she was also off work for her alleged MRSA symptoms. On cross, Petitioner testified she had taken pictures of her breakout from October 2010 but had not included them in evidence.

On October 21, 2010, Petitioner returned to Resurrection. Px10:102. All lesions were healed. MRSA was believed to be resolved. The right knee was swollen but not completely closed. Petitioner was allowed to return to work. That same day, Petitioner returned with facial and wrist swelling. Px10. History noted that Petitioner was seen in employee health feeling well. *Id.* at 110. After leaving employee health, 10 minutes later, Petitioner developed facial and wrist symptoms. The plan was for blood cultures to be taken. *Id.*, Rx5. An incident report noted Petitioner was pulling garbage when her face started feeling red. Rx5.

On October 25, 2010, Petitioner returned to Dr. Guzina relating that she had returned to work recently on October 21st and there she noticed something on her face. The doctor testified that it looked swollen. Dr. Guzina prescribed antihistamine, noting she believed the face swelling was a skin reaction to the MRSA antibiotics Petitioner had already been taking. On November 3, 2010, blood testing was negative for MRSA. Rx6. On November 11, 2010, Petitioner returned to Dr. Guzina, who noted Petitioner was still off work. Px14. On November 16, 2010, Petitioner followed with Dr. Guzina for blood tests. Px14. The doctor referred her to a rheumatologist. Px14. On December 27, 2010, Petitioner informed Dr. Guzina she had stopped taking her MRSA medications. Px14. The doctor reasoned Petitioner could now begin taking the recommended steroid

medications per the rheumatologist's recommendations. Petitioner was still off work as of this visit in order to finish antibiotics for the and she was to return to work on January 20, 2011. *Id.* at 15-16.

On January 17, 2011, Petitioner followed up with Dr. Guzina who noted Petitioner had finished her MRSA medications. Px14. On April 10, 2011 an incident report documented that Petitioner complied of a rash/bubbles maybe after touching a counter. Px10:115, Rx12. She was sent to the ER. On May 5, 2011, Petitioner followed up with Dr. Guzina. Px14. The doctor testified Petitioner had a new rash on her forearm from either gloves or an exposure to something. She testified "we didn't know." Petitioner was to continue her treatment for her autoimmune disease that she presumably had. *Id.* at 18.

On June 29, 2011, another employee report of work injury/illness noted that after cleaning an isolation room, Petitioner washed her hands and noticed in the mirror facial redness. Px10:118, Rx12. She could not recall getting cleaning product in her face. *Id.* at 121. Another noted documented she sprayed cleaning product and her face was the only part of the body exposed. *Id.* at 123. Skin dermatitis was suspected. *Id.* at 122.

On June 30, 2011, Petitioner followed up with Dr. Guzina with another episode of the face rash again at work. Px14. Petitioner was not being followed by the rheumatologist anymore. Dr. Guzina recommended Petitioner see a dermatologist. The doctor thought that Petitioner had been working as of that visit. On July 11, 2011, Petitioner followed up with Dr. Guzina. Px14. She was negative for MRSA but still had a rash on her face. On August 22, 2011, Petitioner returned to Dr. Guzina reporting that she had another episode at work where she swallowed something in the throat. *Id.* at 20. Petitioner followed up with Dr. Guzina in December 2011 complaining of eyelid swelling and difficulty getting up, which the doctor said could be symptoms associated with a rheumatologic condition. *Id.* at 23.

Date of Accident August 15, 2011 – 13 WC 23804 (Choking Incident)

Petitioner testified in 2011 she was involved in another work accident when a co-worker slapped her on her back, causing her to choke on a candy. Petitioner testified a doctor took the candy out and she stayed one day in the hospital. She stated she was given 2-3 days due to the stress from choking. She eventually followed up with a specialist. Petitioner said she noticed pain with swallowing water that lasted one week. She was able to return to work. Petitioner testified that she did not have any problems with her throat prior to the incident in which she choked on a lozenge.

On cross examination, Petitioner admitted she ate candies outside of work as well and also ate candy outside of work while talking to her friends. Petitioner testified she missed three days of work after the candy was taken out of her throat but that her doctor only took her off work for one day. Petitioner testified she was seen by a Polish doctor a couple of days after the incident because she had been instructed to do so at the ER.

On August 15, 2011, employee incident reported noted that Petitioner bent down to grab a bucket and had a mint candy in her throat that got stuck. Rx8. Records show that on August 15, 2011, Petitioner presented to the emergency room. Px6. History noted that Petitioner accidentally swallowed or choked on a candy while sucking on it. There is no mention of a coworker or being slapped on the back. And endoscopic failed to show any foreign body or candy. Petitioner was noted not to be in any distress despite Petitioner having testified that she was taking off work due to the stress of the alleged incident. Further, there is no note taking off work as a result of this incident. Based on Petitioner's lack of credibility corroborating her version of the events and based upon the medical records billing to corroborate her version of the events, the Arbitrator fines that Petitioner feel to prove Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent.

Date of Accident March 19, 2012 – 12 WC 10959 (MRSA)

Petitioner testified she had another outbreak of MRSA in March 2012, which presented in the same way as in September with bubbling, blistering, and bleeding. Petitioner testified she was seen in the ER again and she also filled out a report with her manager. Thereafter, Petitioner testified, she followed up with Dr. Guzina and was taken off work again. Petitioner testified she was allowed to return to work but every time she came back to Resurrection she would get MRSA. Petitioner testified she was told by her doctor that she could not return to working for the hospital anymore. Petitioner testified if the MRSA outbreaks had not happened then she would not have stopped working in 2012. Petitioner testified since March 2012 she had not returned to work but had had additional outbreaks of MRSA. Petitioner testified at the time of each outbreak she followed up with Dr. Guzina and was given pills and cream for treatment.

On cross examination, Petitioner testified that last time she saw Dr. Guzina for MRSA issues was in October 2012 and at the time she was also treating for her arthritis. Petitioner testified since she had stopped working for Resurrection, she had four or five more breakouts of MRSA. Petitioner testified she had not returned to Resurrection prior to these four-five breakouts. Petitioner testified each time the symptoms were similar to the bubbles like the ones shown in Px1. Since she stopped working, she has not looked for work because her doctor told her she could not return to work in a hospital. Petitioner admitted her doctor had not stopped her from returning to work anywhere else. On cross, Petitioner also testified there are no pictures of her breakout from March 2012.

On March 19, 2012, Petitioner presented to Resurrection where it was noted Petitioner was exposed to scabies and presented with a rash. Px11, Rx9. There were bumps on the arms and between fingers noted. There was a rash on her face. Dr. Guzina testified that Petitioner's next complaint of MRSA was on March 22, 2012, when she related to Dr. Guzina that she was cleaning a room where scabies was present and then developed a rash. Px14:24. Petitioner was diagnosed at the emergency room with scabies. Petitioner was tested at Thorek on this date. Px8. Petitioner related in occurred 3 days prior. Petitioner was started on medications for MRSA type infection and followed up. In June 2012, Dr. Guzina updated her chart, testifying that her research showed that p-ANCA titer can by caused by a trigger, which can be many things. She said "it" could cause hypersensitivity vasculitis. *Id.* at 28. This could be diagnosed with a biopsy which was never obtained. *Id.*

Dr. Guzina testified that to a reasonable degree of medical certainty, she believed the source of Petitioner's MRSA was the workplace. *Id.* at 29-30. Dr. Guzina's prognosis was that Petitioner was improving. The doctor testified she did not think she ever returned Petitioner to return to work after the last visit. On cross, Dr. Guzina admitted that there were no blood cultures done to confirm MRSA at the last, most recent visits with Petitioner. Dr. Guzina testified she based her conclusion on the history provided by Petitioner, explaining that exposure causes titers to elevate, which can remain elevated for long periods thereby lowering immunity. Dr. Guzina testified that she knew Petitioner had MRSA in March 2012 because Petitioner got better with antibiotics prescribed to treat MRSA. *Id.* at 41-42. Dr. Guzina testified that she learned that hypersensitivity vasculitis can be triggered by MRSA. Dr. Guzina further testified that once an individual has been diagnosed and treated for MRSA, any further skin infection is automatically treated as if it was MRSA. *Id.* at 50-51, 55. The doctor testified that Petitioner had MRSA on her forearms, where her gloves ended. *Id.* at 57. Dr. Guzina testified Petitioner was off work from September 14, 2010 until October 21, 2010. *Id.* at 62. Petitioner then had symptoms again on October 25, 2010. Petitioner then returned to work on January 20, 2011 and again had symptoms on June 30, 2011. Thereafter, Petitioner went off work again until July 11th or 15th.

Documents show Petitioner was taken off work by Dr. Guzina from March 9, 2012 through October 2, 2012. Px9. Dr. Guzina eventually wrote that Petitioner was permanently disabled. Id.

Petitioner testified she saw Dr. Chiodo at the request of her employer and at the appointment he did not examine her and only looked at the photographs. She testified she was in Dr. Chiodo's office for one hour but his examination of her only lasted for a minute or thirty seconds. The rest of the time Dr. Chiodo asked her questions and looked at her medical records of Petitioner.

Deposition Testimony of Dr. Ernest P. Chiodo

The evidence deposition of Dr. Ernest Chiodo was taken on January 30, 2013. Rx11. Dr. Chiodo testified he board certified in internal medicine, occupational medicine, public health, and general preventative medicine. He is also certified in engineering and public health discipline and in industrial hygiene, which was the discipline that quantified and controlled various occupational and environmental hazards, including exposure to air toxins. Dr. Chiodo testified he had performed an independent medical evaluation on Petitioner on December 6, 2010 and a repeat examination on June 28, 2012. Dr. Chiodo testified that he did not believe Petitioner had a MRSA infection because no record he found actually stated this. However, even if she did, he did not believe it was caused by her work at the hospital. He testified at length how one can contract MRSA, how and where it spreads and treatment for this infection. Dr. Chiodo gave opinions on where he believed Petitioner's MRSA may have originated from.

Deposition Testimony of Dr. Taraneh Firoozi

The evidence deposition of Dr. Taraneh Firoozi was taken on May 25, 2012. Px12. Dr. Firoozi testified he is a dermatologist licensed to practice medicine in the state of Illinois. He first saw Petitioner on September 7, 2010 after she made an appointment, but it was his understanding she was referred to him because she brought in the Employee Report of Injury/Illness. Petitioner provided a history of working in an isolation room which was contaminated by MRSA two weeks prior to the time she presented for the appointment, when she accidentally touched her face with her contaminated gloves. Dr. Firoozi performed a physical exam of Petitioner which revealed multiple ulcers on left ear, right knee, and right cheek. He thought the symptoms were a result of spider bites. Dr. Firoozi testified Petitioner returned on September 11, 2010 and it was his recollection she did not look better. Dr. Firoozi continued Doxycycline because the culture showed the antibiotic was sensitive to Doxycycline while also starting her on sulfur drugs. Dr. Firoozi diagnosed MRSA based on culture results and he therefore ruled out spider bites and contact dermatitis. Petitioner returned on September 21, 2010 and the lesions were healing with necrotic bases. Dr. Firoozi saw Petitioner on October 21, 2010 and noted the MRSA infection had resolved. He allowed Petitioner to return to work on that day as he had kept her off work prior to this. He did not see Petitioner again. Dr. Firoozi testified it was his opinion that Petitioner's MRSA infection *could have been* caused by the events she related to him on September 7, 2010 and included in the report dated September 4, 2010.

Deposition Testimony of Dr. Tatjana Guzina

The deposition testimony of Dr. Tatjana Guzina was taken on June 19, 2012. Px14. Dr. Guzina testified she was board certified in internal medicine. Dr. Guzina's ultimate conclusion was that Petitioner's MRSA was caused by her workplace. Dr. Guzina acknowledged that testing in July 2011 was negative for MRSA. Dr. Guzina testified that in March 2012, she saw Petitioner again, who was reporting scabies. Dr. Guzina testified she started Petitioner on MRSA medications again and that Petitioner eventually got better. Based on this, Dr. Guzina concluded that Petitioner was again exposed to MRSA.

Deposition Testimony of Dr. Sein-Khiong Yeo

The deposition testimony of Dr. Sein-Khiong Yeo was taken on December 20, 2012. Px13. Dr. Yeo is board certified in infectious diseases. He first encountered Petitioner on November 2, 2010 when she was referred to him by Dr. Guzina for a skin condition. Dr. Yeo testified Petitioner told him Resurrection Hospital was developing cultures for MRSA, she was on antibiotics, and was feeling better but was referred to dermatology and told to stop the antibiotics, which had caused the lesion to get worse. Dr. Yeo testified he thought the condition was pure MRSA folliculitis and micro-abscess and so he started Petitioner on Vancomycin. Dr. Yeo testified after seeing Petitioner on November 2, 2010 he did not see her again. He testified as Petitioner was a housekeeper and janitor in the hospital setting, it could throw her into the high-risk category to contract MRSA. Dr. Yeo testified it was his opinion that as Petitioner was a housekeeper and cleaning patient rooms, it increased her chances of contracting MRSA. Dr. Yeo discharged Petitioner on November 4, 2010 with the discharge diagnosis being of MRSA. On cross examination, Dr. Yeo discussed a variety of hypothetical scenarios and settings where one might contract and develop MRSA.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

The Arbitrator had an opportunity to observe Petitioner and her testimony. The Arbitrator finds Petitioner's testimony was not intentionally misleading however her testimony is inconsistent with the medical record and was speculative at times.

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

A. Dates of Accident August 20, 2010 and September 3, 2010 – 10 WC 38521 (MRSA)

After hearing the trial testimony and reviewing the evidence in the record the Arbitrator concludes Petitioner has failed to show that on either August 20, 2010 or on September 3, 2010 she was involved in an accident that arose out of and in the course of her employment with Respondent. The Arbitrator has reviewed extensive testimonies and medical evidence on whether Petitioner contracted MRSA at Respondent's place of work that would arise out of an in the course of that employment. The Arbitrator further notes that the conclusion as to accident in this case is based primarily on one of lack of credibility, lack of corroboration and speculation.

First, the Arbitrator denies Petitioner's claim for 10 WC 38521 as she selected two dates of accident, presumably surmising that her exposure to MRSA may have been either date. Petitioner never gave credible testimony explaining her decision to select these two dates on one claim as alleged accident or exposure dates. Second, Petitioner's histories of how she became or believed she became exposed varied as shown in the evidence. For example, she testified that she noticed blisters and bleeding when she punched out on September 3, 2010 but also noticed similar markings 2 weeks prior. Petitioner never provided testimony as to what area of the workplace she worked two weeks prior. In her initial medical record at Resurrection, varied lengths of time for the presence of these symptoms included 1 week and 2 weeks. See, Px10. There is no mention of any workplace exposure at this initial visit. Then, when Petitioner finally completed a report on September 7th, Petitioner speculated that she thought she may have touched her face accidentally while wearing gloves. Px10:91, Rx4. However, Dr. Firoozi noted Petitioner presumably came into contact with cleaning products. Petitioner did not relate any specific date this would have occurred to Dr. Firoozi. Px10:96. Again, no mention of MRSA is made and no mention of either of the two alleged accident dates are noted. After being diagnosed

with MRSA, Petitioner saw Dr. Guzina on September 14th, where no mention of any workplace exposure is noted and neither date of alleged accident is noted.

Finally, both Drs. Firoozi and Guzina failed to give persuasive or credible testimony or opinions as to when and how in the workplace it was that Petitioner was exposed to MRSA. Both doctors failed persuasively reconcile the varying dates and histories noted in the record. The Arbitrator assigns little weight to these opinions as it relates to the issues of accident and causation. Likewise, the Arbitrator must assign little weight to the opinions of Dr. Yeo as he saw Petitioner only once in November 2010 and did not corroborate where or how the exposure occurred, on what date(s) an exposure occurred but rather simply concluded her MRSA exposure "probably occurred" at work. Px13. Based on the foregoing, the Arbitrator denies Petitioner's claim in 10 WC 38521. All other issues related to this claim are moot.

B. Date of Accident October 21, 2010 – 10 WC 44279 (MRSA)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove accidental injuries/exposure arising out of and the in the course of her employment occurring on October 21, 2010 with Respondent. Again, the conclusion to deny this claim is based primarily on a lack of credibility, corroboration and speculation.

Petitioner initially gave testimony that she did not work for approximately 3 months following her initial alleged MRSA exposure. Eventually, Petitioner testified that she returned to work for one day on October 21, 2010 and noticed symptoms once again. This became the basis of claim 10 WC 44279. Specially, she testified she returned to work for only a couple of hours when she noticed bubbling and bleeding on her hands, face, and legs. The Arbitrator finds this testimony is not only internally inconsistent, as she testified she did not work for 3 months, but also is contradicted by a preponderance of the evidence. Records showed that Petitioner treated with Resurrection on October 21, 2010, where MRSA was believed to be resolved. Px10:102. She was permitted to return to work. Petitioner then returned to Resurrection, complaining of facial and wrist swelling. Upon her return, the history noted that after Petitioner left employee health, 10 minutes later she noticed facial and wrist symptoms. *Id.* at 110. Again, no mention is made of any specific exposure to any unit, floor, department or room number she may have worked in or what she was doing. Petitioner also failed to give any specific details regarding same. The Arbitrator finds this initial history compelling, as it reasonably suggests that Petitioner never even returned to work but rather noticed symptoms after leaving employee health – the very same visit noted earlier on that date. Thus, this history is most consistent with Petitioner's initial testimony that she never worked for 3 months following her first alleged exposure. Even if she did work as alleged, an incident report noted Petitioner was pulling garbage when her face started feeling red. Rx5. This is not consistent with the history noted in Resurrection's records when Petitioner returned a second time. *See*, Px10:110. Further, Petitioner never gave such testimony. Notably, blood cultures taken in November 2010 were negative for MRSA, which would suggest that no exposure in fact occurred.

Based on the foregoing, the Arbitrator denies Petitioner's claim in 10 WC 44279. All other issues related to this claim are moot.

C. Date of Accident August 15, 2011 – 13 WC 23804 (Choking Incident)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove she sustained accidental injuries arising out of and the in the course of her employment occurring on August 15,

2011 with Respondent. The denial of this claim is based primarily on a lack of credibility, corroboration and speculation.

The Arbitrator finds Petitioner's version of events as related by her during her testimony were contradicted by both the injury report and the information contained in the medical records entered into evidence. Petitioner testified that on this date, a candy got stuck in her throat after a co-worker slapped her on her back. Petitioner testified that as she could not breathe, she was seen in the ER and underwent a procedure to dislodge the candy from her throat. However, the incident report noted that Petitioner bent down to grab a bucket and had a mint candy in her throat that got stuck. Rx8. There is no mention of a co-worker. Further, emergency room records noted that Petitioner accidentally swallowed or choked on a candy while sucking on it. There is no mention of a coworker or being slapped on the back or bending over. Further, contrary to Petitioner's testimony that candy had to be dislodged, an endoscopy failed to show anything. Finally, even if an incident occurred, under any of these scenarios, Petitioner failed to prove that this constituted an employment risk or that she was exposed to some other risk to a greater degree than the general public. Based on the foregoing, the Arbitrator denies Petitioner's claim in 13 WC 32804. All other issues related to this claim are moot.

D. Date of Accident March 19, 2012 – 12 WC 10959 (MRSA)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove accidental injuries/exposure arising out of and the in the course of her employment occurring on March 19, 2012 with Respondent. The denial of this claim is based primarily on a lack of credibility, corroboration and speculation.

Petitioner testified she had another "outbreak" of MRSA and it presented in the same manner as previously alleged, with bubbling, blistering, and bleeding. Again, this is contradicted by the information contained in Petitioner's medical records and the report of injury/illness filled out by her. In the injury report Petitioner claims she had started cleaning the isolation room when her face and hands started showing a rash. Rx9. Petitioner saw Dr. Guzina following this alleged incident, telling the doctor she was exposed to scabies rather than MRSA. Despite this, Dr. Guzina later testified she was certain Petitioner was suffering from MRSA because Petitioner improved with MRSA-type medications. Dr. Guzina admitted no testing was done to confirm this but insisted no testing was necessary. Dr. Guzina further concluded this alleged exposure to MRSA was from work but Dr. Guzina was never asked to reconcile either the incident report noting cleaning an isolation room or the alleged exposure to scabies. The Arbitrator assigns little weight to the testimony and opinions of Dr. Guzina as they based on a faulty understanding the of the histories surrounding this alleged incident. Based on the foregoing, the Arbitrator denies Petitioner's claim in 12 WC 10959. All other issues related to this claim are moot.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Having reviewed all evidence, the Arbitrator concludes Petitioner's current condition of ill-being as it relates to her low back/lumbar spine is causally related to her April 17, 2010 work

accident. Petitioner presented credible and corroborating evidence that she injured herself at work while lifting a bag of linen. The Arbitrator does not find the histories inconsistent. Respondent presented no contrary evidence. Therefore, Petitioner's low back is causally related to her April 17, 2010 accident.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Respondent presented into evidence the medical bills payment ledger showing $10,167.35 was paid for the treatment undergone by her. Rx10. Petitioner testified that to her knowledge all her medical bills related to the April 17, 2010 incident had been paid. However, Petitioner introduced into evidence a summary and corresponding bill totaling $12,043.00 between April 20, 2010 and August 3, 2010 and the corresponding medical financial history confirms an outstanding balance of $276.00. As such after analyzing the full set of medical bills the Arbitrator finds that Respondent has paid all reasonable and related medical bills of Petitioner as it pertains to the April 17, 2010 work incident.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Evidence shows Respondent paid TTD benefits to Petitioner for the time-period of April 22, 2010 until July 11, 2010 in the amount of $3,427.11. Rx10. Petitioner testified she was taken off work by her doctor on April 22, 2010 and she remained off work until she was allowed to return to light duty work on July 11, 2010. Based on the evidence presented the Arbitrator finds TTD benefits were paid by Respondent for this time and no additional benefits are due to Petitioner.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. The Arbitrator finds Petitioner sustained only a minor back strain as a result of the alleged incident and was found capable of returning to full duty work within three months. Petitioner gave no testimony as to the effects of her back injury. As such the Arbitrator finds Petitioner did not sustain any permanent partial disability as a result of the alleged incident.

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

Ljiljana Pelivanovic,

Petitioner,

vs.

Our Lady of Resurrection,

Respondent.

Case #: 10 WC 44279

Consolidated cases: 10 WC 38521
10 WC 38522
12 WC 10959
13 WC 23804

20IWCC0749

DECISION AND OPINION ON REVIEW

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

I. FINDINGS OF FACT

Petitioner, a hospital housekeeper, alleged she contracted Methicillin Resistant Staphylococcus Aureus ("MRSA") from cleaning hospital rooms which had been infected with that staph bacteria. Petitioner claims she was exposed to MRSA while working on: August 20, 2010 and September 3, 2010 (10 WC 38521); October 21, 2010 (this claim, 10 WC 44279); and March 19, 2012 (12 WC 10959).

Petitioner testified that about two weeks before September 3, 2010, while working, she first noticed blisters and bleeding on her face, the inside of her arms, and leg. Petitioner notified her supervisor, Ms. Chowaniec, of her condition and that she had been cleaning an infected patient's room. Petitioner testified that Ms. Chowaniec did not "want to hear it" and would not fill out an accident report. After Petitioner's shift ended on September 3, 2010, while still at the

20IWCC0749

hospital, she noticed that her condition had gotten much worse. The blisters and bleeding were all over her face, neck, hands, and leg, like "chicken pox." She again reported her condition to Ms. Chowaniec and stated she may have accidentally touched her face while cleaning at work, and then touched her skin. She advised Ms. Chowaniec that she had been cleaning ICU isolation rooms.

Petitioner sought treatment in the emergency room on September 4, 2010 and was admitted to the hospital for two nights. After her discharge, Petitioner saw her primary care physician, Dr. Guzina, who diagnosed her with MRSA. The MRSA diagnosis was confirmed by a positive culture. Petitioner was off work about three months.

Ms. Chowaniec filled out a report dated September 7, 2010 documenting Petitioner's complaints. The report documented Petitioner's report of accidentally touching her face with her gloves while cleaning an isolation room. Under the reports section, "cause of occurrence," Ms. Chowaniec wrote, "infection/isolation room." The report also indicated that Petitioner should be more careful and not contact her skin while cleaning.

Petitioner returned to work on October 21, 2010, after she was told she no longer had MRSA. However, while working on that date, she noticed the same symptoms she had previously experienced – bubbling and bleeding on her right hand, arm, face and leg. She reported the foregoing to her supervisor. Petitioner was again treated in the emergency room, and followed up with Dr. Guzina and Dr. Yeo, who had her admitted to Thorek Hospital. Petitioner was taken off work until January 20, 2011.

On March 19, 2012, Petitioner had yet another incident of similar symptoms on her skin while at work. She reported the incident to Ms. Chowaniec. She sought treatment in the emergency room, and then with Dr. Guzina, who took her off work. Dr. Guzina eventually released Petitioner to work on October 2, 2012.

Several physicians provided testimony regarding Petitioner's MRSA diagnoses and their relation, if any, to her work environment. Petitioner's treating physicians, Dr. Guzina, Dr. Firoozi, and Dr. Yeo, as well as Respondent's Section 12 examiner, Dr. Chiodo, were called as witnesses at evidence depositions.

Dr. Guzina, a board-certified internal medicine physician, testified that she first treated Petitioner for MRSA on September 14, 2010, after Petitioner had been diagnosed with that condition. Dr. Guzina saw Petitioner again on October 25, 2010 after she had returned back to work. Then, Petitioner reported that while cleaning hospital rooms on October 21, 2010, she noticed her face was swollen. Dr. Guzina instructed Petitioner to follow-up with an infectious disease specialist, although she continued to monitor the antibiotics Petitioner was taking. On January 20, 2011, Petitioner returned to work in an improved condition with no rashes.

Dr. Guzina testified that Petitioner returned to see her on March 22, 2012, with MRSA symptoms. Petitioner reported having cleaned a hospital room in which a scabies patient had been present. Upon exam, Dr. Guzina observed Petitioner had raised papillae and small open wounds with scabs. Although Petitioner went to the ER before seeing Dr. Guzina and was given medication, the rashes on her arms, legs, face, upper chest, and buttocks had continued to worsen. Dr. Guzina took Petitioner off work, and started her on medications for MRSA.

Because Petitioner's MRSA diagnosis in September 2010 had been confirmed by a positive culture, Dr. Guzina testified that she found it unnecessary to obtain another culture to confirm Petitioner's infection from March 19, 2012 was MRSA. Dr. Guzina testified that once a patient has a positive culture for MRSA, it's reasonable to assume that all subsequent skin infections they develop should be treated as MRSA. After Petitioner's initial MRSA exposure at work, subsequent exposures would bring back her symptoms.

Dr. Firoozi, a board-certified dermatologist, testified that she first saw Petitioner on September 7, 2010. Petitioner gave a history of having worked in an isolation room that had been contaminated with MRSA two weeks before her office visit. Petitioner reported she had accidentally touched her face, ears, knee, and other parts of her body with contaminated gloves. At that time, Dr. Firoozi did not have any culture results and initially believed Petitioner had spider bites, the appearance of which were similar to MRSA lesions. She started Petitioner on antibiotics. When Dr. Firoozi next saw Petitioner on September 11, 2010, she diagnosed Petitioner with MRSA based upon her positive culture. Dr. Firoozi prescribed a different antibiotic and an antiseptic body cleanser. Petitioner's lesions improved on subsequent visits, and on October 21, 2010, Dr. Firoozi believed that most of her MRSA skin infection had resolved. She released Petitioner back to work that day, even though she believed Petitioner's right knee was probably still somewhat infectious. Dr. Firoozi opined that based upon Petitioner's reported history, she could have contracted MRSA from an exposure at work.

Dr. Yeo, a board-certified infectious disease specialist, testified that he first examined Petitioner for her MRSA diagnosis on November 2, 2010 as referred by Dr. Guzina. At his exam, Petitioner reported her condition had been present for weeks or months. Dr. Yeo noted that her lesions were dry and that she had been on antibiotics. She told him that she had cleaned patient rooms, isolation rooms, and ICU rooms. Dr. Yeo had Petitioner admitted to the hospital to begin "first line" intravenous antibiotics. He explained that Petitioner had been taking "second line" antibiotics which had improved her condition but not resolved it. After receiving the intravenous antibiotics, Petitioner's condition improved and on November 4, 2010 he discharged her.

Dr. Yeo opined that based on Petitioner's history, she likely contracted MRSA while working as a janitor cleaning the various hospital rooms. He opined that in 2010, the vast majority of MRSA cases were contracted in hospitals with only a handful happening outside of them. Dr. Yeo explained that people working in a hospital setting, nursing home setting, or a long-term care setting like Petitioner and himself already, "have MRSA in our skin." The

MRSA can be "colonized" within an hour over a person's entire body, and a scratch or open wound can cause abscesses and lesions. Dr. Yeo stated Petitioner may have been sensitive to the harsh cleaning chemicals which might have caused a break in her skin, which then might have created an opportunity for a MRSA infection. He also believed Petitioner's scratching was a cause of the abscesses/lesions. Dr. Yeo testified that he told Petitioner she had to stop scratching because she had lesions everywhere she had scratched.

Dr. Yeo testified that, in November 2010, he diagnosed Petitioner with MRSA based upon her previous positive culture. He stated that the blood test he had ordered to confirm MRSA came back negative because Petitioner had been on antibiotic treatment. Dr. Yeo opined that once a MRSA infection is diagnosed, every subsequent MRSA diagnosis most probably relates back to the initial exposure. He further explained that the treatment for MRSA will never alleviate a non-MRSA condition.

Dr. Chiodo, Respondent's Section 12 examiner, conducted two examinations of Petitioner at Respondent's request: on December 6, 2010 and June 28, 2012. He testified that he is board-certified in internal medicine, with several subspecialties. He also holds master's degrees, is a certified industry hygienist, and is an attorney. At his first examination of Petitioner, Dr. Chiodo testified that Petitioner gave a history of probably accidentally touching her face after cleaning an isolation room. She also reported having facial redness and swelling of her wrists on October 21, 2010, her first day back at work. Dr. Chiodo testified that he did not believe Petitioner had MRSA because she had not had a positive culture. He stated that if she actually did have MRSA, he did not believe Petitioner contracted it from her hospital workplace because MRSA is present in many different locations. He testified that there is nothing unique to hospitals that would be a cause of her contracting MRSA versus some other non-occupational cause.

At Dr. Chiodo's second exam on June 28, 2012, Petitioner reported she had two additional exposure episodes, on June 29, 2011 and on March 19, 2012. At that exam, Dr. Chiodo did not observe any MRSA lesions and noted there had been no blood tests, cultures, or environmental health records to confirm the presence of MRSA or scabies. Dr. Chiodo believed Petitioner developed a rash from anxiety. He believed that a positive culture was needed for a clinical diagnosis of MRSA, which should not be made by just looking at a lesion.

On cross examination, Dr. Chiodo acknowledged that he practices and teaches both medicine and law, and that while he is retained as an expert by plaintiffs, he is more often retained by insurance carriers. Dr. Chiodo admitted he did not ask Petitioner which rooms or areas in the hospital she had cleaned, or what she had done in the days and weeks before March 19, 2012. He admitted that if Petitioner did have MRSA, he had no opinion as to what caused it. He then opined that the most likely cause of Petitioner's MRSA was her cigarette smoking.

Dr. Chiodo opined that Petitioner's workplace was not a 51% or more cause of her MRSA infection. Dr. Chiodo testified it was not his job, or the job of Petitioner's treaters, to

figure out what caused Petitioner's MRSA. He believed that without cultures to confirm the presence of MRSA, a skin condition is just a rash. Dr. Chiodo did not believe Petitioner had MRSA or scabies because no records confirmed that. He believed the problems Petitioner complained of were most likely psychosomatic.

II. CONCLUSIONS OF LAW

The Arbitrator denied all three of Petitioner's MRSA claims, finding that she did not prove accidental injuries or exposures. The Arbitrator based her findings upon Petitioner's lack of credibility, a lack of corroboration and speculation. The Arbitrator noted Petitioner's histories varied and lacked details, and that Dr. Guzina documented no date of occurrence or mention of a workplace exposure. The Arbitrator found that Petitioner's blood culture in November 2010 was negative for MRSA and believed that Petitioner's history, "reasonably suggests that Petitioner never even returned to work," on October 21, 2010, the date of her second alleged exposure.

The Arbitrator also found that both Drs. Firoozi and Guzina failed to give persuasive or credible testimony or opinions as to when and how Petitioner was exposed to MRSA in her workplace. The Arbitrator assigned little weight to Dr. Yeo's opinions, stating he saw Petitioner only once, in November 2010, and did not corroborate where, how or when Petitioner's MRSA exposures occurred. The Arbitrator believed Petitioner did not prove she was exposed to MRSA on March 19, 2012, because she initially reported she had been exposed to scabies, and because Dr. Guzina performed no testing to confirm MRSA.

The Commission views the evidence differently than the Arbitrator, and finds that Petitioner did prove that while working for Respondent, she was exposed to MRSA, which manifested on August 20, September 3, 2010, October 21, 2010 and March 19, 2012. In so doing, the Commission examines the testimony of Petitioner's treating physicians, and the objective medical evidence on which they relied in reaching their opinions. The Commission is not persuaded by the opinions of Dr. Chiodo, Respondent's Section 12 examiner, who had no understanding whatsoever of Petitioner's exposure at work to MRSA preceding her onset of symptoms and was not even aware that Petitioner had a positive MRSA culture.

Petitioner testified that her duties in August and September 2010 required her to clean and disinfect hospital rooms in which patients with MRSA had been present. She testified she gave notice of her skin lesions to her supervisor when she discovered them, whether or not she knew her infections were MRSA. Petitioner's lab report, dated September 5, 2010, confirmed that Petitioner had contracted MRSA. The foregoing is uncontroverted.

First, the Commission finds the opinions of Dr. Yeo, Petitioner's treating infectious disease specialist, highly persuasive and adopts his testimony and opinions. Dr. Yeo testified that when he examined Petitioner on November 2, 2010 on referral from Dr. Guzina, Petitioner reported cleaning patient rooms, isolation rooms, and ICU rooms. He also noted that Petitioner had dry MRSA lesions "everywhere." Dr. Yeo had Petitioner admitted to Thorek Hospital to

receive a course of "first line" intravenous MRSA drugs, which ultimately proved effective in controlling her MRSA infection compared to prior treatments.

Dr. Yeo testified that MRSA is usually first contracted or "colonized" on exposed areas of the body, like the arms, legs or face. If a patient has MRSA colonization on a body part, it can be spread to the entire body by touching other body parts. If a patient has MRSA colonization on their hand and touches their buttocks, that area would also become colonized. The first area of the body exposed to MRSA is not necessarily the first area to develop lesions. Lesions first develop where the skin has been opened. An open wound would allow a full-blown infection to set in. He testified that lesions can develop on any body part, not just at the initial exposed area. Dr. Yeo also explained that hospitals rooms were high MRSA risk environments and testified that the vast majority of MRSA cases in 2010 were contracted in hospital settings, with only a handful contracted outside of that setting. As for Petitioner's negative MRSA blood test on November 3, 2010, Dr. Yeo explained that Petitioner's results were negative because she had been on antibiotics at that time. He ultimately opined that the source of Petitioner's MRSA infections was the hospital in which she worked. Given the fact that Petitioner worked regularly in a hospital, cleaning isolation rooms and ICU rooms, and the uncontroverted evidence that some of those rooms had been occupied by infected patients, the Commission finds it plausible that she contracted MRSA from her workplace as opined by Dr. Yeo.

The Commission also finds the opinions of Dr. Guzina to be persuasive. Dr. Guzina was certain that Petitioner's infection was MRSA. She testified that Petitioner may have been more susceptible to MRSA infections because her immunity was lower. Dr. Guzina opined that once a patient has been diagnosed with MRSA, one should assume that subsequent skin infections were MRSA for the rest of their lives and treat them with MRSA drugs; not doing so would endanger the person's life. In Petitioner's case, her lesions resolved after receiving MRSA treatment. Had Petitioner's condition not been caused by MRSA in the first instance, Dr. Guzina explained that the lesions would not have resolved. In addition, Dr. Guzina's understanding of Petitioner's presentation, symptom onset, diagnostic test results, and exposure to rooms being cleaned due to infectious patients, further buttress the opinions of Dr. Yeo and a finding that Petitioner's MRSA infection, and subsequent manifestations, developed as a result of her exposures at work.

The Commission further finds the opinions and testimony of Dr. Firoozi to be persuasive. Like Dr. Guzina, Dr. Firoozi was aware of Petitioner's history of working in an isolation room contaminated by MRSA prior to developing her initial lesions. She confirmed that Petitioner had contracted MRSA, based upon her positive culture. Dr. Firoozi opined that, based on Petitioner's history of touching her face with infected gloves while cleaning an infected isolation room, her exposure to MRSA in her workplace could have been the cause of her infection. Although Dr. Firoozi reported Petitioner's initial MRSA infection had resolved by October 21, 2010, she acknowledged that Petitioner's right knee was, "probably still somewhat infectious," on that date, because a wound on it had not completely closed. Less than two weeks later on November 2, 2010, Petitioner saw Dr. Yeo who confirmed her improved, but symptomatic, MRSA condition requiring a hospital admission. Like Drs. Yeo and Guzina, Dr. Firoozi

believed that Petitioner's exposure in the workplace to infected patient rooms, coupled with transmission modalities like touching of her body with infected gloves, could have been a cause of her MSRA. The Commission finds her opinion to be persuasive and plausible, particularly in consideration of Petitioner's lack of prior symptoms or treatment for MRSA, her post-August 2010 onset of symptoms, Ms. Chowaniec's report acknowledging Petitioner's reported transmission mechanism, and the expert testimony of both Dr. Yeo and Dr. Guzina. Thus, the Commission finds that as of October 21, 2010, Petitioner was still experiencing a MRSA infection which she had contracted while working in August/September 2010.

In contrast, the Commission finds the opinions of Dr. Chiodo, Respondent's Section 12 examiner, to be wholly speculative and unsupported by the evidence. Dr. Chiodo did not believe it was relevant to know which hospital rooms Petitioner cleaned prior to her development of lesions. He also, without factual basis, attributed Petitioner's contraction of MRSA to anything but contaminated hospital rooms. After professing to have more education and knowledge about Petitioner's condition than her treating physicians, Dr. Chiodo then repeatedly and incorrectly testified that Petitioner's MRSA diagnosis was never confirmed by a culture. The record, however, clearly reflects a September 5, 2010 lab report showing a positive culture for MRSA. Incredibly, Dr. Chiodo also testified that there is nothing unique to hospitals that would be a cause of Petitioner's MRSA versus some other non-occupational cause and, without factual support on which to base his medical conclusion, claimed that if Petitioner did have MRSA, her cigarette smoking was the "likely" cause. The Commission will not disregard positive diagnostic test results, the opinions of several treating physicians, and the uncontroverted evidence that Petitioner cleaned contaminated hospital rooms prior to her first manifestation of symptoms to find Dr. Chiodo's opinions persuasive in this case.

Dr. Chiodo's additional opinion that Petitioner's antibiotic treatment was unwarranted following her March 2012 occurrence is contradicted by the fact that Petitioner's lesions improved following that treatment; Dr. Guzina noted Petitioner's improved condition on April 16, 2012. Petitioner's lack of MRSA lesions at Dr. Chiodo's June 28, 2012 exam fails as proof that she did not have lesions on March 19, 2012. His reference that there was no indication that she had, "mythical open lesions," is contrary to the clinically documented medical evidence of Petitioner's treating physicians. Dr. Chiodo's further claim that the most likely cause of Petitioner's "rashes" was psychosomatic is unsupported by any evidence and unpersuasive.

The Commission also notes additional considerations that erode Dr. Chiodo's credibility. Dr. Chiodo acknowledged that 90% of his income stemmed from insurance carriers and his work as an expert witness. Moreover, despite also being a practicing attorney, Dr. Chiodo concluded that Petitioner's workplace was not 51% or more the cause of her contracting MRSA (a condition he did not believe she had in the first place), a conclusion based on the incorrect legal standard. For a workplace injury or exposure to be compensable, it need only be a cause of *a* claimant's condition; not the primary cause. *Sisbro, Inc. v. Indus. Comm'n,* 797 N.E.2d 665, 672 (2003). The Commission concludes that Dr. Chiodo's opinions are based on speculation, in light of the facts in this case and his lack of understanding of those facts. The medical bases for his

opinions, and his medical-legal conclusions, are wholly lacking in persuasiveness and credibility. The Commission accords no credence to the opinions of Dr. Chiodo in this case.

Ultimately, the Commission finds Petitioner proved she contracted her first MRSA infection as a result of one or more exposures which occurred in the course and scope of her employment and manifested on August 20 and September 3, 2010. Petitioner testified that she had cleaned specific isolation rooms in the hospital, often identifying them by room number, in which infected patients had been present. Respondent offered no evidence contradicting that testimony and, to the contrary, Ms. Chowaniec's accident report confirmed Petitioner's work in an isolation room and the transmission method deemed competent to cause a MRSA infection, as explained by Petitioner's treating physicians. The Commission further finds that Petitioner still had a MRSA infection on October 21, 2010, which related back to her initial MRSA infection. In so finding, the Commission relies upon the testimony and opinions of Dr. Firoozi, and also, upon Dr. Yeo's opinion that Petitioner had MRSA on November 2, 2010.

In concluding that Petitioner's March 19, 2012 infection was MRSA, relating back to her August 20 and September 3, 2010 exposures, the Commission relies upon the testimony of Dr. Yeo, who opined that subsequent infections relate back to the initial exposure in patients diagnosed with MRSA. The Commission further relies upon the testimony of Dr. Guzina, who, before making her MRSA diagnosis, examined Petitioner and researched medical literature. Dr. Guzina opined similarly to Dr. Yeo that once Petitioner had been exposed to MRSA, further exposures would bring back her symptoms.

Because the Commission finds that Petitioner's MRSA conditions on October 21, 2010 and March 19, 2012 each relate back to her initial MRSA exposure or exposures in August and September, 2010, given the evolution of the disease and its presentation over time as explained by her treating physicians, the Commission awards Petitioner her medical bills incurred in connection with all three of her MRSA claims, in case number 10 WC 38521. The Commission further awards Petitioner, in case number 10 WC 38521, temporary total disability benefits for the periods: September 4, 2010 through October 20, 2010; October 22, 2010 through January 20, 2011, and March 20, 2012 through October 2, 2012.

As a result of Petitioner's work-related MRSA infections, she suffered numerous skin injuries to multiple body parts on multiple subsequent dates. She was advised to not return to her prior job in the hospital; a job she had held since 2001. However, Petitioner has not proven a loss of trade. She has not been advised to avoid work as a housekeeper or maid or janitor in non-medical settings, such as hotels, office buildings or residences. Accordingly, the Commission finds Petitioner entitled to permanent partial disability in the amount of 10% loss of person as a whole pursuant to §8(d)2 of the Act, in claim number 10 WC 38521. Because the Commission finds Petitioner's MRSA conditions on October 21, 2010 and March 19, 2012, were continuations of the MRSA she contracted during her August and September 2010 work exposures, and not new occurrences on those dates, it denies additional benefits in claim numbers 10 WC 44279 and 12 WC 10959.

20IWCC0749

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator in this case, filed March 4, 2019, is affirmed and adopted, though for the reasons stated above.

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

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

DATED: DEC 18 2020
o-10/22/20
MP/mcp
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PELIVANOVIC, LJILJIANA
Employee/Petitioner

Case# **10WC044279**

10WC038522
10WC038521
12WC010959
13WC023804

OUR LADY OF RESURRECTION
Employer/Respondent

20IWCC0749

On 2/19/2019, 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:

0014 ARNOLD & KADJAN
PAUL EGAN
35 E WACKER DR SUITE 600
CHICAGO, IL 60601

2965 KEEFE CAMPBELL BIERY & ASSOC
PANKHURI PARTI
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

LILLIANA PELIVANOVIC
Employee/Petitioner

v.

OUR LADY OF THE RESURRECTION
Employer/Respondent

Case # 10 WC 44279

Consolidated cases: **10 WC 38522**
10 WC 38521
12 WC 10959
13 WC 23804

20IWCC0749

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of Chicago on **November 13, 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

20IWCC0749

FINDINGS

On **10/21/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accidents **was** given to Respondent. Having found no accident in case number 10 WC 44279, all other issues are rendered moot.

In the year preceding the injury, Petitioner earned **$23,670.40**; the average weekly wage was **$455.20**.

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

ORDER

Having found no accident in case number 10 WC 44279, all other issues are rendered moot.

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

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

Signature of Arbitrator

2-19-2019
Date

FEB 19 2019

20IWCC0749

FINDINGS OF FACT

Background

Liliana Pelivanovic ("Petitioner") alleged injuries arising out of and in the course of her employment with Our Lady of Resurrection ("Respondent") on various dates of accident. Petitioner gave an opening statement indicating that the April 17, 2010 claim involved a back injury; that the August 20, 2010, September 3, 2010, October 21, 2010 and March 19, 2012 claims involved MRSA and that the August 15, 2011 involved the throat. The matters were previously consolidated and the parties held a trial on all claims and any and all issues on November 13, 2018. The following is a recitation of the facts adduced at trial.

Testimonial and Other Evidence

Petitioner testified she was born in Serbia on April 7, 1952 and said she spoke little English. Petitioner testified she currently was married and did not have any children. She testified that since 2001 she worked for Respondent in the environmental department. Her duties included cleaning floors, housekeeping, wiping beds, mopping floors, wiping cabinets, picking up garbage, cleaning beds, disinfecting the ER, vacuuming and cleaning washrooms.

Date of Accident April 17, 2010 – 10 WC 38522 (low back)

Petitioner testified she was first injured on April 17, 2010 while she was working in surgery. She testified that there was a lot of linen in the bag and when she pulled the bag, she felt a click. She called her group leader Javier and he helped take half out and drop it in the shoot. Petitioner said she had no prior back pain. Petitioner said she went to the ER within the hospital and then saw her personal doctor, Dr. Tatjana Guzina. Petitioner said she then saw Dr. Foreman at IBJI for therapy to her back. Petitioner testified she was first allowed to return to work at a light-duty job with restriction of not lifting more than 20 pounds. She testified the restrictions were for about a month and they helped a little bit. Petitioner testified that she did not have any problems with her back prior to the incident in April 2010. She testified her back problems continued for two-three years after the incident and she was still having issues with her back, which required her to take pain pills.

On cross examination, Petitioner admitted she informed Dr. Forman that she had hurt her back while pulling linens. She testified she underwent therapy for her lower back pain and was ultimately discharged. Petitioner testified at discharge, she was released light duty and then returned to full duty 30 days thereafter. To her knowledge all the medical bills for her lower back treatment had been paid by workers' compensation.

Records show on April 14, 2010, Petitioner presented to Respondent's emergency room where she gave a history of lifting a heavy linen bag at work. Px5. She complained of back pain. She was diagnosed with a strain, given medications, taken off work for two days and advised to follow up with her doctor. On April 17, 2010, an employee incident report noted Petitioner injured her back when she pulled heavy linen up. Rx1.On April 19, 2010, her primary doctor, Dr. Guzina, simply noted Petitioner could not work. Px7. On April 20, 2010, Petitioner first saw Dr. Edward Foreman of IBJI. Px4. She gave a similar history of lifting a bag of garbage and injuring her low back. The doctor diagnosed strain and recommended medications, therapy and that she be off work. She was diagnosed with a strain. Thereafter, Petitioner began therapy at IBJI. Px4. On May 11, 2010, Petitioner followed up with Dr. Foreman. Px4. His impression was low back pain and he recommended Petitioner continue with therapy. On May 19, 2010, therapists noted Petitioner reported 90% improvement. Additional therapy was recommended. On May 13, 2010, Petitioner underwent an MRI of the low back. On June 25, 2010, Petitioner was discharged from therapy and recommended to start work

conditioning. She rated her pain 8/10 and continued to complain of low back pain and pain down the left leg. Petitioner began work conditioning on June 29th and was discharged from work conditioning on July 6th. That same day, Petitioner saw Dr. Foreman who released Petitioner to work. Petitioner's last visit with Dr. Foreman was on August 3, 2010, where he noted Petitioner presented with negative SLR. His impression was chronic low back pain. He released Petitioner to return to work starting August 4th with no lifting greater than 30 pounds. She was to follow up as needed. Px4.

Dates of Accident August 20, 2010 and September 3, 2010 – 10 WC 38521 (MRSA)

Petitioner next testified that on September 3, 2010 she was punched out of work at 11:30pm when she noticed blisters and bleeding on her face, neck, ears, both hands, arms and all over, like chicken pox. She first noticed similar markings 2 weeks prior while at work. Petitioner testified she was diagnosed with MRSA and was taken off work.

After getting discharged from the hospital, Petitioner testified she followed up with her doctor – Dr. Guzina at which time she underwent some tests and was diagnosed with MRSA. Petitioner testified she was taken off work after September 3, 2010 as her doctor told her she would not return to work without being cured.

Petitioner testified she was taken off work in September 2010 and was off work for three or four months. She returned to work after three months when she did not have MRSA. Petitioner testified she did not return to work for one day and was not working in September, October, and November and then came back before Christmas in December. Petitioner testified she was not allowed in the hospital for three months until she was cured from MRSA. She also testified that she did not return to work for one day at which time she had another outbreak.

Petitioner identified Px1 as photos taken in September 2010 at the hospital and at her home. She testified the photographs were a fair representation of her symptoms. Petitioner also testified the blemishes in the photos were similar to the ones she had experienced two weeks before September 3, 2010. The blemishes also represented the ones she experienced later in October 2010 and March 2012. Petitioner testified she did not have any problems with MRSA before the first incident that occurred two weeks before September 3, 2010.

On cross examination, Petitioner testified the MRSA lesions had been present for 10-14 days prior to September 3, 2010 and had looked exactly the same for that time-period. She testified to waiting for these 14 days because her manager did not let her go to the ER or fill out a report. Petitioner admitted her report was filled out on September 5 or September 6, 2010 and indicated the symptoms had been present since September 3, 2010.

On September 4, 2010, Petitioner presented to Resurrection for suspected vasalitis [sic]. Px10. Various medical notes recorded rash to the elbow, face and buttocks. The left elbow and left ear had black scabs with no oozing. Other notes remarked various symptoms were present for 2 weeks that spread to the face and another that facial lesions were present for one day. Another record noted an elbow lesion present for 1 week.**there is no mention of any exposure at work.&** Petitioner followed up with dermatology.

Records show that on September 7, 2010, an employee report of work injury or illness was completed, noting that on September 3, 2010, Petitioner believed she probably touched her face accidentally while wearing her gloves. Px10:91, Rx4. Petitioner also followed up with Dr. Firoozi, who wrote that Petitioner worked in ICU and presumably came in contact with cleaning products. Px10:96. The doctor noted blood tests were not back yet. On September 11, 2010, results were positive for MRSA. Px10:97. Petitioner was given medication.

On September 14, 2010, Petitioner presented to Dr. Guzina, who noted Petitioner had an infection in her cheek and had already been treating for MRSA. See, Px7, 14. Dr. Guzina also testified in this matter regarding her treatment of Petitioner and her opinions. Px14. At the September 2010 visit, the doctor advised Petitioner to continue her course of treatment. Dr. Guzina testified that her role was largely one of providing follow up and coordinating care with other doctors. On September 21st and 28th, 2010, Petitioner followed up at Resurrection and lesions were healing. Medications were refilled. Px10:98. On October 7th and 12th, medications were again refilled. Px10.

Date of Accident October 21, 2010 – 10 WC 44279 (MRSA)

Petitioner then testified she did go back to work on October 21, 2010 for one day. She worked a few hours and noticed the same bumps and blisters on her face, legs and arms. She again reported this to Monica. Petitioner treated within the emergency room and then following up with Dr. Guzina. Petitioner testified Dr. Guzina referred her to Dr. Yeo and saw him at Thorek Hospital. Petitioner was admitted to Thorek Hospital for two nights and three days at which time tests were again undertaken to determine what the blemishes were. Petitioner testified she believed the tests were to check for MRSA. Petitioner testified she was taken off work again in October 2010 and she remained off work until *January* 20, 2011. Petitioner testified during the period she was off work her symptoms did not improve and remained the same. Petitioner also testified that she had been taken off work in September 2010 and did not return to work until *December*.

On cross examination, Petitioner testified that after being taken off work in September 2010, she returned on October 21, 2010, worked for a couple of hours, was sent to the ER again, and then did not work until January 20, 2011. Petitioner admitted she had returned to work on October 21, 2010 because Dr. Firoozi had allowed her to. Petitioner testified she presented to work at 3:00pm and then filled out the report at 3:50pm because the blisters had returned on her body. She testified on October 21, 2010, Dr. Firoozi had allowed her to return to work and then on October 25, 2010 Dr. Guzina took her off work again. Petitioner testified she did not return to Dr. Firoozi because "they" did not send her. Petitioner testified she was aware her blood was tested for MRSA in November 2010 by Dr. Yeo but was not aware the results were negative for MRSA. Petitioner admitted Dr. Guzina took her off work for her non-work-related health issues at times and it was possible the time off work was due to her arthritis symptoms may have overlapped with the time she was also off work for her alleged MRSA symptoms. On cross, Petitioner testified she had taken pictures of her breakout from October 2010 but had not included them in evidence.

On October 21, 2010, Petitioner returned to Resurrection. Px10:102. All lesions were healed. MRSA was believed to be resolved. The right knee was swollen but not completely closed. Petitioner was allowed to return to work. That same day, Petitioner returned with facial and wrist swelling. Px10. History noted that Petitioner was seen in employee health feeling well. *Id.* at 110. After leaving employee health, 10 minutes later, Petitioner developed facial and wrist symptoms. The plan was for blood cultures to be taken. *Id.*, Rx5. An incident report noted Petitioner was pulling garbage when her face started feeling red. Rx5.

On October 25, 2010, Petitioner returned to Dr. Guzina relating that she had returned to work recently on October 21st and there she noticed something on her face. The doctor testified that it looked swollen. Dr. Guzina prescribed antihistamine, noting she believed the face swelling was a skin reaction to the MRSA antibiotics Petitioner had already been taking. On November 3, 2010, blood testing was negative for MRSA. Rx6. On November 11, 2010, Petitioner returned to Dr. Guzina, who noted Petitioner was still off work. Px14. On November 16, 2010, Petitioner followed with Dr. Guzina for blood tests. Px14. The doctor referred her to a rheumatologist. Px14. On December 27, 2010, Petitioner informed Dr. Guzina she had stopped taking her MRSA medications. Px14. The doctor reasoned Petitioner could now begin taking the recommended steroid

medications per the rheumatologist's recommendations. Petitioner was still off work as of this visit in order to finish antibiotics for the and she was to return to work on January 20, 2011. *Id.* at 15-16.

On January 17, 2011, Petitioner followed up with Dr. Guzina who noted Petitioner had finished her MRSA medications. Px14. On April 10, 2011 an incident report documented that Petitioner complied of a rash/bubbles maybe after touching a counter. Px10:115, Rx12. She was sent to the ER. On May 5, 2011, Petitioner followed up with Dr. Guzina. Px14. The doctor testified Petitioner had a new rash on her forearm from either gloves or an exposure to something. She testified "we didn't know." Petitioner was to continue her treatment for her autoimmune disease that she presumably had. *Id.* at 18.

On June 29, 2011, another employee report of work injury/illness noted that after cleaning an isolation room, Petitioner washed her hands and noticed in the mirror facial redness. Px10:118, Rx12. She could not recall getting cleaning product in her face. *Id.* at 121. Another noted documented she sprayed cleaning product and her face was the only part of the body exposed. *Id.* at 123. Skin dermatitis was suspected. *Id.* at 122.

On June 30, 2011, Petitioner followed up with Dr. Guzina with another episode of the face rash again at work. Px14. Petitioner was not being followed by the rheumatologist anymore. Dr. Guzina recommended Petitioner see a dermatologist. The doctor thought that Petitioner had been working as of that visit. On July 11, 2011, Petitioner followed up with Dr. Guzina. Px14. She was negative for MRSA but still had a rash on her face. On August 22, 2011, Petitioner returned to Dr. Guzina reporting that she had another episode at work where she swallowed something in the throat. *Id.* at 20. Petitioner followed up with Dr. Guzina in December 2011 complaining of eyelid swelling and difficulty getting up, which the doctor said could be symptoms associated with a rheumatologic condition. *Id.* at 23.

Date of Accident August 15, 2011 – 13 WC 23804 (Choking Incident)

Petitioner testified in 2011 she was involved in another work accident when a co-worker slapped her on her back, causing her to choke on a candy. Petitioner testified a doctor took the candy out and she stayed one day in the hospital. She stated she was given 2-3 days due to the stress from choking. She eventually followed up with a specialist. Petitioner said she noticed pain with swallowing water that lasted one week. She was able to return to work. Petitioner testified that she did not have any problems with her throat prior to the incident in which she choked on a lozenge.

On cross examination, Petitioner admitted she ate candies outside of work as well and also ate candy outside of work while talking to her friends. Petitioner testified she missed three days of work after the candy was taken out of her throat but that her doctor only took her off work for one day. Petitioner testified she was seen by a Polish doctor a couple of days after the incident because she had been instructed to do so at the ER.

On August 15, 2011, employee incident reported noted that Petitioner bent down to grab a bucket and had a mint candy in her throat that got stuck. Rx8. Records show that on August 15, 2011, Petitioner presented to the emergency room. Px6. History noted that Petitioner accidentally swallowed or choked on a candy while sucking on it. There is no mention of a coworker or being slapped on the back. And endoscopic failed to show any foreign body or candy. Petitioner was noted not to be in any distress despite Petitioner having testified that she was taking off work due to the stress of the alleged incident. Further, there is no note taking off work as a result of this incident. Based on Petitioner's lack of credibility corroborating her version of the events and based upon the medical records billing to corroborate her version of the events, the Arbitrator fines that Petitioner feel to prove Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent.

Date of Accident March 19, 2012 – 12 WC 10959 (MRSA)

Petitioner testified she had another outbreak of MRSA in March 2012, which presented in the same way as in September with bubbling, blistering, and bleeding. Petitioner testified she was seen in the ER again and she also filled out a report with her manager. Thereafter, Petitioner testified, she followed up with Dr. Guzina and was taken off work again. Petitioner testified she was allowed to return to work but every time she came back to Resurrection she would get MRSA. Petitioner testified she was told by her doctor that she could not return to working for the hospital anymore. Petitioner testified if the MRSA outbreaks had not happened then she would not have stopped working in 2012. Petitioner testified since March 2012 she had not returned to work but had had additional outbreaks of MRSA. Petitioner testified at the time of each outbreak she followed up with Dr. Guzina and was given pills and cream for treatment.

On cross examination, Petitioner testified that last time she saw Dr. Guzina for MRSA issues was in October 2012 and at the time she was also treating for her arthritis. Petitioner testified since she had stopped working for Resurrection, she had four or five more breakouts of MRSA. Petitioner testified she had not returned to Resurrection prior to these four-five breakouts. Petitioner testified each time the symptoms were similar to the bubbles like the ones shown in Px1. Since she stopped working, she has not looked for work because her doctor told her she could not return to work in a hospital. Petitioner admitted her doctor had not stopped her from returning to work anywhere else. On cross, Petitioner also testified there are no pictures of her breakout from March 2012.

On March 19, 2012, Petitioner presented to Resurrection where it was noted Petitioner was exposed to scabies and presented with a rash. Px11, Rx9. There were bumps on the arms and between fingers noted. There was a rash on her face. Dr. Guzina testified that Petitioner's next complaint of MRSA was on March 22, 2012, when she related to Dr. Guzina that she was cleaning a room where scabies was present and then developed a rash. Px14:24. Petitioner was diagnosed at the emergency room with scabies. Petitioner was tested at Thorek on this date. Px8. Petitioner related in occurred 3 days prior. Petitioner was started on medications for MRSA type infection and followed up. In June 2012, Dr. Guzina updated her chart, testifying that her research showed that p-ANCA titer can by caused by a trigger, which can be many things. She said "it" could cause hypersensitivity vasculitis. *Id.* at 28. This could be diagnosed with a biopsy which was never obtained. *Id.*

Dr. Guzina testified that to a reasonable degree of medical certainty, she believed the source of Petitioner's MRSA was the workplace. *Id.* at 29-30. Dr. Guzina's prognosis was that Petitioner was improving. The doctor testified she did not think she ever returned Petitioner to return to work after the last visit. On cross, Dr. Guzina admitted that there were no blood cultures done to confirm MRSA at the last, most recent visits with Petitioner. Dr. Guzina testified she based her conclusion on the history provided by Petitioner, explaining that exposure causes titers to elevate, which can remain elevated for long periods thereby lowering immunity. Dr. Guzina testified that she knew Petitioner had MRSA in March 2012 because Petitioner got better with antibiotics prescribed to treat MRSA. *Id.* at 41-42. Dr. Guzina testified that she learned that hypersensitivity vasculitis can be triggered by MRSA. Dr. Guzina further testified that once an individual has been diagnosed and treated for MRSA, any further skin infection is automatically treated as if it was MRSA. *Id.* at 50-51, 55. The doctor testified that Petitioner had MRSA on her forearms, where her gloves ended. *Id.* at 57. Dr. Guzina testified Petitioner was off work from September 14, 2010 until October 21, 2010. *Id.* at 62. Petitioner then had symptoms again on October 25, 2010. Petitioner then returned to work on January 20, 2011 and again had symptoms on June 30, 2011. Thereafter, Petitioner went off work again until July 11th or 15th.

Documents show Petitioner was taken off work by Dr. Guzina from March 9, 2012 through October 2, 2012. Px9. Dr. Guzina eventually wrote that Petitioner was permanently disabled. Id.

Petitioner testified she saw Dr. Chiodo at the request of her employer and at the appointment he did not examine her and only looked at the photographs. She testified she was in Dr. Chiodo's office for one hour but his examination of her only lasted for a minute or thirty seconds. The rest of the time Dr. Chiodo asked her questions and looked at her medical records of Petitioner.

Deposition Testimony of Dr. Ernest P. Chiodo

The evidence deposition of Dr. Ernest Chiodo was taken on January 30, 2013. Rx11. Dr. Chiodo testified he board certified in internal medicine, occupational medicine, public health, and general preventative medicine. He is also certified in engineering and public health discipline and in industrial hygiene, which was the discipline that quantified and controlled various occupational and environmental hazards, including exposure to air toxins. Dr. Chiodo testified he had performed an independent medical evaluation on Petitioner on December 6, 2010 and a repeat examination on June 28, 2012. Dr. Chiodo testified that he did not believe Petitioner had a MRSA infection because no record he found actually stated this. However, even if she did, he did not believe it was caused by her work at the hospital. He testified at length how one can contract MRSA, how and where it spreads and treatment for this infection. Dr. Chiodo gave opinions on where he believed Petitioner's MRSA may have originated from.

Deposition Testimony of Dr. Taraneh Firoozi

The evidence deposition of Dr. Taraneh Firoozi was taken on May 25, 2012. Px12. Dr. Firoozi testified he is a dermatologist licensed to practice medicine in the state of Illinois. He first saw Petitioner on September 7, 2010 after she made an appointment, but it was his understanding she was referred to him because she brought in the Employee Report of Injury/Illness. Petitioner provided a history of working in an isolation room which was contaminated by MRSA two weeks prior to the time she presented for the appointment, when she accidentally touched her face with her contaminated gloves. Dr. Firoozi performed a physical exam of Petitioner which revealed multiple ulcers on left ear, right knee, and right cheek. He thought the symptoms were a result of spider bites. Dr. Firoozi testified Petitioner returned on September 11, 2010 and it was his recollection she did not look better. Dr. Firoozi continued Doxycycline because the culture showed the antibiotic was sensitive to Doxycycline while also starting her on sulfur drugs. Dr. Firoozi diagnosed MRSA based on culture results and he therefore ruled out spider bites and contact dermatitis. Petitioner returned on September 21, 2010 and the lesions were healing with necrotic bases. Dr. Firoozi saw Petitioner on October 21, 2010 and noted the MRSA infection had resolved. He allowed Petitioner to return to work on that day as he had kept her off work prior to this. He did not see Petitioner again. Dr. Firoozi testified it was his opinion that Petitioner's MRSA infection *could have been* caused by the events she related to him on September 7, 2010 and included in the report dated September 4, 2010.

Deposition Testimony of Dr. Tatjana Guzina

The deposition testimony of Dr. Tatjana Guzina was taken on June 19, 2012. Px14. Dr. Guzina testified she was board certified in internal medicine. Dr. Guzina's ultimate conclusion was that Petitioner's MRSA was caused by her workplace. Dr. Guzina acknowledged that testing in July 2011 was negative for MRSA. Dr. Guzina testified that in March 2012, she saw Petitioner again, who was reporting scabies. Dr. Guzina testified she started Petitioner on MRSA medications again and that Petitioner eventually got better. Based on this, Dr. Guzina concluded that Petitioner was again exposed to MRSA.

Deposition Testimony of Dr. Sein-Khiong Yeo

The deposition testimony of Dr. Sein-Khiong Yeo was taken on December 20, 2012. Px13. Dr. Yeo is board certified in infectious diseases. He first encountered Petitioner on November 2, 2010 when she was referred to him by Dr. Guzina for a skin condition. Dr. Yeo testified Petitioner told him Resurrection Hospital was developing cultures for MRSA, she was on antibiotics, and was feeling better but was referred to dermatology and told to stop the antibiotics, which had caused the lesion to get worse. Dr. Yeo testified he thought the condition was pure MRSA folliculitis and micro-abscess and so he started Petitioner on Vancomycin. Dr. Yeo testified after seeing Petitioner on November 2, 2010 he did not see her again. He testified as Petitioner was a housekeeper and janitor in the hospital setting, it could throw her into the high-risk category to contract MRSA. Dr. Yeo testified it was his opinion that as Petitioner was a housekeeper and cleaning patient rooms, it increased her chances of contracting MRSA. Dr. Yeo discharged Petitioner on November 4, 2010 with the discharge diagnosis being of MRSA. On cross examination, Dr. Yeo discussed a variety of hypothetical scenarios and settings where one might contract and develop MRSA.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

The Arbitrator had an opportunity to observe Petitioner and her testimony. The Arbitrator finds Petitioner's testimony was not intentionally misleading however her testimony is inconsistent with the medical record and was speculative at times.

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

A. Dates of Accident August 20, 2010 and September 3, 2010 – 10 WC 38521 (MRSA)

After hearing the trial testimony and reviewing the evidence in the record the Arbitrator concludes Petitioner has failed to show that on either August 20, 2010 or on September 3, 2010 she was involved in an accident that arose out of and in the course of her employment with Respondent. The Arbitrator has reviewed extensive testimonies and medical evidence on whether Petitioner contracted MRSA at Respondent's place of work that would arise out of an in the course of that employment. The Arbitrator further notes that the conclusion as to accident in this case is based primarily on one of lack of credibility, lack of corroboration and speculation.

First, the Arbitrator denies Petitioner's claim for 10 WC 38521 as she selected two dates of accident, presumably surmising that her exposure to MRSA may have been either date. Petitioner never gave credible testimony explaining her decision to select these two dates on one claim as alleged accident or exposure dates. Second, Petitioner's histories of how she became or believed she became exposed varied as shown in the evidence. For example, she testified that she noticed blisters and bleeding when she punched out on September 3, 2010 but also noticed similar markings 2 weeks prior. Petitioner never provided testimony as to what area of the workplace she worked two weeks prior. In her initial medical record at Resurrection, varied lengths of time for the presence of these symptoms included 1 week and 2 weeks. See, Px10. There is no mention of any workplace exposure at this initial visit. Then, when Petitioner finally completed a report on September 7th, Petitioner speculated that she thought she may have touched her face accidentally while wearing gloves. Px10:91, Rx4. However, Dr. Firoozi noted Petitioner presumably came into contact with cleaning products. Petitioner did not relate any specific date this would have occurred to Dr. Firoozi. Px10:96. Again, no mention of MRSA is made and no mention of either of the two alleged accident dates are noted. After being diagnosed

with MRSA, Petitioner saw Dr. Guzina on September 14th, where no mention of any workplace exposure is noted and neither date of alleged accident is noted.

Finally, both Drs. Firoozi and Guzina failed to give persuasive or credible testimony or opinions as to when and how in the workplace it was that Petitioner was exposed to MRSA. Both doctors failed persuasively reconcile the varying dates and histories noted in the record. The Arbitrator assigns little weight to these opinions as it relates to the issues of accident and causation. Likewise, the Arbitrator must assign little weight to the opinions of Dr. Yeo as he saw Petitioner only once in November 2010 and did not corroborate where or how the exposure occurred, on what date(s) an exposure occurred but rather simply concluded her MRSA exposure "probably occurred" at work. Px13. Based on the foregoing, the Arbitrator denies Petitioner's claim in 10 WC 38521. All other issues related to this claim are moot.

B. Date of Accident October 21, 2010 – 10 WC 44279 (MRSA)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove accidental injuries/exposure arising out of and the in the course of her employment occurring on October 21, 2010 with Respondent. Again, the conclusion to deny this claim is based primarily on a lack of credibility, corroboration and speculation.

Petitioner initially gave testimony that she did not work for approximately 3 months following her initial alleged MRSA exposure. Eventually, Petitioner testified that she returned to work for one day on October 21, 2010 and noticed symptoms once again. This became the basis of claim 10 WC 44279. Specially, she testified she returned to work for only a couple of hours when she noticed bubbling and bleeding on her hands, face, and legs. The Arbitrator finds this testimony is not only internally inconsistent, as she testified she did not work for 3 months, but also is contradicted by a preponderance of the evidence. Records showed that Petitioner treated with Resurrection on October 21, 2010, where MRSA was believed to be resolved. Px10:102. She was permitted to return to work. Petitioner then returned to Resurrection, complaining of facial and wrist swelling. Upon her return, the history noted that after Petitioner left employee health, 10 minutes later she noticed facial and wrist symptoms. *Id.* at 110. Again, no mention is made of any specific exposure to any unit, floor, department or room number she may have worked in or what she was doing. Petitioner also failed to give any specific details regarding same. The Arbitrator finds this initial history compelling, as it reasonably suggests that Petitioner never even returned to work but rather noticed symptoms after leaving employee health – the very same visit noted earlier on that date. Thus, this history is most consistent with Petitioner's initial testimony that she never worked for 3 months following her first alleged exposure. Even if she did work as alleged, an incident report noted Petitioner was pulling garbage when her face started feeling red. Rx5. This is not consistent with the history noted in Resurrection's records when Petitioner returned a second time. *See*, Px10:110. Further, Petitioner never gave such testimony. Notably, blood cultures taken in November 2010 were negative for MRSA, which would suggest that no exposure in fact occurred.

Based on the foregoing, the Arbitrator denies Petitioner's claim in 10 WC 44279. All other issues related to this claim are moot.

C. Date of Accident August 15, 2011 – 13 WC 23804 (Choking Incident)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove she sustained accidental injuries arising out of and the in the course of her employment occurring on August 15,

2011 with Respondent. The denial of this claim is based primarily on a lack of credibility, corroboration and speculation.

The Arbitrator finds Petitioner's version of events as related by her during her testimony were contradicted by both the injury report and the information contained in the medical records entered into evidence. Petitioner testified that on this date, a candy got stuck in her throat after a co-worker slapped her on her back. Petitioner testified that as she could not breathe, she was seen in the ER and underwent a procedure to dislodge the candy from her throat. However, the incident report noted that Petitioner bent down to grab a bucket and had a mint candy in her throat that got stuck. Rx8. There is no mention of a co-worker. Further, emergency room records noted that Petitioner accidentally swallowed or choked on a candy while sucking on it. There is no mention of a coworker or being slapped on the back or bending over. Further, contrary to Petitioner's testimony that candy had to be dislodged, an endoscopy failed to show anything. Finally, even if an incident occurred, under any of these scenarios, Petitioner failed to prove that this constituted an employment risk or that she was exposed to some other risk to a greater degree than the general public. Based on the foregoing, the Arbitrator denies Petitioner's claim in 13 WC 32804. All other issues related to this claim are moot.

D. Date of Accident March 19, 2012 – 12 WC 10959 (MRSA)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove accidental injuries/exposure arising out of and the in the course of her employment occurring on March 19, 2012 with Respondent. The denial of this claim is based primarily on a lack of credibility, corroboration and speculation.

Petitioner testified she had another "outbreak" of MRSA and it presented in the same manner as previously alleged, with bubbling, blistering, and bleeding. Again, this is contradicted by the information contained in Petitioner's medical records and the report of injury/illness filled out by her. In the injury report Petitioner claims she had started cleaning the isolation room when her face and hands started showing a rash. Rx9. Petitioner saw Dr. Guzina following this alleged incident, telling the doctor she was exposed to scabies rather than MRSA. Despite this, Dr. Guzina later testified she was certain Petitioner was suffering from MRSA because Petitioner improved with MRSA-type medications. Dr. Guzina admitted no testing was done to confirm this but insisted no testing was necessary. Dr. Guzina further concluded this alleged exposure to MRSA was from work but Dr. Guzina was never asked to reconcile either the incident report noting cleaning an isolation room or the alleged exposure to scabies. The Arbitrator assigns little weight to the testimony and opinions of Dr. Guzina as they based on a faulty understanding the of the histories surrounding this alleged incident. Based on the foregoing, the Arbitrator denies Petitioner's claim in 12 WC 10959. All other issues related to this claim are moot.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Having reviewed all evidence, the Arbitrator concludes Petitioner's current condition of ill-being as it relates to her low back/lumbar spine is causally related to her April 17, 2010 work

accident. Petitioner presented credible and corroborating evidence that she injured herself at work while lifting a bag of linen. The Arbitrator does not find the histories inconsistent. Respondent presented no contrary evidence. Therefore, Petitioner's low back is causally related to her April 17, 2010 accident.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Respondent presented into evidence the medical bills payment ledger showing $10,167.35 was paid for the treatment undergone by her. Rx10. Petitioner testified that to her knowledge all her medical bills related to the April 17, 2010 incident had been paid. However, Petitioner introduced into evidence a summary and corresponding bill totaling $12,043.00 between April 20, 2010 and August 3, 2010 and the corresponding medical financial history confirms an outstanding balance of $276.00. As such after analyzing the full set of medical bills the Arbitrator finds that Respondent has paid all reasonable and related medical bills of Petitioner as it pertains to the April 17, 2010 work incident.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Evidence shows Respondent paid TTD benefits to Petitioner for the time-period of April 22, 2010 until July 11, 2010 in the amount of $3,427.11. Rx10. Petitioner testified she was taken off work by her doctor on April 22, 2010 and she remained off work until she was allowed to return to light duty work on July 11, 2010. Based on the evidence presented the Arbitrator finds TTD benefits were paid by Respondent for this time and no additional benefits are due to Petitioner.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. The Arbitrator finds Petitioner sustained only a minor back strain as a result of the alleged incident and was found capable of returning to full duty work within three months. Petitioner gave no testimony as to the effects of her back injury. As such the Arbitrator finds Petitioner did not sustain any permanent partial disability as a result of the alleged incident.

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

Ljiljana Pelivanovic,

Petitioner,

vs.

Our Lady of Resurrection,

Respondent.

Case #: 12 WC 10959

Consolidated cases: 10 WC 38521
10 WC 38522
10 WC 44279
13 WC 23804

20IWCC0750

DECISION AND OPINION ON REVIEW

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

I. FINDINGS OF FACT

Petitioner, a hospital housekeeper, alleged she contracted Methicillin Resistant Staphylococcus Aureus ("MRSA") from cleaning hospital rooms which had been infected with that staph bacteria. Petitioner claims she was exposed to MRSA while working on: August 20, 2010 and September 3, 2010 (10 WC 38521); October 21, 2010 (10 WC 44279); and March 19, 2012 (this claim, 12 WC 10959).

Petitioner testified that about two weeks before September 3, 2010, while working, she first noticed blisters and bleeding on her face, the inside of her arms, and leg. Petitioner notified her supervisor, Ms. Chowaniec, of her condition and that she had been cleaning an infected patient's room. Petitioner testified that Ms. Chowaniec did not "want to hear it" and would not fill out an accident report. After Petitioner's shift ended on September 3, 2010, while still at the

hospital, she noticed that her condition had gotten much worse. The blisters and bleeding were all over her face, neck, hands, and leg, like "chicken pox." She again reported her condition to Ms. Chowaniec and stated she may have accidentally touched her face while cleaning at work, and then touched her skin. She advised Ms. Chowaniec that she had been cleaning ICU isolation rooms.

Petitioner sought treatment in the emergency room on September 4, 2010 and was admitted to the hospital for two nights. After her discharge, Petitioner saw her primary care physician, Dr. Guzina, who diagnosed her with MRSA. The MRSA diagnosis was confirmed by a positive culture. Petitioner was off work about three months.

Ms. Chowaniec filled out a report dated September 7, 2010 documenting Petitioner's complaints. The report documented Petitioner's report of accidentally touching her face with her gloves while cleaning an isolation room. Under the reports section, "cause of occurrence," Ms. Chowaniec wrote, "infection/isolation room." The report also indicated that Petitioner should be more careful and not contact her skin while cleaning.

Petitioner returned to work on October 21, 2010, after she was told she no longer had MRSA. However, while working on that date, she noticed the same symptoms she had previously experienced – bubbling and bleeding on her right hand, arm, face and leg. She reported the foregoing to her supervisor. Petitioner was again treated in the emergency room, and followed up with Dr. Guzina and Dr. Yeo, who had her admitted to Thorek Hospital. Petitioner was taken off work until January 20, 2011.

On March 19, 2012, Petitioner had yet another incident of similar symptoms on her skin while at work. She reported the incident to Ms. Chowaniec. She sought treatment in the emergency room, and then with Dr. Guzina, who took her off work. Dr. Guzina eventually released Petitioner to work on October 2, 2012.

Several physicians provided testimony regarding Petitioner's MRSA diagnoses and their relation, if any, to her work environment. Petitioner's treating physicians, Dr. Guzina, Dr. Firoozi, and Dr. Yeo, as well as Respondent's Section 12 examiner, Dr. Chiodo, were called as witnesses at evidence depositions.

Dr. Guzina, a board-certified internal medicine physician, testified that she first treated Petitioner for MRSA on September 14, 2010, after Petitioner had been diagnosed with that condition. Dr. Guzina saw Petitioner again on October 25, 2010 after she had returned back to work. Then, Petitioner reported that while cleaning hospital rooms on October 21, 2010, she noticed her face was swollen. Dr. Guzina instructed Petitioner to follow-up with an infectious disease specialist, although she continued to monitor the antibiotics Petitioner was taking. On January 20, 2011, Petitioner returned to work in an improved condition with no rashes.

Dr. Guzina testified that Petitioner returned to see her on March 22, 2012, with MRSA symptoms. Petitioner reported having cleaned a hospital room in which a scabies patient had been present. Upon exam, Dr. Guzina observed Petitioner had raised papillae and small open wounds with scabs. Although Petitioner went to the ER before seeing Dr. Guzina and was given medication, the rashes on her arms, legs, face, upper chest, and buttocks had continued to worsen. Dr. Guzina took Petitioner off work, and started her on medications for MRSA.

Because Petitioner's MRSA diagnosis in September 2010 had been confirmed by a positive culture, Dr. Guzina testified that she found it unnecessary to obtain another culture to confirm Petitioner's infection from March 19, 2012 was MRSA. Dr. Guzina testified that once a patient has a positive culture for MRSA, it's reasonable to assume that all subsequent skin infections they develop should be treated as MRSA. After Petitioner's initial MRSA exposure at work, subsequent exposures would bring back her symptoms.

Dr. Firoozi, a board-certified dermatologist, testified that she first saw Petitioner on September 7, 2010. Petitioner gave a history of having worked in an isolation room that had been contaminated with MRSA two weeks before her office visit. Petitioner reported she had accidentally touched her face, ears, knee, and other parts of her body with contaminated gloves. At that time, Dr. Firoozi did not have any culture results and initially believed Petitioner had spider bites, the appearance of which were similar to MRSA lesions. She started Petitioner on antibiotics. When Dr. Firoozi next saw Petitioner on September 11, 2010, she diagnosed Petitioner with MRSA based upon her positive culture. Dr. Firoozi prescribed a different antibiotic and an antiseptic body cleanser. Petitioner's lesions improved on subsequent visits, and on October 21, 2010, Dr. Firoozi believed that most of her MRSA skin infection had resolved. She released Petitioner back to work that day, even though she believed Petitioner's right knee was probably still somewhat infectious. Dr. Firoozi opined that based upon Petitioner's reported history, she could have contracted MRSA from an exposure at work.

Dr. Yeo, a board-certified infectious disease specialist, testified that he first examined Petitioner for her MRSA diagnosis on November 2, 2010 as referred by Dr. Guzina. At his exam, Petitioner reported her condition had been present for weeks or months. Dr. Yeo noted that her lesions were dry and that she had been on antibiotics. She told him that she had cleaned patient rooms, isolation rooms, and ICU rooms. Dr. Yeo had Petitioner admitted to the hospital to begin "first line" intravenous antibiotics. He explained that Petitioner had been taking "second line" antibiotics which had improved her condition but not resolved it. After receiving the intravenous antibiotics, Petitioner's condition improved and on November 4, 2010 he discharged her.

Dr. Yeo opined that based on Petitioner's history, she likely contracted MRSA while working as a janitor cleaning the various hospital rooms. He opined that in 2010, the vast majority of MRSA cases were contracted in hospitals with only a handful happening outside of them. Dr. Yeo explained that people working in a hospital setting, nursing home setting, or a long-term care setting like Petitioner and himself already, "have MRSA in our skin." The

MRSA can be "colonized" within an hour over a person's entire body, and a scratch or open wound can cause abscesses and lesions. Dr. Yeo stated Petitioner may have been sensitive to the harsh cleaning chemicals which might have caused a break in her skin, which then might have created an opportunity for a MRSA infection. He also believed Petitioner's scratching was a cause of the abscesses/lesions. Dr. Yeo testified that he told Petitioner she had to stop scratching because she had lesions everywhere she had scratched.

Dr. Yeo testified that, in November 2010, he diagnosed Petitioner with MRSA based upon her previous positive culture. He stated that the blood test he had ordered to confirm MRSA came back negative because Petitioner had been on antibiotic treatment. Dr. Yeo opined that once a MRSA infection is diagnosed, every subsequent MRSA diagnosis most probably relates back to the initial exposure. He further explained that the treatment for MRSA will never alleviate a non-MRSA condition.

Dr. Chiodo, Respondent's Section 12 examiner, conducted two examinations of Petitioner at Respondent's request: on December 6, 2010 and June 28, 2012. He testified that he is board-certified in internal medicine, with several subspecialties. He also holds master's degrees, is a certified industry hygienist, and is an attorney. At his first examination of Petitioner, Dr. Chiodo testified that Petitioner gave a history of probably accidentally touching her face after cleaning an isolation room. She also reported having facial redness and swelling of her wrists on October 21, 2010, her first day back at work. Dr. Chiodo testified that he did not believe Petitioner had MRSA because she had not had a positive culture. He stated that if she actually did have MRSA, he did not believe Petitioner contracted it from her hospital workplace because MRSA is present in many different locations. He testified that there is nothing unique to hospitals that would be a cause of her contracting MRSA versus some other non-occupational cause.

At Dr. Chiodo's second exam on June 28, 2012, Petitioner reported she had two additional exposure episodes, on June 29, 2011 and on March 19, 2012. At that exam, Dr. Chiodo did not observe any MRSA lesions and noted there had been no blood tests, cultures, or environmental health records to confirm the presence of MRSA or scabies. Dr. Chiodo believed Petitioner developed a rash from anxiety. He believed that a positive culture was needed for a clinical diagnosis of MRSA, which should not be made by just looking at a lesion.

On cross examination, Dr. Chiodo acknowledged that he practices and teaches both medicine and law, and that while he is retained as an expert by plaintiffs, he is more often retained by insurance carriers. Dr. Chiodo admitted he did not ask Petitioner which rooms or areas in the hospital she had cleaned, or what she had done in the days and weeks before March 19, 2012. He admitted that if Petitioner did have MRSA, he had no opinion as to what caused it. He then opined that the most likely cause of Petitioner's MRSA was her cigarette smoking.

Dr. Chiodo opined that Petitioner's workplace was not a 51% or more cause of her MRSA infection. Dr. Chiodo testified it was not his job, or the job of Petitioner's treaters, to

figure out what caused Petitioner's MRSA. He believed that without cultures to confirm the presence of MRSA, a skin condition is just a rash. Dr. Chiodo did not believe Petitioner had MRSA or scabies because no records confirmed that. He believed the problems Petitioner complained of were most likely psychosomatic.

II. CONCLUSIONS OF LAW

The Arbitrator denied all three of Petitioner's MRSA claims, finding that she did not prove accidental injuries or exposures. The Arbitrator based her findings upon Petitioner's lack of credibility, a lack of corroboration and speculation. The Arbitrator noted Petitioner's histories varied and lacked details, and that Dr. Guzina documented no date of occurrence or mention of a workplace exposure. The Arbitrator found that Petitioner's blood culture in November 2010 was negative for MRSA and believed that Petitioner's history, "reasonably suggests that Petitioner never even returned to work," on October 21, 2010, the date of her second alleged exposure.

The Arbitrator also found that both Drs. Firoozi and Guzina failed to give persuasive or credible testimony or opinions as to when and how Petitioner was exposed to MRSA in her workplace. The Arbitrator assigned little weight to Dr. Yeo's opinions, stating he saw Petitioner only once, in November 2010, and did not corroborate where, how or when Petitioner's MRSA exposures occurred. The Arbitrator believed Petitioner did not prove she was exposed to MRSA on March 19, 2012, because she initially reported she had been exposed to scabies, and because Dr. Guzina performed no testing to confirm MRSA.

The Commission views the evidence differently than the Arbitrator, and finds that Petitioner did prove that while working for Respondent, she was exposed to MRSA, which manifested on August 20, September 3, 2010, October 21, 2010 and March 19, 2012. In so doing, the Commission examines the testimony of Petitioner's treating physicians, and the objective medical evidence on which they relied in reaching their opinions. The Commission is not persuaded by the opinions of Dr. Chiodo, Respondent's Section 12 examiner, who had no understanding whatsoever of Petitioner's exposure at work to MRSA preceding her onset of symptoms and was not even aware that Petitioner had a positive MRSA culture.

Petitioner testified that her duties in August and September 2010 required her to clean and disinfect hospital rooms in which patients with MRSA had been present. She testified she gave notice of her skin lesions to her supervisor when she discovered them, whether or not she knew her infections were MRSA. Petitioner's lab report, dated September 5, 2010, confirmed that Petitioner had contracted MRSA. The foregoing is uncontroverted.

First, the Commission finds the opinions of Dr. Yeo, Petitioner's treating infectious disease specialist, highly persuasive and adopts his testimony and opinions. Dr. Yeo testified that when he examined Petitioner on November 2, 2010 on referral from Dr. Guzina, Petitioner reported cleaning patient rooms, isolation rooms, and ICU rooms. He also noted that Petitioner

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had dry MRSA lesions "everywhere." Dr. Yeo had Petitioner admitted to Thorek Hospital to receive a course of "first line" intravenous MRSA drugs, which ultimately proved effective in controlling her MRSA infection compared to prior treatments.

Dr. Yeo testified that MRSA is usually first contracted or "colonized" on exposed areas of the body, like the arms, legs or face. If a patient has MRSA colonization on a body part, it can be spread to the entire body by touching other body parts. If a patient has MRSA colonization on their hand and touches their buttocks, that area would also become colonized. The first area of the body exposed to MRSA is not necessarily the first area to develop lesions. Lesions first develop where the skin has been opened. An open wound would allow a full-blown infection to set in. He testified that lesions can develop on any body part, not just at the initial exposed area. Dr. Yeo also explained that hospitals rooms were high MRSA risk environments and testified that the vast majority of MRSA cases in 2010 were contracted in hospital settings, with only a handful contracted outside of that setting. As for Petitioner's negative MRSA blood test on November 3, 2010, Dr. Yeo explained that Petitioner's results were negative because she had been on antibiotics at that time. He ultimately opined that the source of Petitioner's MRSA infections was the hospital in which she worked. Given the fact that Petitioner worked regularly in a hospital, cleaning isolation rooms and ICU rooms, and the uncontroverted evidence that some of those rooms had been occupied by infected patients, the Commission finds it plausible that she contracted MRSA from her workplace as opined by Dr. Yeo.

The Commission also finds the opinions of Dr. Guzina to be persuasive. Dr. Guzina was certain that Petitioner's infection was MRSA. She testified that Petitioner may have been more susceptible to MRSA infections because her immunity was lower. Dr. Guzina opined that once a patient has been diagnosed with MRSA, one should assume that subsequent skin infections were MRSA for the rest of their lives and treat them with MRSA drugs; not doing so would endanger the person's life. In Petitioner's case, her lesions resolved after receiving MRSA treatment. Had Petitioner's condition not been caused by MRSA in the first instance, Dr. Guzina explained that the lesions would not have resolved. In addition, Dr. Guzina's understanding of Petitioner's presentation, symptom onset, diagnostic test results, and exposure to rooms being cleaned due to infectious patients, further buttress the opinions of Dr. Yeo and a finding that Petitioner's MRSA infection, and subsequent manifestations, developed as a result of her exposures at work.

The Commission further finds the opinions and testimony of Dr. Firoozi to be persuasive. Like Dr. Guzina, Dr. Firoozi was aware of Petitioner's history of working in an isolation room contaminated by MRSA prior to developing her initial lesions. She confirmed that Petitioner had contracted MRSA, based upon her positive culture. Dr. Firoozi opined that, based on Petitioner's history of touching her face with infected gloves while cleaning an infected isolation room, her exposure to MRSA in her workplace could have been the cause of her infection. Although Dr. Firoozi reported Petitioner's initial MRSA infection had resolved by October 21, 2010, she acknowledged that Petitioner's right knee was, "probably still somewhat infectious," on that date, because a wound on it had not completely closed. Less than two weeks later on November 2, 2010, Petitioner saw Dr. Yeo who confirmed her improved, but symptomatic,

MRSA condition requiring a hospital admission. Like Drs. Yeo and Guzina, Dr. Firoozi believed that Petitioner's exposure in the workplace to infected patient rooms, coupled with transmission modalities like touching of her body with infected gloves, could have been a cause of her MSRA. The Commission finds her opinion to be persuasive and plausible, particularly in consideration of Petitioner's lack of prior symptoms or treatment for MRSA, her post-August 2010 onset of symptoms, Ms. Chowaniec's report acknowledging Petitioner's reported transmission mechanism, and the expert testimony of both Dr. Yeo and Dr. Guzina. Thus, the Commission finds that as of October 21, 2010, Petitioner was still experiencing a MRSA infection which she had contracted while working in August/September 2010.

In contrast, the Commission finds the opinions of Dr. Chiodo, Respondent's Section 12 examiner, to be wholly speculative and unsupported by the evidence. Dr. Chiodo did not believe it was relevant to know which hospital rooms Petitioner cleaned prior to her development of lesions. He also, without factual basis, attributed Petitioner's contraction of MRSA to anything but contaminated hospital rooms. After professing to have more education and knowledge about Petitioner's condition than her treating physicians, Dr. Chiodo then repeatedly and incorrectly testified that Petitioner's MRSA diagnosis was never confirmed by a culture. The record, however, clearly reflects a September 5, 2010 lab report showing a positive culture for MRSA. Incredibly, Dr. Chiodo also testified that there is nothing unique to hospitals that would be a cause of Petitioner's MRSA versus some other non-occupational cause and, without factual support on which to base his medical conclusion, claimed that if Petitioner did have MRSA, her cigarette smoking was the "likely" cause. The Commission will not disregard positive diagnostic test results, the opinions of several treating physicians, and the uncontroverted evidence that Petitioner cleaned contaminated hospital rooms prior to her first manifestation of symptoms to find Dr. Chiodo's opinions persuasive in this case.

Dr. Chiodo's additional opinion that Petitioner's antibiotic treatment was unwarranted following her March 2012 occurrence is contradicted by the fact that Petitioner's lesions improved following that treatment; Dr. Guzina noted Petitioner's improved condition on April 16, 2012. Petitioner's lack of MRSA lesions at Dr. Chiodo's June 28, 2012 exam fails as proof that she did not have lesions on March 19, 2012. His reference that there was no indication that she had, "mythical open lesions," is contrary to the clinically documented medical evidence of Petitioner's treating physicians. Dr. Chiodo's further claim that the most likely cause of Petitioner's "rashes" was psychosomatic is unsupported by any evidence and unpersuasive.

The Commission also notes additional considerations that erode Dr. Chiodo's credibility. Dr. Chiodo acknowledged that 90% of his income stemmed from insurance carriers and his work as an expert witness. Moreover, despite also being a practicing attorney, Dr. Chiodo concluded that Petitioner's workplace was not 51% or more the cause of her contracting MRSA (a condition he did not believe she had in the first place), a conclusion based on the incorrect legal standard. For a workplace injury or exposure to be compensable, it need only be a cause of *a* claimant's condition; not the primary cause. *Sisbro, Inc. v. Indus. Comm'n,* 797 N.E.2d 665, 672 (2003). The Commission concludes that Dr. Chiodo's opinions are based on speculation, in light

of the facts in this case and his lack of understanding of those facts. The medical bases for his opinions, and his medical-legal conclusions, are wholly lacking in persuasiveness and credibility. The Commission accords no credence to the opinions of Dr. Chiodo in this case.

Ultimately, the Commission finds Petitioner proved she contracted her first MRSA infection as a result of one or more exposures which occurred in the course and scope of her employment and manifested on August 20 and September 3, 2010. Petitioner testified that she had cleaned specific isolation rooms in the hospital, often identifying them by room number, in which infected patients had been present. Respondent offered no evidence contradicting that testimony and, to the contrary, Ms. Chowaniec's accident report confirmed Petitioner's work in an isolation room and the transmission method deemed competent to cause a MRSA infection, as explained by Petitioner's treating physicians. The Commission further finds that Petitioner still had a MRSA infection on October 21, 2010, which related back to her initial MRSA infection. In so finding, the Commission relies upon the testimony and opinions of Dr. Firoozi, and also, upon Dr. Yeo's opinion that Petitioner had MRSA on November 2, 2010.

In concluding that Petitioner's March 19, 2012 infection was MRSA, relating back to her August 20 and September 3, 2010 exposures, the Commission relies upon the testimony of Dr. Yeo, who opined that subsequent infections relate back to the initial exposure in patients diagnosed with MRSA. The Commission further relies upon the testimony of Dr. Guzina, who, before making her MRSA diagnosis, examined Petitioner and researched medical literature. Dr. Guzina opined similarly to Dr. Yeo that once Petitioner had been exposed to MRSA, further exposures would bring back her symptoms.

Because the Commission finds that Petitioner's MRSA conditions on October 21, 2010 and March 19, 2012 each relate back to her initial MRSA exposure or exposures in August and September, 2010, given the evolution of the disease and its presentation over time as explained by her treating physicians, the Commission awards Petitioner her medical bills incurred in connection with all three of her MRSA claims, in case number 10 WC 38521. The Commission further awards Petitioner, in case number 10 WC 38521, temporary total disability benefits for the periods: September 4, 2010 through October 20, 2010; October 22, 2010 through January 20, 2011, and March 20, 2012 through October 2, 2012.

As a result of Petitioner's work-related MRSA infections, she suffered numerous skin injuries to multiple body parts on multiple subsequent dates. She was advised to not return to her prior job in the hospital; a job she had held since 2001. However, Petitioner has not proven a loss of trade. She has not been advised to avoid work as a housekeeper or maid or janitor in non-medical settings, such as hotels, office buildings or residences. Accordingly, the Commission finds Petitioner entitled to permanent partial disability in the amount of 10% loss of person as a whole pursuant to §8(d)2 of the Act, in claim number 10 WC 38521. Because the Commission finds Petitioner's MRSA conditions on October 21, 2010 and March 19, 2012, were continuations of the MRSA she contracted during her August and September 2010 work

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exposures, and not new occurrences on those dates, it denies additional benefits in claim numbers 10 WC 44279 and 12 WC 10959.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator in this case, filed March 4, 2019, is affirmed and adopted, though for the reasons stated above.

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

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

DATED: DEC 18 2020
o-10/22/20
MP/mcp
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PELIVANOVIC, LILLIANA
Employee/Petitioner

Case# **12WC010959**

10WC038522
10WC038521
13WC023804
10WC044279

OUR LADY OF RESURRECTION
Employer/Respondent

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On 2/19/2019, 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:

0014 ARNOLD & KADJAN
PAUL EGAN
35 E WACKER DR SUITE 600
CHICAGO, IL 60601

2965 KEEFE CAMPBELL BIERY & ASSOC
PANKHURI PARTI
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

LILLIANA PELIVANOVIC
Employee/Petitioner

v.

OUR LADY OF THE RESURRECTION
Employer/Respondent

Case # 12 WC 10959

Consolidated cases: **10 WC 38522**
10 WC 38521
13 WC 23804
10 WC 44279

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An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of Chicago on **November 13, 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

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FINDINGS

On **3/19/2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accidents **was** given to Respondent. Having found no accident in case number 12 WC 10959, all other issues are rendered moot.

In the year preceding the injury, Petitioner earned **$23,670.40**; the average weekly wage was **$455.20**.

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

ORDER

Having found no accident in case number 12 WC 10959, all other issues are rendered moot.

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

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

Signature of Arbitrator

2-19-2019
Date

FEB 19 2019

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FINDINGS OF FACT

Background

Liliana Pelivanovic ("Petitioner") alleged injuries arising out of and in the course of her employment with Our Lady of Resurrection ("Respondent") on various dates of accident. Petitioner gave an opening statement indicating that the April 17, 2010 claim involved a back injury; that the August 20, 2010, September 3, 2010, October 21, 2010 and March 19, 2012 claims involved MRSA and that the August 15, 2011 involved the throat. The matters were previously consolidated and the parties held a trial on all claims and any and all issues on November 13, 2018. The following is a recitation of the facts adduced at trial.

Testimonial and Other Evidence

Petitioner testified she was born in Serbia on April 7, 1952 and said she spoke little English. Petitioner testified she currently was married and did not have any children. She testified that since 2001 she worked for Respondent in the environmental department. Her duties included cleaning floors, housekeeping, wiping beds, mopping floors, wiping cabinets, picking up garbage, cleaning beds, disinfecting the ER, vacuuming and cleaning washrooms.

Date of Accident April 17, 2010 – 10 WC 38522 (low back)

Petitioner testified she was first injured on April 17, 2010 while she was working in surgery. She testified that there was a lot of linen in the bag and when she pulled the bag, she felt a click. She called her group leader Javier and he helped take half out and drop it in the shoot. Petitioner said she had no prior back pain. Petitioner said she went to the ER within the hospital and then saw her personal doctor, Dr. Tatjana Guzina. Petitioner said she then saw Dr. Foreman at IBJI for therapy to her back. Petitioner testified she was first allowed to return to work at a light-duty job with restriction of not lifting more than 20 pounds. She testified the restrictions were for about a month and they helped a little bit. Petitioner testified that she did not have any problems with her back prior to the incident in April 2010. She testified her back problems continued for two-three years after the incident and she was still having issues with her back, which required her to take pain pills.

On cross examination, Petitioner admitted she informed Dr. Forman that she had hurt her back while pulling linens. She testified she underwent therapy for her lower back pain and was ultimately discharged. Petitioner testified at discharge, she was released light duty and then returned to full duty 30 days thereafter. To her knowledge all the medical bills for her lower back treatment had been paid by workers' compensation.

Records show on April 14, 2010, Petitioner presented to Respondent's emergency room where she gave a history of lifting a heavy linen bag at work. Px5. She complained of back pain. She was diagnosed with a strain, given medications, taken off work for two days and advised to follow up with her doctor. On April 17, 2010, an employee incident report noted Petitioner injured her back when she pulled heavy linen up. Rx1.On April 19, 2010, her primary doctor, Dr. Guzina, simply noted Petitioner could not work. Px7. On April 20, 2010, Petitioner first saw Dr. Edward Foreman of IBJI. Px4. She gave a similar history of lifting a bag of garbage and injuring her low back. The doctor diagnosed strain and recommended medications, therapy and that she be off work. She was diagnosed with a strain. Thereafter, Petitioner began therapy at IBJI. Px4. On May 11, 2010, Petitioner followed up with Dr. Foreman. Px4. His impression was low back pain and he recommended Petitioner continue with therapy. On May 19, 2010, therapists noted Petitioner reported 90% improvement. Additional therapy was recommended. On May 13, 2010, Petitioner underwent an MRI of the low back. On June 25, 2010, Petitioner was discharged from therapy and recommended to start work

conditioning. She rated her pain 8/10 and continued to complain of low back pain and pain down the left leg. Petitioner began work conditioning on June 29th and was discharged from work conditioning on July 6th. That same day, Petitioner saw Dr. Foreman who released Petitioner to work. Petitioner's last visit with Dr. Foreman was on August 3, 2010, where he noted Petitioner presented with negative SLR. His impression was chronic low back pain. He released Petitioner to return to work starting August 4th with no lifting greater than 30 pounds. She was to follow up as needed. Px4.

Dates of Accident August 20, 2010 and September 3, 2010 – 10 WC 38521 (MRSA)

Petitioner next testified that on September 3, 2010 she was punched out of work at 11:30pm when she noticed blisters and bleeding on her face, neck, ears, both hands, arms and all over, like chicken pox. She first noticed similar markings 2 weeks prior while at work. Petitioner testified she was diagnosed with MRSA and was taken off work.

After getting discharged from the hospital, Petitioner testified she followed up with her doctor – Dr. Guzina at which time she underwent some tests and was diagnosed with MRSA. Petitioner testified she was taken off work after September 3, 2010 as her doctor told her she would not return to work without being cured.

Petitioner testified she was taken off work in September 2010 and was off work for three or four months. She returned to work after three months when she did not have MRSA. Petitioner testified she did not return to work for one day and was not working in September, October, and November and then came back before Christmas in December. Petitioner testified she was not allowed in the hospital for three months until she was cured from MRSA. She also testified that she did not return to work for one day at which time she had another outbreak.

Petitioner identified Px1 as photos taken in September 2010 at the hospital and at her home. She testified the photographs were a fair representation of her symptoms. Petitioner also testified the blemishes in the photos were similar to the ones she had experienced two weeks before September 3, 2010. The blemishes also represented the ones she experienced later in October 2010 and March 2012. Petitioner testified she did not have any problems with MRSA before the first incident that occurred two weeks before September 3, 2010.

On cross examination, Petitioner testified the MRSA lesions had been present for 10-14 days prior to September 3, 2010 and had looked exactly the same for that time-period. She testified to waiting for these 14 days because her manager did not let her go to the ER or fill out a report. Petitioner admitted her report was filled out on September 5 or September 6, 2010 and indicated the symptoms had been present since September 3, 2010.

On September 4, 2010, Petitioner presented to Resurrection for suspected vasalitis [sic]. Px10. Various medical notes recorded rash to the elbow, face and buttocks. The left elbow and left ear had black scabs with no oozing. Other notes remarked various symptoms were present for 2 weeks that spread to the face and another that facial lesions were present for one day. Another record noted an elbow lesion present for 1 week.**there is no mention of any exposure at work.&** Petitioner followed up with dermatology.

Records show that on September 7, 2010, an employee report of work injury or illness was completed, noting that on September 3, 2010, Petitioner believed she probably touched her face accidentally while wearing her gloves. Px10:91, Rx4. Petitioner also followed up with Dr. Firoozi, who wrote that Petitioner worked in ICU and presumably came in contact with cleaning products. Px10:96. The doctor noted blood tests were not back yet. On September 11, 2010, results were positive for MRSA. Px10:97. Petitioner was given medication.

On September 14, 2010, Petitioner presented to Dr. Guzina, who noted Petitioner had an infection in her cheek and had already been treating for MRSA. See, Px7, 14. Dr. Guzina also testified in this matter regarding her treatment of Petitioner and her opinions. Px14. At the September 2010 visit, the doctor advised Petitioner to continue her course of treatment. Dr. Guzina testified that her role was largely one of providing follow up and coordinating care with other doctors. On September 21st and 28th, 2010, Petitioner followed up at Resurrection and lesions were healing. Medications were refilled. Px10:98. On October 7th and 12th, medications were again refilled. Px10.

Date of Accident October 21, 2010 – 10 WC 44279 (MRSA)

Petitioner then testified she did go back to work on October 21, 2010 for one day. She worked a few hours and noticed the same bumps and blisters on her face, legs and arms. She again reported this to Monica. Petitioner treated within the emergency room and then following up with Dr. Guzina. Petitioner testified Dr. Guzina referred her to Dr. Yeo and saw him at Thorek Hospital. Petitioner was admitted to Thorek Hospital for two nights and three days at which time tests were again undertaken to determine what the blemishes were. Petitioner testified she believed the tests were to check for MRSA. Petitioner testified she was taken off work again in October 2010 and she remained off work until *January* 20, 2011. Petitioner testified during the period she was off work her symptoms did not improve and remained the same. Petitioner also testified that she had been taken off work in September 2010 and did not return to work until *December*.

On cross examination, Petitioner testified that after being taken off work in September 2010, she returned on October 21, 2010, worked for a couple of hours, was sent to the ER again, and then did not work until January 20, 2011. Petitioner admitted she had returned to work on October 21, 2010 because Dr. Firoozi had allowed her to. Petitioner testified she presented to work at 3:00pm and then filled out the report at 3:50pm because the blisters had returned on her body. She testified on October 21, 2010, Dr. Firoozi had allowed her to return to work and then on October 25, 2010 Dr. Guzina took her off work again. Petitioner testified she did not return to Dr. Firoozi because "they" did not send her. Petitioner testified she was aware her blood was tested for MRSA in November 2010 by Dr. Yeo but was not aware the results were negative for MRSA. Petitioner admitted Dr. Guzina took her off work for her non-work-related health issues at times and it was possible the time off work was due to her arthritis symptoms may have overlapped with the time she was also off work for her alleged MRSA symptoms. On cross, Petitioner testified she had taken pictures of her breakout from October 2010 but had not included them in evidence.

On October 21, 2010, Petitioner returned to Resurrection. Px10:102. All lesions were healed. MRSA was believed to be resolved. The right knee was swollen but not completely closed. Petitioner was allowed to return to work. That same day, Petitioner returned with facial and wrist swelling. Px10. History noted that Petitioner was seen in employee health feeling well. *Id.* at 110. After leaving employee health, 10 minutes later, Petitioner developed facial and wrist symptoms. The plan was for blood cultures to be taken. *Id.*, Rx5. An incident report noted Petitioner was pulling garbage when her face started feeling red. Rx5.

On October 25, 2010, Petitioner returned to Dr. Guzina relating that she had returned to work recently on October 21st and there she noticed something on her face. The doctor testified that it looked swollen. Dr. Guzina prescribed antihistamine, noting she believed the face swelling was a skin reaction to the MRSA antibiotics Petitioner had already been taking. On November 3, 2010, blood testing was negative for MRSA. Rx6. On November 11, 2010, Petitioner returned to Dr. Guzina, who noted Petitioner was still off work. Px14. On November 16, 2010, Petitioner followed with Dr. Guzina for blood tests. Px14. The doctor referred her to a rheumatologist. Px14. On December 27, 2010, Petitioner informed Dr. Guzina she had stopped taking her MRSA medications. Px14. The doctor reasoned Petitioner could now begin taking the recommended steroid

medications per the rheumatologist's recommendations. Petitioner was still off work as of this visit in order to finish antibiotics for the and she was to return to work on January 20, 2011. *Id.* at 15-16.

On January 17, 2011, Petitioner followed up with Dr. Guzina who noted Petitioner had finished her MRSA medications. Px14. On April 10, 2011 an incident report documented that Petitioner complied of a rash/bubbles maybe after touching a counter. Px10:115, Rx12. She was sent to the ER. On May 5, 2011, Petitioner followed up with Dr. Guzina. Px14. The doctor testified Petitioner had a new rash on her forearm from either gloves or an exposure to something. She testified "we didn't know." Petitioner was to continue her treatment for her autoimmune disease that she presumably had. *Id.* at 18.

On June 29, 2011, another employee report of work injury/illness noted that after cleaning an isolation room, Petitioner washed her hands and noticed in the mirror facial redness. Px10:118, Rx12. She could not recall getting cleaning product in her face. *Id.* at 121. Another noted documented she sprayed cleaning product and her face was the only part of the body exposed. *Id.* at 123. Skin dermatitis was suspected. *Id.* at 122.

On June 30, 2011, Petitioner followed up with Dr. Guzina with another episode of the face rash again at work. Px14. Petitioner was not being followed by the rheumatologist anymore. Dr. Guzina recommended Petitioner see a dermatologist. The doctor thought that Petitioner had been working as of that visit. On July 11, 2011, Petitioner followed up with Dr. Guzina. Px14. She was negative for MRSA but still had a rash on her face. On August 22, 2011, Petitioner returned to Dr. Guzina reporting that she had another episode at work where she swallowed something in the throat. *Id.* at 20. Petitioner followed up with Dr. Guzina in December 2011 complaining of eyelid swelling and difficulty getting up, which the doctor said could be symptoms associated with a rheumatologic condition. *Id.* at 23.

Date of Accident August 15, 2011 – 13 WC 23804 (Choking Incident)

Petitioner testified in 2011 she was involved in another work accident when a co-worker slapped her on her back, causing her to choke on a candy. Petitioner testified a doctor took the candy out and she stayed one day in the hospital. She stated she was given 2-3 days due to the stress from choking. She eventually followed up with a specialist. Petitioner said she noticed pain with swallowing water that lasted one week. She was able to return to work. Petitioner testified that she did not have any problems with her throat prior to the incident in which she choked on a lozenge.

On cross examination, Petitioner admitted she ate candies outside of work as well and also ate candy outside of work while talking to her friends. Petitioner testified she missed three days of work after the candy was taken out of her throat but that her doctor only took her off work for one day. Petitioner testified she was seen by a Polish doctor a couple of days after the incident because she had been instructed to do so at the ER.

On August 15, 2011, employee incident reported noted that Petitioner bent down to grab a bucket and had a mint candy in her throat that got stuck. Rx8. Records show that on August 15, 2011, Petitioner presented to the emergency room. Px6. History noted that Petitioner accidentally swallowed or choked on a candy while sucking on it. There is no mention of a coworker or being slapped on the back. And endoscopic failed to show any foreign body or candy. Petitioner was noted not to be in any distress despite Petitioner having testified that she was taking off work due to the stress of the alleged incident. Further, there is no note taking off work as a result of this incident. Based on Petitioner's lack of credibility corroborating her version of the events and based upon the medical records billing to corroborate her version of the events, the Arbitrator fines that Petitioner feel to prove Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent.

Date of Accident March 19, 2012 – 12 WC 10959 (MRSA)

Petitioner testified she had another outbreak of MRSA in March 2012, which presented in the same way as in September with bubbling, blistering, and bleeding. Petitioner testified she was seen in the ER again and she also filled out a report with her manager. Thereafter, Petitioner testified, she followed up with Dr. Guzina and was taken off work again. Petitioner testified she was allowed to return to work but every time she came back to Resurrection she would get MRSA. Petitioner testified she was told by her doctor that she could not return to working for the hospital anymore. Petitioner testified if the MRSA outbreaks had not happened then she would not have stopped working in 2012. Petitioner testified since March 2012 she had not returned to work but had had additional outbreaks of MRSA. Petitioner testified at the time of each outbreak she followed up with Dr. Guzina and was given pills and cream for treatment.

On cross examination, Petitioner testified that last time she saw Dr. Guzina for MRSA issues was in October 2012 and at the time she was also treating for her arthritis. Petitioner testified since she had stopped working for Resurrection, she had four or five more breakouts of MRSA. Petitioner testified she had not returned to Resurrection prior to these four-five breakouts. Petitioner testified each time the symptoms were similar to the bubbles like the ones shown in Px1. Since she stopped working, she has not looked for work because her doctor told her she could not return to work in a hospital. Petitioner admitted her doctor had not stopped her from returning to work anywhere else. On cross, Petitioner also testified there are no pictures of her breakout from March 2012.

On March 19, 2012, Petitioner presented to Resurrection where it was noted Petitioner was exposed to scabies and presented with a rash. Px11, Rx9. There were bumps on the arms and between fingers noted. There was a rash on her face. Dr. Guzina testified that Petitioner's next complaint of MRSA was on March 22, 2012, when she related to Dr. Guzina that she was cleaning a room where scabies was present and then developed a rash. Px14:24. Petitioner was diagnosed at the emergency room with scabies. Petitioner was tested at Thorek on this date. Px8. Petitioner related in occurred 3 days prior. Petitioner was started on medications for MRSA type infection and followed up. In June 2012, Dr. Guzina updated her chart, testifying that her research showed that p-ANCA titer can by caused by a trigger, which can be many things. She said "it" could cause hypersensitivity vasculitis. *Id.* at 28. This could be diagnosed with a biopsy which was never obtained. *Id.*

Dr. Guzina testified that to a reasonable degree of medical certainty, she believed the source of Petitioner's MRSA was the workplace. *Id.* at 29-30. Dr. Guzina's prognosis was that Petitioner was improving. The doctor testified she did not think she ever returned Petitioner to return to work after the last visit. On cross, Dr. Guzina admitted that there were no blood cultures done to confirm MRSA at the last, most recent visits with Petitioner. Dr. Guzina testified she based her conclusion on the history provided by Petitioner, explaining that exposure causes titers to elevate, which can remain elevated for long periods thereby lowering immunity. Dr. Guzina testified that she knew Petitioner had MRSA in March 2012 because Petitioner got better with antibiotics prescribed to treat MRSA. *Id.* at 41-42. Dr. Guzina testified that she learned that hypersensitivity vasculitis can be triggered by MRSA. Dr. Guzina further testified that once an individual has been diagnosed and treated for MRSA, any further skin infection is automatically treated as if it was MRSA. *Id.* at 50-51, 55. The doctor testified that Petitioner had MRSA on her forearms, where her gloves ended. *Id.* at 57. Dr. Guzina testified Petitioner was off work from September 14, 2010 until October 21, 2010. *Id.* at 62. Petitioner then had symptoms again on October 25, 2010. Petitioner then returned to work on January 20, 2011 and again had symptoms on June 30, 2011. Thereafter, Petitioner went off work again until July 11th or 15th.

Documents show Petitioner was taken off work by Dr. Guzina from March 9, 2012 through October 2, 2012. Px9. Dr. Guzina eventually wrote that Petitioner was permanently disabled. Id.

Petitioner testified she saw Dr. Chiodo at the request of her employer and at the appointment he did not examine her and only looked at the photographs. She testified she was in Dr. Chiodo's office for one hour but his examination of her only lasted for a minute or thirty seconds. The rest of the time Dr. Chiodo asked her questions and looked at her medical records of Petitioner.

Deposition Testimony of Dr. Ernest P. Chiodo

The evidence deposition of Dr. Ernest Chiodo was taken on January 30, 2013. Rx11. Dr. Chiodo testified he board certified in internal medicine, occupational medicine, public health, and general preventative medicine. He is also certified in engineering and public health discipline and in industrial hygiene, which was the discipline that quantified and controlled various occupational and environmental hazards, including exposure to air toxins. Dr. Chiodo testified he had performed an independent medical evaluation on Petitioner on December 6, 2010 and a repeat examination on June 28, 2012. Dr. Chiodo testified that he did not believe Petitioner had a MRSA infection because no record he found actually stated this. However, even if she did, he did not believe it was caused by her work at the hospital. He testified at length how one can contract MRSA, how and where it spreads and treatment for this infection. Dr. Chiodo gave opinions on where he believed Petitioner's MRSA may have originated from.

Deposition Testimony of Dr. Taraneh Firoozi

The evidence deposition of Dr. Taraneh Firoozi was taken on May 25, 2012. Px12. Dr. Firoozi testified he is a dermatologist licensed to practice medicine in the state of Illinois. He first saw Petitioner on September 7, 2010 after she made an appointment, but it was his understanding she was referred to him because she brought in the Employee Report of Injury/Illness. Petitioner provided a history of working in an isolation room which was contaminated by MRSA two weeks prior to the time she presented for the appointment, when she accidentally touched her face with her contaminated gloves. Dr. Firoozi performed a physical exam of Petitioner which revealed multiple ulcers on left ear, right knee, and right cheek. He thought the symptoms were a result of spider bites. Dr. Firoozi testified Petitioner returned on September 11, 2010 and it was his recollection she did not look better. Dr. Firoozi continued Doxycycline because the culture showed the antibiotic was sensitive to Doxycycline while also starting her on sulfur drugs. Dr. Firoozi diagnosed MRSA based on culture results and he therefore ruled out spider bites and contact dermatitis. Petitioner returned on September 21, 2010 and the lesions were healing with necrotic bases. Dr. Firoozi saw Petitioner on October 21, 2010 and noted the MRSA infection had resolved. He allowed Petitioner to return to work on that day as he had kept her off work prior to this. He did not see Petitioner again. Dr. Firoozi testified it was his opinion that Petitioner's MRSA infection *could have been* caused by the events she related to him on September 7, 2010 and included in the report dated September 4, 2010.

Deposition Testimony of Dr. Tatjana Guzina

The deposition testimony of Dr. Tatjana Guzina was taken on June 19, 2012. Px14. Dr. Guzina testified she was board certified in internal medicine. Dr. Guzina's ultimate conclusion was that Petitioner's MRSA was caused by her workplace. Dr. Guzina acknowledged that testing in July 2011 was negative for MRSA. Dr. Guzina testified that in March 2012, she saw Petitioner again, who was reporting scabies. Dr. Guzina testified she started Petitioner on MRSA medications again and that Petitioner eventually got better. Based on this, Dr. Guzina concluded that Petitioner was again exposed to MRSA.

Deposition Testimony of Dr. Sein-Khiong Yeo

The deposition testimony of Dr. Sein-Khiong Yeo was taken on December 20, 2012. Px13. Dr. Yeo is board certified in infectious diseases. He first encountered Petitioner on November 2, 2010 when she was referred to him by Dr. Guzina for a skin condition. Dr. Yeo testified Petitioner told him Resurrection Hospital was developing cultures for MRSA, she was on antibiotics, and was feeling better but was referred to dermatology and told to stop the antibiotics, which had caused the lesion to get worse. Dr. Yeo testified he thought the condition was pure MRSA folliculitis and micro-abscess and so he started Petitioner on Vancomycin. Dr. Yeo testified after seeing Petitioner on November 2, 2010 he did not see her again. He testified as Petitioner was a housekeeper and janitor in the hospital setting, it could throw her into the high-risk category to contract MRSA. Dr. Yeo testified it was his opinion that as Petitioner was a housekeeper and cleaning patient rooms, it increased her chances of contracting MRSA. Dr. Yeo discharged Petitioner on November 4, 2010 with the discharge diagnosis being of MRSA. On cross examination, Dr. Yeo discussed a variety of hypothetical scenarios and settings where one might contract and develop MRSA.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

The Arbitrator had an opportunity to observe Petitioner and her testimony. The Arbitrator finds Petitioner's testimony was not intentionally misleading however her testimony is inconsistent with the medical record and was speculative at times.

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

A. Dates of Accident August 20, 2010 and September 3, 2010 – 10 WC 38521 (MRSA)

After hearing the trial testimony and reviewing the evidence in the record the Arbitrator concludes Petitioner has failed to show that on either August 20, 2010 or on September 3, 2010 she was involved in an accident that arose out of and in the course of her employment with Respondent. The Arbitrator has reviewed extensive testimonies and medical evidence on whether Petitioner contracted MRSA at Respondent's place of work that would arise out of an in the course of that employment. The Arbitrator further notes that the conclusion as to accident in this case is based primarily on one of lack of credibility, lack of corroboration and speculation.

First, the Arbitrator denies Petitioner's claim for 10 WC 38521 as she selected two dates of accident, presumably surmising that her exposure to MRSA may have been either date. Petitioner never gave credible testimony explaining her decision to select these two dates on one claim as alleged accident or exposure dates. Second, Petitioner's histories of how she became or believed she became exposed varied as shown in the evidence. For example, she testified that she noticed blisters and bleeding when she punched out on September 3, 2010 but also noticed similar markings 2 weeks prior. Petitioner never provided testimony as to what area of the workplace she worked two weeks prior. In her initial medical record at Resurrection, varied lengths of time for the presence of these symptoms included 1 week and 2 weeks. See, Px10. There is no mention of any workplace exposure at this initial visit. Then, when Petitioner finally completed a report on September 7th, Petitioner speculated that she thought she may have touched her face accidentally while wearing gloves. Px10:91, Rx4. However, Dr. Firoozi noted Petitioner presumably came into contact with cleaning products. Petitioner did not relate any specific date this would have occurred to Dr. Firoozi. Px10:96. Again, no mention of MRSA is made and no mention of either of the two alleged accident dates are noted. After being diagnosed

with MRSA, Petitioner saw Dr. Guzina on September 14th, where no mention of any workplace exposure is noted and neither date of alleged accident is noted.

Finally, both Drs. Firoozi and Guzina failed to give persuasive or credible testimony or opinions as to when and how in the workplace it was that Petitioner was exposed to MRSA. Both doctors failed persuasively reconcile the varying dates and histories noted in the record. The Arbitrator assigns little weight to these opinions as it relates to the issues of accident and causation. Likewise, the Arbitrator must assign little weight to the opinions of Dr. Yeo as he saw Petitioner only once in November 2010 and did not corroborate where or how the exposure occurred, on what date(s) an exposure occurred but rather simply concluded her MRSA exposure "probably occurred" at work. Px13. Based on the foregoing, the Arbitrator denies Petitioner's claim in 10 WC 38521. All other issues related to this claim are moot.

B. Date of Accident October 21, 2010 – 10 WC 44279 (MRSA)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove accidental injuries/exposure arising out of and the in the course of her employment occurring on October 21, 2010 with Respondent. Again, the conclusion to deny this claim is based primarily on a lack of credibility, corroboration and speculation.

Petitioner initially gave testimony that she did not work for approximately 3 months following her initial alleged MRSA exposure. Eventually, Petitioner testified that she returned to work for one day on October 21, 2010 and noticed symptoms once again. This became the basis of claim 10 WC 44279. Specially, she testified she returned to work for only a couple of hours when she noticed bubbling and bleeding on her hands, face, and legs. The Arbitrator finds this testimony is not only internally inconsistent, as she testified she did not work for 3 months, but also is contradicted by a preponderance of the evidence. Records showed that Petitioner treated with Resurrection on October 21, 2010, where MRSA was believed to be resolved. Px10:102. She was permitted to return to work. Petitioner then returned to Resurrection, complaining of facial and wrist swelling. Upon her return, the history noted that after Petitioner left employee health, 10 minutes later she noticed facial and wrist symptoms. *Id.* at 110. Again, no mention is made of any specific exposure to any unit, floor, department or room number she may have worked in or what she was doing. Petitioner also failed to give any specific details regarding same. The Arbitrator finds this initial history compelling, as it reasonably suggests that Petitioner never even returned to work but rather noticed symptoms after leaving employee health – the very same visit noted earlier on that date. Thus, this history is most consistent with Petitioner's initial testimony that she never worked for 3 months following her first alleged exposure. Even if she did work as alleged, an incident report noted Petitioner was pulling garbage when her face started feeling red. Rx5. This is not consistent with the history noted in Resurrection's records when Petitioner returned a second time. *See*, Px10:110. Further, Petitioner never gave such testimony. Notably, blood cultures taken in November 2010 were negative for MRSA, which would suggest that no exposure in fact occurred.

Based on the foregoing, the Arbitrator denies Petitioner's claim in 10 WC 44279. All other issues related to this claim are moot.

C. Date of Accident August 15, 2011 – 13 WC 23804 (Choking Incident)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove she sustained accidental injuries arising out of and the in the course of her employment occurring on August 15,

2011 with Respondent. The denial of this claim is based primarily on a lack of credibility, corroboration and speculation.

The Arbitrator finds Petitioner's version of events as related by her during her testimony were contradicted by both the injury report and the information contained in the medical records entered into evidence. Petitioner testified that on this date, a candy got stuck in her throat after a co-worker slapped her on her back. Petitioner testified that as she could not breathe, she was seen in the ER and underwent a procedure to dislodge the candy from her throat. However, the incident report noted that Petitioner bent down to grab a bucket and had a mint candy in her throat that got stuck. Rx8. There is no mention of a co-worker. Further, emergency room records noted that Petitioner accidentally swallowed or choked on a candy while sucking on it. There is no mention of a coworker or being slapped on the back or bending over. Further, contrary to Petitioner's testimony that candy had to be dislodged, an endoscopy failed to show anything. Finally, even if an incident occurred, under any of these scenarios, Petitioner failed to prove that this constituted an employment risk or that she was exposed to some other risk to a greater degree than the general public. Based on the foregoing, the Arbitrator denies Petitioner's claim in 13 WC 32804. All other issues related to this claim are moot.

D. Date of Accident March 19, 2012 – 12 WC 10959 (MRSA)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove accidental injuries/exposure arising out of and the in the course of her employment occurring on March 19, 2012 with Respondent. The denial of this claim is based primarily on a lack of credibility, corroboration and speculation.

Petitioner testified she had another "outbreak" of MRSA and it presented in the same manner as previously alleged, with bubbling, blistering, and bleeding. Again, this is contradicted by the information contained in Petitioner's medical records and the report of injury/illness filled out by her. In the injury report Petitioner claims she had started cleaning the isolation room when her face and hands started showing a rash. Rx9. Petitioner saw Dr. Guzina following this alleged incident, telling the doctor she was exposed to scabies rather than MRSA. Despite this, Dr. Guzina later testified she was certain Petitioner was suffering from MRSA because Petitioner improved with MRSA-type medications. Dr. Guzina admitted no testing was done to confirm this but insisted no testing was necessary. Dr. Guzina further concluded this alleged exposure to MRSA was from work but Dr. Guzina was never asked to reconcile either the incident report noting cleaning an isolation room or the alleged exposure to scabies. The Arbitrator assigns little weight to the testimony and opinions of Dr. Guzina as they based on a faulty understanding the of the histories surrounding this alleged incident. Based on the foregoing, the Arbitrator denies Petitioner's claim in 12 WC 10959. All other issues related to this claim are moot.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Having reviewed all evidence, the Arbitrator concludes Petitioner's current condition of ill-being as it relates to her low back/lumbar spine is causally related to her April 17, 2010 work

accident. Petitioner presented credible and corroborating evidence that she injured herself at work while lifting a bag of linen. The Arbitrator does not find the histories inconsistent. Respondent presented no contrary evidence. Therefore, Petitioner's low back is causally related to her April 17, 2010 accident.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Respondent presented into evidence the medical bills payment ledger showing $10,167.35 was paid for the treatment undergone by her. Rx10. Petitioner testified that to her knowledge all her medical bills related to the April 17, 2010 incident had been paid. However, Petitioner introduced into evidence a summary and corresponding bill totaling $12,043.00 between April 20, 2010 and August 3, 2010 and the corresponding medical financial history confirms an outstanding balance of $276.00. As such after analyzing the full set of medical bills the Arbitrator finds that Respondent has paid all reasonable and related medical bills of Petitioner as it pertains to the April 17, 2010 work incident.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Evidence shows Respondent paid TTD benefits to Petitioner for the time-period of April 22, 2010 until July 11, 2010 in the amount of $3,427.11. Rx10. Petitioner testified she was taken off work by her doctor on April 22, 2010 and she remained off work until she was allowed to return to light duty work on July 11, 2010. Based on the evidence presented the Arbitrator finds TTD benefits were paid by Respondent for this time and no additional benefits are due to Petitioner.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. The Arbitrator finds Petitioner sustained only a minor back strain as a result of the alleged incident and was found capable of returning to full duty work within three months. Petitioner gave no testimony as to the effects of her back injury. As such the Arbitrator finds Petitioner did not sustain any permanent partial disability as a result of the alleged incident.

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

Ljiljana Pelivanovic,

Petitioner,

vs.

Our Lady of Resurrection,

Respondent.

Case #: 13 WC 23804

Consolidated cases: 10 WC 38521
10 WC 38522
10 WC 44279
12 WC 10959

20IWCC0751

DECISION AND OPINION ON REVIEW

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

Petitioner alleged that while working on August 15, 2011, a piece of hard candy she had in her mouth became stuck in her throat when a co-worker slapped her on her back. The Arbitrator found that Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment on that date. For the reasons stated in the Arbitrator's decision, the Commission hereby affirms and adopts that decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 19, 2019, is hereby affirmed and adopted.

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.

20IWCC0751

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

DATED: DEC 18 2020
o-10/22/2020
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PELIVANOVIC, LJILJANA
Employee/Petitioner

Case# **13WC023804**

10WC038522
10WC038521
12WC010959
10WC044279

OUR LADY OF RESURRECTION
Employer/Respondent

20IWCC0751

On 2/19/2019, 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:

0014 ARNOLD & KADJAN
PAUL EGAN
35 E WACKER DR SUITE 600
CHICAGO, IL 60601

2965 KEEFE CAMPBELL BIERY & ASSOC
PANKHURI PARTI
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

LILLIANA PELIVANOVIC
Employee/Petitioner

v.

OUR LADY OF THE RESURRECTION
Employer/Respondent

Case # **13** WC **23804**

Consolidated cases: **10 WC 38522**
10 WC 38521
12 WC 10959
10 WC 44279

20IWCC0751

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of Chicago on **November 13, 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

20IWCC0751

FINDINGS

On **8/15/2011**, 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 accidents **was** given to Respondent. Having found no accident in case number 13 WC 23804, all other issues are rendered moot.

In the year preceding the injury, Petitioner earned **$23,670.40**; the average weekly wage was **$455.20**.

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

ORDER

Having found no accident in case number 13 WC 23804, all other issues are rendered moot.

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

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

Signature of Arbitrator

2-19-2019
Date

FEB 19 2019

FINDINGS OF FACT

Background

Liliana Pelivanovic ("Petitioner") alleged injuries arising out of and in the course of her employment with Our Lady of Resurrection ("Respondent") on various dates of accident. Petitioner gave an opening statement indicating that the April 17, 2010 claim involved a back injury; that the August 20, 2010, September 3, 2010, October 21, 2010 and March 19, 2012 claims involved MRSA and that the August 15, 2011 involved the throat. The matters were previously consolidated and the parties held a trial on all claims and any and all issues on November 13, 2018. The following is a recitation of the facts adduced at trial.

Testimonial and Other Evidence

Petitioner testified she was born in Serbia on April 7, 1952 and said she spoke little English. Petitioner testified she currently was married and did not have any children. She testified that since 2001 she worked for Respondent in the environmental department. Her duties included cleaning floors, housekeeping, wiping beds, mopping floors, wiping cabinets, picking up garbage, cleaning beds, disinfecting the ER, vacuuming and cleaning washrooms.

Date of Accident April 17, 2010 – 10 WC 38522 (low back)

Petitioner testified she was first injured on April 17, 2010 while she was working in surgery. She testified that there was a lot of linen in the bag and when she pulled the bag, she felt a click. She called her group leader Javier and he helped take half out and drop it in the shoot. Petitioner said she had no prior back pain. Petitioner said she went to the ER within the hospital and then saw her personal doctor, Dr. Tatjana Guzina. Petitioner said she then saw Dr. Foreman at IBJI for therapy to her back. Petitioner testified she was first allowed to return to work at a light-duty job with restriction of not lifting more than 20 pounds. She testified the restrictions were for about a month and they helped a little bit. Petitioner testified that she did not have any problems with her back prior to the incident in April 2010. She testified her back problems continued for two-three years after the incident and she was still having issues with her back, which required her to take pain pills.

On cross examination, Petitioner admitted she informed Dr. Forman that she had hurt her back while pulling linens. She testified she underwent therapy for her lower back pain and was ultimately discharged. Petitioner testified at discharge, she was released light duty and then returned to full duty 30 days thereafter. To her knowledge all the medical bills for her lower back treatment had been paid by workers' compensation.

Records show on April 14, 2010, Petitioner presented to Respondent's emergency room where she gave a history of lifting a heavy linen bag at work. Px5. She complained of back pain. She was diagnosed with a strain, given medications, taken off work for two days and advised to follow up with her doctor. On April 17, 2010, an employee incident report noted Petitioner injured her back when she pulled heavy linen up. Rx1.On April 19, 2010, her primary doctor, Dr. Guzina, simply noted Petitioner could not work. Px7. On April 20, 2010, Petitioner first saw Dr. Edward Foreman of IBJI. Px4. She gave a similar history of lifting a bag of garbage and injuring her low back. The doctor diagnosed strain and recommended medications, therapy and that she be off work. She was diagnosed with a strain. Thereafter, Petitioner began therapy at IBJI. Px4. On May 11, 2010, Petitioner followed up with Dr. Foreman. Px4. His impression was low back pain and he recommended Petitioner continue with therapy. On May 19, 2010, therapists noted Petitioner reported 90% improvement. Additional therapy was recommended. On May 13, 2010, Petitioner underwent an MRI of the low back. On June 25, 2010, Petitioner was discharged from therapy and recommended to start work

conditioning. She rated her pain 8/10 and continued to complain of low back pain and pain down the left leg. Petitioner began work conditioning on June 29th and was discharged from work conditioning on July 6th. That same day, Petitioner saw Dr. Foreman who released Petitioner to work. Petitioner's last visit with Dr. Foreman was on August 3, 2010, where he noted Petitioner presented with negative SLR. His impression was chronic low back pain. He released Petitioner to return to work starting August 4th with no lifting greater than 30 pounds. She was to follow up as needed. Px4.

Dates of Accident August 20, 2010 and September 3, 2010 – 10 WC 38521 (MRSA)

Petitioner next testified that on September 3, 2010 she was punched out of work at 11:30pm when she noticed blisters and bleeding on her face, neck, ears, both hands, arms and all over, like chicken pox. She first noticed similar markings 2 weeks prior while at work. Petitioner testified she was diagnosed with MRSA and was taken off work.

After getting discharged from the hospital, Petitioner testified she followed up with her doctor – Dr. Guzina at which time she underwent some tests and was diagnosed with MRSA. Petitioner testified she was taken off work after September 3, 2010 as her doctor told her she would not return to work without being cured.

Petitioner testified she was taken off work in September 2010 and was off work for three or four months. She returned to work after three months when she did not have MRSA. Petitioner testified she did not return to work for one day and was not working in September, October, and November and then came back before Christmas in December. Petitioner testified she was not allowed in the hospital for three months until she was cured from MRSA. She also testified that she did not return to work for one day at which time she had another outbreak.

Petitioner identified Px1 as photos taken in September 2010 at the hospital and at her home. She testified the photographs were a fair representation of her symptoms. Petitioner also testified the blemishes in the photos were similar to the ones she had experienced two weeks before September 3, 2010. The blemishes also represented the ones she experienced later in October 2010 and March 2012. Petitioner testified she did not have any problems with MRSA before the first incident that occurred two weeks before September 3, 2010.

On cross examination, Petitioner testified the MRSA lesions had been present for 10-14 days prior to September 3, 2010 and had looked exactly the same for that time-period. She testified to waiting for these 14 days because her manager did not let her go to the ER or fill out a report. Petitioner admitted her report was filled out on September 5 or September 6, 2010 and indicated the symptoms had been present since September 3, 2010.

On September 4, 2010, Petitioner presented to Resurrection for suspected vasalitis [sic]. Px10. Various medical notes recorded rash to the elbow, face and buttocks. The left elbow and left ear had black scabs with no oozing. Other notes remarked various symptoms were present for 2 weeks that spread to the face and another that facial lesions were present for one day. Another record noted an elbow lesion present for 1 week.**there is no mention of any exposure at work.&** Petitioner followed up with dermatology.

Records show that on September 7, 2010, an employee report of work injury or illness was completed, noting that on September 3, 2010, Petitioner believed she probably touched her face accidentally while wearing her gloves. Px10:91, Rx4. Petitioner also followed up with Dr. Firoozi, who wrote that Petitioner worked in ICU and presumably came in contact with cleaning products. Px10:96. The doctor noted blood tests were not back yet. On September 11, 2010, results were positive for MRSA. Px10:97. Petitioner was given medication.

On September 14, 2010, Petitioner presented to Dr. Guzina, who noted Petitioner had an infection in her cheek and had already been treating for MRSA. See, Px7, 14. Dr. Guzina also testified in this matter regarding her treatment of Petitioner and her opinions. Px14. At the September 2010 visit, the doctor advised Petitioner to continue her course of treatment. Dr. Guzina testified that her role was largely one of providing follow up and coordinating care with other doctors. On September 21st and 28th, 2010, Petitioner followed up at Resurrection and lesions were healing. Medications were refilled. Px10:98. On October 7th and 12th, medications were again refilled. Px10.

Date of Accident October 21, 2010 – 10 WC 44279 (MRSA)

Petitioner then testified she did go back to work on October 21, 2010 for one day. She worked a few hours and noticed the same bumps and blisters on her face, legs and arms. She again reported this to Monica. Petitioner treated within the emergency room and then following up with Dr. Guzina. Petitioner testified Dr. Guzina referred her to Dr. Yeo and saw him at Thorek Hospital. Petitioner was admitted to Thorek Hospital for two nights and three days at which time tests were again undertaken to determine what the blemishes were. Petitioner testified she believed the tests were to check for MRSA. Petitioner testified she was taken off work again in October 2010 and she remained off work until *January* 20, 2011. Petitioner testified during the period she was off work her symptoms did not improve and remained the same. Petitioner also testified that she had been taken off work in September 2010 and did not return to work until *December*.

On cross examination, Petitioner testified that after being taken off work in September 2010, she returned on October 21, 2010, worked for a couple of hours, was sent to the ER again, and then did not work until January 20, 2011. Petitioner admitted she had returned to work on October 21, 2010 because Dr. Firoozi had allowed her to. Petitioner testified she presented to work at 3:00pm and then filled out the report at 3:50pm because the blisters had returned on her body. She testified on October 21, 2010, Dr. Firoozi had allowed her to return to work and then on October 25, 2010 Dr. Guzina took her off work again. Petitioner testified she did not return to Dr. Firoozi because "they" did not send her. Petitioner testified she was aware her blood was tested for MRSA in November 2010 by Dr. Yeo but was not aware the results were negative for MRSA. Petitioner admitted Dr. Guzina took her off work for her non-work-related health issues at times and it was possible the time off work was due to her arthritis symptoms may have overlapped with the time she was also off work for her alleged MRSA symptoms. On cross, Petitioner testified she had taken pictures of her breakout from October 2010 but had not included them in evidence.

On October 21, 2010, Petitioner returned to Resurrection. Px10:102. All lesions were healed. MRSA was believed to be resolved. The right knee was swollen but not completely closed. Petitioner was allowed to return to work. That same day, Petitioner returned with facial and wrist swelling. Px10. History noted that Petitioner was seen in employee health feeling well. *Id.* at 110. After leaving employee health, 10 minutes later, Petitioner developed facial and wrist symptoms. The plan was for blood cultures to be taken. *Id.*, Rx5. An incident report noted Petitioner was pulling garbage when her face started feeling red. Rx5.

On October 25, 2010, Petitioner returned to Dr. Guzina relating that she had returned to work recently on October 21st and there she noticed something on her face. The doctor testified that it looked swollen. Dr. Guzina prescribed antihistamine, noting she believed the face swelling was a skin reaction to the MRSA antibiotics Petitioner had already been taking. On November 3, 2010, blood testing was negative for MRSA. Rx6. On November 11, 2010, Petitioner returned to Dr. Guzina, who noted Petitioner was still off work. Px14. On November 16, 2010, Petitioner followed with Dr. Guzina for blood tests. Px14. The doctor referred her to a rheumatologist. Px14. On December 27, 2010, Petitioner informed Dr. Guzina she had stopped taking her MRSA medications. Px14. The doctor reasoned Petitioner could now begin taking the recommended steroid

medications per the rheumatologist's recommendations. Petitioner was still off work as of this visit in order to finish antibiotics for the and she was to return to work on January 20, 2011. *Id.* at 15-16.

On January 17, 2011, Petitioner followed up with Dr. Guzina who noted Petitioner had finished her MRSA medications. Px14. On April 10, 2011 an incident report documented that Petitioner complied of a rash/bubbles maybe after touching a counter. Px10:115, Rx12. She was sent to the ER. On May 5, 2011, Petitioner followed up with Dr. Guzina. Px14. The doctor testified Petitioner had a new rash on her forearm from either gloves or an exposure to something. She testified "we didn't know." Petitioner was to continue her treatment for her autoimmune disease that she presumably had. *Id.* at 18.

On June 29, 2011, another employee report of work injury/illness noted that after cleaning an isolation room, Petitioner washed her hands and noticed in the mirror facial redness. Px10:118, Rx12. She could not recall getting cleaning product in her face. *Id.* at 121. Another noted documented she sprayed cleaning product and her face was the only part of the body exposed. *Id.* at 123. Skin dermatitis was suspected. *Id.* at 122.

On June 30, 2011, Petitioner followed up with Dr. Guzina with another episode of the face rash again at work. Px14. Petitioner was not being followed by the rheumatologist anymore. Dr. Guzina recommended Petitioner see a dermatologist. The doctor thought that Petitioner had been working as of that visit. On July 11, 2011, Petitioner followed up with Dr. Guzina. Px14. She was negative for MRSA but still had a rash on her face. On August 22, 2011, Petitioner returned to Dr. Guzina reporting that she had another episode at work where she swallowed something in the throat. *Id.* at 20. Petitioner followed up with Dr. Guzina in December 2011 complaining of eyelid swelling and difficulty getting up, which the doctor said could be symptoms associated with a rheumatologic condition. *Id.* at 23.

Date of Accident August 15, 2011 – 13 WC 23804 (Choking Incident)

Petitioner testified in 2011 she was involved in another work accident when a co-worker slapped her on her back, causing her to choke on a candy. Petitioner testified a doctor took the candy out and she stayed one day in the hospital. She stated she was given 2-3 days due to the stress from choking. She eventually followed up with a specialist. Petitioner said she noticed pain with swallowing water that lasted one week. She was able to return to work. Petitioner testified that she did not have any problems with her throat prior to the incident in which she choked on a lozenge.

On cross examination, Petitioner admitted she ate candies outside of work as well and also ate candy outside of work while talking to her friends. Petitioner testified she missed three days of work after the candy was taken out of her throat but that her doctor only took her off work for one day. Petitioner testified she was seen by a Polish doctor a couple of days after the incident because she had been instructed to do so at the ER.

On August 15, 2011, employee incident reported noted that Petitioner bent down to grab a bucket and had a mint candy in her throat that got stuck. Rx8. Records show that on August 15, 2011, Petitioner presented to the emergency room. Px6. History noted that Petitioner accidentally swallowed or choked on a candy while sucking on it. There is no mention of a coworker or being slapped on the back. And endoscopic failed to show any foreign body or candy. Petitioner was noted not to be in any distress despite Petitioner having testified that she was taking off work due to the stress of the alleged incident. Further, there is no note taking off work as a result of this incident. Based on Petitioner's lack of credibility corroborating her version of the events and based upon the medical records billing to corroborate her version of the events, the Arbitrator fines that Petitioner feel to prove Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent.

Date of Accident March 19, 2012 – 12 WC 10959 (MRSA)

Petitioner testified she had another outbreak of MRSA in March 2012, which presented in the same way as in September with bubbling, blistering, and bleeding. Petitioner testified she was seen in the ER again and she also filled out a report with her manager. Thereafter, Petitioner testified, she followed up with Dr. Guzina and was taken off work again. Petitioner testified she was allowed to return to work but every time she came back to Resurrection she would get MRSA. Petitioner testified she was told by her doctor that she could not return to working for the hospital anymore. Petitioner testified if the MRSA outbreaks had not happened then she would not have stopped working in 2012. Petitioner testified since March 2012 she had not returned to work but had had additional outbreaks of MRSA. Petitioner testified at the time of each outbreak she followed up with Dr. Guzina and was given pills and cream for treatment.

On cross examination, Petitioner testified that last time she saw Dr. Guzina for MRSA issues was in October 2012 and at the time she was also treating for her arthritis. Petitioner testified since she had stopped working for Resurrection, she had four or five more breakouts of MRSA. Petitioner testified she had not returned to Resurrection prior to these four-five breakouts. Petitioner testified each time the symptoms were similar to the bubbles like the ones shown in Px1. Since she stopped working, she has not looked for work because her doctor told her she could not return to work in a hospital. Petitioner admitted her doctor had not stopped her from returning to work anywhere else. On cross, Petitioner also testified there are no pictures of her breakout from March 2012.

On March 19, 2012, Petitioner presented to Resurrection where it was noted Petitioner was exposed to scabies and presented with a rash. Px11, Rx9. There were bumps on the arms and between fingers noted. There was a rash on her face. Dr. Guzina testified that Petitioner's next complaint of MRSA was on March 22, 2012, when she related to Dr. Guzina that she was cleaning a room where scabies was present and then developed a rash. Px14:24. Petitioner was diagnosed at the emergency room with scabies. Petitioner was tested at Thorek on this date. Px8. Petitioner related in occurred 3 days prior. Petitioner was started on medications for MRSA type infection and followed up. In June 2012, Dr. Guzina updated her chart, testifying that her research showed that p-ANCA titer can by caused by a trigger, which can be many things. She said "it" could cause hypersensitivity vasculitis. *Id.* at 28. This could be diagnosed with a biopsy which was never obtained. *Id.*

Dr. Guzina testified that to a reasonable degree of medical certainty, she believed the source of Petitioner's MRSA was the workplace. *Id.* at 29-30. Dr. Guzina's prognosis was that Petitioner was improving. The doctor testified she did not think she ever returned Petitioner to return to work after the last visit. On cross, Dr. Guzina admitted that there were no blood cultures done to confirm MRSA at the last, most recent visits with Petitioner. Dr. Guzina testified she based her conclusion on the history provided by Petitioner, explaining that exposure causes titers to elevate, which can remain elevated for long periods thereby lowering immunity. Dr. Guzina testified that she knew Petitioner had MRSA in March 2012 because Petitioner got better with antibiotics prescribed to treat MRSA. *Id.* at 41-42. Dr. Guzina testified that she learned that hypersensitivity vasculitis can be triggered by MRSA. Dr. Guzina further testified that once an individual has been diagnosed and treated for MRSA, any further skin infection is automatically treated as if it was MRSA. *Id.* at 50-51, 55. The doctor testified that Petitioner had MRSA on her forearms, where her gloves ended. *Id.* at 57. Dr. Guzina testified Petitioner was off work from September 14, 2010 until October 21, 2010. *Id.* at 62. Petitioner then had symptoms again on October 25, 2010. Petitioner then returned to work on January 20, 2011 and again had symptoms on June 30, 2011. Thereafter, Petitioner went off work again until July 11th or 15th.

Documents show Petitioner was taken off work by Dr. Guzina from March 9, 2012 through October 2, 2012. Px9. Dr. Guzina eventually wrote that Petitioner was permanently disabled. Id.

Petitioner testified she saw Dr. Chiodo at the request of her employer and at the appointment he did not examine her and only looked at the photographs. She testified she was in Dr. Chiodo's office for one hour but his examination of her only lasted for a minute or thirty seconds. The rest of the time Dr. Chiodo asked her questions and looked at her medical records of Petitioner.

Deposition Testimony of Dr. Ernest P. Chiodo

The evidence deposition of Dr. Ernest Chiodo was taken on January 30, 2013. Rx11. Dr. Chiodo testified he board certified in internal medicine, occupational medicine, public health, and general preventative medicine. He is also certified in engineering and public health discipline and in industrial hygiene, which was the discipline that quantified and controlled various occupational and environmental hazards, including exposure to air toxins. Dr. Chiodo testified he had performed an independent medical evaluation on Petitioner on December 6, 2010 and a repeat examination on June 28, 2012. Dr. Chiodo testified that he did not believe Petitioner had a MRSA infection because no record he found actually stated this. However, even if she did, he did not believe it was caused by her work at the hospital. He testified at length how one can contract MRSA, how and where it spreads and treatment for this infection. Dr. Chiodo gave opinions on where he believed Petitioner's MRSA may have originated from.

Deposition Testimony of Dr. Taraneh Firoozi

The evidence deposition of Dr. Taraneh Firoozi was taken on May 25, 2012. Px12. Dr. Firoozi testified he is a dermatologist licensed to practice medicine in the state of Illinois. He first saw Petitioner on September 7, 2010 after she made an appointment, but it was his understanding she was referred to him because she brought in the Employee Report of Injury/Illness. Petitioner provided a history of working in an isolation room which was contaminated by MRSA two weeks prior to the time she presented for the appointment, when she accidentally touched her face with her contaminated gloves. Dr. Firoozi performed a physical exam of Petitioner which revealed multiple ulcers on left ear, right knee, and right cheek. He thought the symptoms were a result of spider bites. Dr. Firoozi testified Petitioner returned on September 11, 2010 and it was his recollection she did not look better. Dr. Firoozi continued Doxycycline because the culture showed the antibiotic was sensitive to Doxycycline while also starting her on sulfur drugs. Dr. Firoozi diagnosed MRSA based on culture results and he therefore ruled out spider bites and contact dermatitis. Petitioner returned on September 21, 2010 and the lesions were healing with necrotic bases. Dr. Firoozi saw Petitioner on October 21, 2010 and noted the MRSA infection had resolved. He allowed Petitioner to return to work on that day as he had kept her off work prior to this. He did not see Petitioner again. Dr. Firoozi testified it was his opinion that Petitioner's MRSA infection *could have been* caused by the events she related to him on September 7, 2010 and included in the report dated September 4, 2010.

Deposition Testimony of Dr. Tatjana Guzina

The deposition testimony of Dr. Tatjana Guzina was taken on June 19, 2012. Px14. Dr. Guzina testified she was board certified in internal medicine. Dr. Guzina's ultimate conclusion was that Petitioner's MRSA was caused by her workplace. Dr. Guzina acknowledged that testing in July 2011 was negative for MRSA. Dr. Guzina testified that in March 2012, she saw Petitioner again, who was reporting scabies. Dr. Guzina testified she started Petitioner on MRSA medications again and that Petitioner eventually got better. Based on this, Dr. Guzina concluded that Petitioner was again exposed to MRSA.

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Deposition Testimony of Dr. Sein-Khiong Yeo

The deposition testimony of Dr. Sein-Khiong Yeo was taken on December 20, 2012. Px13. Dr. Yeo is board certified in infectious diseases. He first encountered Petitioner on November 2, 2010 when she was referred to him by Dr. Guzina for a skin condition. Dr. Yeo testified Petitioner told him Resurrection Hospital was developing cultures for MRSA, she was on antibiotics, and was feeling better but was referred to dermatology and told to stop the antibiotics, which had caused the lesion to get worse. Dr. Yeo testified he thought the condition was pure MRSA folliculitis and micro-abscess and so he started Petitioner on Vancomycin. Dr. Yeo testified after seeing Petitioner on November 2, 2010 he did not see her again. He testified as Petitioner was a housekeeper and janitor in the hospital setting, it could throw her into the high-risk category to contract MRSA. Dr. Yeo testified it was his opinion that as Petitioner was a housekeeper and cleaning patient rooms, it increased her chances of contracting MRSA. Dr. Yeo discharged Petitioner on November 4, 2010 with the discharge diagnosis being of MRSA. On cross examination, Dr. Yeo discussed a variety of hypothetical scenarios and settings where one might contract and develop MRSA.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

The Arbitrator had an opportunity to observe Petitioner and her testimony. The Arbitrator finds Petitioner's testimony was not intentionally misleading however her testimony is inconsistent with the medical record and was speculative at times.

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

A. Dates of Accident August 20, 2010 and September 3, 2010 – 10 WC 38521 (MRSA)

After hearing the trial testimony and reviewing the evidence in the record the Arbitrator concludes Petitioner has failed to show that on either August 20, 2010 or on September 3, 2010 she was involved in an accident that arose out of and in the course of her employment with Respondent. The Arbitrator has reviewed extensive testimonies and medical evidence on whether Petitioner contracted MRSA at Respondent's place of work that would arise out of an in the course of that employment. The Arbitrator further notes that the conclusion as to accident in this case is based primarily on one of lack of credibility, lack of corroboration and speculation.

First, the Arbitrator denies Petitioner's claim for 10 WC 38521 as she selected two dates of accident, presumably surmising that her exposure to MRSA may have been either date. Petitioner never gave credible testimony explaining her decision to select these two dates on one claim as alleged accident or exposure dates. Second, Petitioner's histories of how she became or believed she became exposed varied as shown in the evidence. For example, she testified that she noticed blisters and bleeding when she punched out on September 3, 2010 but also noticed similar markings 2 weeks prior. Petitioner never provided testimony as to what area of the workplace she worked two weeks prior. In her initial medical record at Resurrection, varied lengths of time for the presence of these symptoms included 1 week and 2 weeks. See, Px10. There is no mention of any workplace exposure at this initial visit. Then, when Petitioner finally completed a report on September 7th, Petitioner speculated that she thought she may have touched her face accidentally while wearing gloves. Px10:91, Rx4. However, Dr. Firoozi noted Petitioner presumably came into contact with cleaning products. Petitioner did not relate any specific date this would have occurred to Dr. Firoozi. Px10:96. Again, no mention of MRSA is made and no mention of either of the two alleged accident dates are noted. After being diagnosed

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with MRSA, Petitioner saw Dr. Guzina on September 14th, where no mention of any workplace exposure is noted and neither date of alleged accident is noted.

Finally, both Drs. Firoozi and Guzina failed to give persuasive or credible testimony or opinions as to when and how in the workplace it was that Petitioner was exposed to MRSA. Both doctors failed persuasively reconcile the varying dates and histories noted in the record. The Arbitrator assigns little weight to these opinions as it relates to the issues of accident and causation. Likewise, the Arbitrator must assign little weight to the opinions of Dr. Yeo as he saw Petitioner only once in November 2010 and did not corroborate where or how the exposure occurred, on what date(s) an exposure occurred but rather simply concluded her MRSA exposure "probably occurred" at work. Px13. Based on the foregoing, the Arbitrator denies Petitioner's claim in 10 WC 38521. All other issues related to this claim are moot.

B. Date of Accident October 21, 2010 – 10 WC 44279 (MRSA)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove accidental injuries/exposure arising out of and the in the course of her employment occurring on October 21, 2010 with Respondent. Again, the conclusion to deny this claim is based primarily on a lack of credibility, corroboration and speculation.

Petitioner initially gave testimony that she did not work for approximately 3 months following her initial alleged MRSA exposure. Eventually, Petitioner testified that she returned to work for one day on October 21, 2010 and noticed symptoms once again. This became the basis of claim 10 WC 44279. Specially, she testified she returned to work for only a couple of hours when she noticed bubbling and bleeding on her hands, face, and legs. The Arbitrator finds this testimony is not only internally inconsistent, as she testified she did not work for 3 months, but also is contradicted by a preponderance of the evidence. Records showed that Petitioner treated with Resurrection on October 21, 2010, where MRSA was believed to be resolved. Px10:102. She was permitted to return to work. Petitioner then returned to Resurrection, complaining of facial and wrist swelling. Upon her return, the history noted that after Petitioner left employee health, 10 minutes later she noticed facial and wrist symptoms. *Id.* at 110. Again, no mention is made of any specific exposure to any unit, floor, department or room number she may have worked in or what she was doing. Petitioner also failed to give any specific details regarding same. The Arbitrator finds this initial history compelling, as it reasonably suggests that Petitioner never even returned to work but rather noticed symptoms after leaving employee health – the very same visit noted earlier on that date. Thus, this history is most consistent with Petitioner's initial testimony that she never worked for 3 months following her first alleged exposure. Even if she did work as alleged, an incident report noted Petitioner was pulling garbage when her face started feeling red. Rx5. This is not consistent with the history noted in Resurrection's records when Petitioner returned a second time. *See*, Px10:110. Further, Petitioner never gave such testimony. Notably, blood cultures taken in November 2010 were negative for MRSA, which would suggest that no exposure in fact occurred.

Based on the foregoing, the Arbitrator denies Petitioner's claim in 10 WC 44279. All other issues related to this claim are moot.

C. Date of Accident August 15, 2011 – 13 WC 23804 (Choking Incident)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove she sustained accidental injuries arising out of and the in the course of her employment occurring on August 15,

2011 with Respondent. The denial of this claim is based primarily on a lack of credibility, corroboration and speculation.

The Arbitrator finds Petitioner's version of events as related by her during her testimony were contradicted by both the injury report and the information contained in the medical records entered into evidence. Petitioner testified that on this date, a candy got stuck in her throat after a co-worker slapped her on her back. Petitioner testified that as she could not breathe, she was seen in the ER and underwent a procedure to dislodge the candy from her throat. However, the incident report noted that Petitioner bent down to grab a bucket and had a mint candy in her throat that got stuck. Rx8. There is no mention of a co-worker. Further, emergency room records noted that Petitioner accidentally swallowed or choked on a candy while sucking on it. There is no mention of a coworker or being slapped on the back or bending over. Further, contrary to Petitioner's testimony that candy had to be dislodged, an endoscopy failed to show anything. Finally, even if an incident occurred, under any of these scenarios, Petitioner failed to prove that this constituted an employment risk or that she was exposed to some other risk to a greater degree than the general public. Based on the foregoing, the Arbitrator denies Petitioner's claim in 13 WC 32804. All other issues related to this claim are moot.

D. Date of Accident March 19, 2012 – 12 WC 10959 (MRSA)

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Based on a preponderance of the evidence, the Arbitrator concludes Petitioner failed to prove accidental injuries/exposure arising out of and the in the course of her employment occurring on March 19, 2012 with Respondent. The denial of this claim is based primarily on a lack of credibility, corroboration and speculation.

Petitioner testified she had another "outbreak" of MRSA and it presented in the same manner as previously alleged, with bubbling, blistering, and bleeding. Again, this is contradicted by the information contained in Petitioner's medical records and the report of injury/illness filled out by her. In the injury report Petitioner claims she had started cleaning the isolation room when her face and hands started showing a rash. Rx9. Petitioner saw Dr. Guzina following this alleged incident, telling the doctor she was exposed to scabies rather than MRSA. Despite this, Dr. Guzina later testified she was certain Petitioner was suffering from MRSA because Petitioner improved with MRSA-type medications. Dr. Guzina admitted no testing was done to confirm this but insisted no testing was necessary. Dr. Guzina further concluded this alleged exposure to MRSA was from work but Dr. Guzina was never asked to reconcile either the incident report noting cleaning an isolation room or the alleged exposure to scabies. The Arbitrator assigns little weight to the testimony and opinions of Dr. Guzina as they based on a faulty understanding the of the histories surrounding this alleged incident. Based on the foregoing, the Arbitrator denies Petitioner's claim in 12 WC 10959. All other issues related to this claim are moot.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Having reviewed all evidence, the Arbitrator concludes Petitioner's current condition of ill-being as it relates to her low back/lumbar spine is causally related to her April 17, 2010 work

accident. Petitioner presented credible and corroborating evidence that she injured herself at work while lifting a bag of linen. The Arbitrator does not find the histories inconsistent. Respondent presented no contrary evidence. Therefore, Petitioner's low back is causally related to her April 17, 2010 accident.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Respondent presented into evidence the medical bills payment ledger showing $10,167.35 was paid for the treatment undergone by her. Rx10. Petitioner testified that to her knowledge all her medical bills related to the April 17, 2010 incident had been paid. However, Petitioner introduced into evidence a summary and corresponding bill totaling $12,043.00 between April 20, 2010 and August 3, 2010 and the corresponding medical financial history confirms an outstanding balance of $276.00. As such after analyzing the full set of medical bills the Arbitrator finds that Respondent has paid all reasonable and related medical bills of Petitioner as it pertains to the April 17, 2010 work incident.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. Evidence shows Respondent paid TTD benefits to Petitioner for the time-period of April 22, 2010 until July 11, 2010 in the amount of $3,427.11. Rx10. Petitioner testified she was taken off work by her doctor on April 22, 2010 and she remained off work until she was allowed to return to light duty work on July 11, 2010. Based on the evidence presented the Arbitrator finds TTD benefits were paid by Respondent for this time and no additional benefits are due to Petitioner.

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 found no accident in case numbers 10 WC 38521, 10 WC 44279, 12 WC 10959 and 13 WC 23804, to the extent this issue is in dispute, it is moot. *See*, Ax2-5.

Thus, the only remaining claim is Petitioner's low back injury for date of accident April 17, 2010 for case number 10 WC 38522. Ax1. The Arbitrator finds Petitioner sustained only a minor back strain as a result of the alleged incident and was found capable of returning to full duty work within three months. Petitioner gave no testimony as to the effects of her back injury. As such the Arbitrator finds Petitioner did not sustain any permanent partial disability as a result of the alleged incident.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARGARET NELSON,

Petitioner,

vs. NO: 18 WC 24452

STATE OF ILLINOIS/ILLINOIS STATE UNIVERSITY,

Respondent.

20IWCC0752

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 24, 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.

DATED: DEC 18 2020
DDM/pm

D. Douglas McCarthy

20IWCC0752

O: 11/10/20
052

Barbara N. Flores

DISSENT

A claimant who suffers from a pre-existing condition may recover benefits under the Act where an accident aggravates or accelerates her condition. *International Vermiculite Company v. The Industrial Commission*, 77 Ill. 2d 1 (1979). Further the accident must be a factor which contributes to the disability. *Caterpillar Tractor Co. v. The Industrial Commission*, 92 Ill. 2d 30 (1982). Mere correlation of symptoms is not enough as causation between the accident and the resulting disability must exist. *Long v. The Industrial Commission*, 76 Ill. 2d 561 (1979). Further, as the Supreme Court of Illinois 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." Petitioner failed to prove her condition is work-related. Therefore, I respectfully dissent.

The Majority in affirming and adopting the Decision of the Arbitrator affords greater weight to the opinions of Dr. Li over those of Dr. Stewart. I find the opinions of Dr. Stewart to be more persuasive; therefore, I afford greater weight to his opinions over those of Dr. Li.

On October 25, 2019, Dr. Stewart provided his opinions via evidence deposition. RX1. Dr. Stewart testified Petitioner's development of cubital tunnel syndrome was not connected to her work duties for Respondent. RX1, p. 10. Dr. Stewart explained that two requirements were necessary- 1) force and 2) positioning (flexion). *Id.* As to force, prolonged forceful grasping was necessary as it is such force which causes the muscular tension which on a repeated basis causes injury to the nerve. RX1, p. 11. As to flexion, as the elbow bends beyond 90 degrees, this places increased pressure on the nerve. *Id.* Dr. Stewart, in examining Petitioner, had her demonstrate her body mechanism while typing. RX1, p. 8. As Petitioner's job duties did not require the necessary force and flexion, Dr. Stewart opined Petitioner's development of cubital tunnel syndrome was unrelated to her job. RX1, p. 10-11.

On August 2, 2019, Dr. Li provided his opinions via evidence deposition. PX1. Dr. Li testified in opposition to Dr. Stewart finding a causal relationship between Petitioner's work duties- bending her arm at "around 90 degrees" as well as resting her arm on the chair caused her cubital tunnel syndrome. PX1, p. 16. Dr. Li opined force was not a factor but instead only the amount of flexion. PX1, p. 17.

Petitioner testified at trial as to her arm position which Petitioner's attorney noted "at at least a 90-degree angle." T. 15. Petitioner testified her arms were straight forward in a neutral position. *Id.* Petitioner then revised her testimony stating her left hand turned invoices as opposed

to typing, and she entered numbers into the computer with her right hand. T. 17. When questioned regarding the position of her right arm, Petitioner testified her arm was resting on the keypad, and she would lean on her right elbow "probably a little." *Id.*

As the Court noted in *Sisbro, Inc. v. The Industrial Commission*, 207 Ill. 2d 193, 212-13 (2003): Every employee whose disease or preexisting condition disables him while at work is not automatically entitled to a recovery under the Workmen's Compensation Act. In *Carson-Payson Co. v. Industrial Com. (1930), 340 Ill. 632, 639, 173 N.E. 184*, this court said, quoting from Lord Chancellor Loreburn's opinion in *Hughes v. Clover, Clayton & Co.* (1910), 102 L.T.R. 340, 342, *aff'g* (1909) 2K.B. 798, 101, L.T.R. 475: "In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that, whatever the man had been doing, it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone, or from the disease and employment taken together, looking at it broadly. *County of Cook, 68 Ill. 2d at 31-31.*"

Further, 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) ("the claimant's injury 'was directly connected with the manner and method in which she was required to do her work, and to use her arm in the discharge of her duties'").

Petitioner failed to prove a causal relationship between her work duties and her condition of ill-being, cubital tunnel syndrome. Dr. Stewart possessed a better understanding of Petitioner's job duties. See *Gross v. Illinois Workers' Compensation Commission*, 2011 IL App (4th) 100615WC, ¶ 24 ("An expert opinion is only as valid as the reasons for the opinion." (Internal quotation marks omitted.)). Moreover, Dr. Stewart opined it was not just flexion but force necessary to determine a causal relationship. Dr. Li completely disregarded the force component and provides an unsupported theory he references as "cell phone" elbow. I find Dr. Stewart's opinions more persuasive and accordingly afford the same more weight. As such, I find Petitioner failed to prove she sustained an accident which arose out of and 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

NELSON, MARGARET
Employee/Petitioner

Case# **18WC024452**

ST OF IL/ILLINOIS STATE UNIVERSITY
Employer/Respondent

20IWCC0752

On 2/24/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 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:

0564 WILLIAMS & SWEE LTD
JEAN A SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 62701

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

0000 ASSISTANT ATTORNEY GENERAL
LOUIS LAUGGES
500 S SECOND ST
SPRINGFIELD, IL 62706

0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
1901 FOX DR
CHAMPAIGN, IL 61820-7333

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

FEB 24 2020

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

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Margaret Nelson
Employee/Petitioner

v.

State of Illinois/Illinois State University
Employer/Respondent

Case # **18** WC **24452**

Consolidated cases: _____

20IWCC0752

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 **Bloomington**, on **12-17-19**. 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 **7-9-18**, 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 $**67,728.96**; the average weekly wage was $**1,302.48**.

On the date of accident, Petitioner was **55** 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 $**3,991.21** under Section 8(j) of the Act for medical bills it paid through its group carrier.

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $19,836.66 to Orthopedic and Shoulder Center, $175.00 to Ambulatory Anesthesia, $2,138.00 to Memorial Medical Center, and $4,045.11 to Prescription Partners, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner $280.00 for out of pocket medical bills she paid.

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $781.49/week for 37.95 weeks, because the injuries sustained caused the 15% loss of use of the right arm, as provided in Section 8(e) of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment;

however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

January 31, 2020
Date

FEB 24 2020

FINDINGS OF FACT

Petitioner, a 59-year old Business Manager II, testified that she had worked 28 years for Respondent prior to 7-9-18. Petitioner said that she worked 7.5 hours a day and that most of her workday was spent using a computer for data entry, budgeting and paying bills for Respondent's Energy Management Department.

Petitioner testified that in the 3-4 years prior to 7-9-18 accident, her workstation included an adjustable height worktable which allowed her to sit or stand during the workday. Petitioner said that she used a chair with arm rests and that she sat most of her workday. At arbitration, Petitioner demonstrated how she held her hands and arms during the workday prior to 7-9-18. Petitioner demonstrated and testified that she kept her hands in a neutral position and that her elbows were below the tabletop and were at a 90° angle while she was typing on her computer.

Petitioner testified that she was previously diagnosed with bilateral carpal tunnel from her computer work with Respondent. In Commission Decision 14 WC 033121, 16 IWCC 0799 (PX 8), Petitioner arbitrated her 7-3-14 repetitive trauma claim and was awarded 15% of her right hand and 12.5% of her left hand for bilateral carpal tunnel syndrome with surgery. In the Findings of Fact, the Commission found that prior to 7-3-14, Petitioner used the keyboard with her wrists angled up at approximately 60 degrees while typing (PX 8).

Petitioner said that after her carpal tunnel injury, Respondent adjusted her work site. Petitioner testified at arbitration that because of her prior carpal tunnel syndrome, she was aware of holding her wrists in a neutral position and that this caused her to bend her elbows more while using her computer.

Petitioner testified that on and before 7-9-18, she would type in numbers with her right hand while she used her left hand to turn documents. Petitioner said that while she did this, she would lean on her right elbow which rested on the armchair and that this put some pressure on her right elbow.

Petitioner said that in the months before 7-9-18, she began to notice some discomfort in her right elbow with numbness and tingling into her right ring and little finger. Petitioner said that the numbness and pain was worse at the end of a workday and work week and that her symptoms would improve over the weekends.

Petitioner treated with Dr. Li, an orthopedic surgeon, on 7-9-18. Petitioner said that when she met with Dr. Li she described her work station and she demonstrated how she held her hands and arms while she was using her computer at work. Petitioner said that after she treated with Dr. Li, she believed that her right arm and hand condition was work related.

Petitioner testified at arbitration that she is right hand dominant. Petitioner testified that the right ulnar surgery improved her symptoms, but that she still experiences occasional tingling in her right small and ring finger and that she has lost some dexterity in her right hand. Petitioner said that she uses the Voltaren Gel that Dr. Li prescribed a few times a week and that she performs the home exercises that Dr. Li's office recommended on a daily basis. Petitioner said that she experiences increased pain if she bumps her elbow.

Petitioner said that she retired three weeks before arbitration.

On 7-9-18, Dr. Li's record states that Petitioner had been working for ISU for a very long time and that she types all day with her elbow bent at about 90 degrees and that sometimes she puts her elbows right on the arm rest. The record states that over the last several months, Petitioner began to notice numbness and tingling going to the ulnar distribution, increased pain, decreased grip strength. Dr. Li stated that the more Petitioner

types and the more she is at her desk, the worse the symptoms are. Dr. Li stated the symptoms are worse at the end of the workday and that they improve over the weekends (PX 2).

Petitioner reported her accident to Respondent on 7-10-18 (RX 2, PX 5).

On 7-24-17, Petitioner underwent an EMG with Dr. Trudeau. Dr. Trudeau took a history of a new work accident with a 7-9-18 date of accident. Dr. Trudeau stated this was the third time that he had worked with Petitioner and that she always had a positive work motivation. Dr. Trudeau stated that the EMG revealed ulnar neuropathy at the right elbow, moderately severe by EMG (PX 3).

On 9-21-18, Petitioner underwent a right cubital tunnel release with anterior transposition of ulnar nerve (PX 4).

Petitioner followed up with physical therapy through Dr. Li's office. On 11-15-18, the therapist stated that Petitioner demonstrated progress towards goals, but had fatigue and minor weakness (PX 7, p. 56).

On 11-26-18, Dr. Li released Petitioner from his care. Dr. Li recommended Voltaren Gel because Petitioner had pain and that other non-narcotic options do not control adequately. Dr. Li recommended that Petitioner continue with her home exercise program (PX 7, p.p. 53, 54).

On 5-7-19, Petitioner met with Dr. Stewart's occupational therapist, Jill Hecht. Ms. Hecht took a history that Petitioner was a business manager at Illinois State University, that she does a lot of typing all day long, that she kept her arms at 90 degrees while typing, and that she sometimes placed her elbows on the arm rest. Ms. Hecht evaluated Petitioner's strength and noted a decrease in right upper extremity grip strength for the static grip testing, as compared to the contralateral side (PX 6).

Petitioner had a previous bilateral carpal tunnel claim with a 7-3-14 date of accident, case caption 14 WC 033121, 16 IWCC 0759. On 1-2-16, Arbitrator Dollison entered a decision finding that Petitioner's bilateral carpal tunnel syndrome with resulting surgery was causally related to the 7-3-14 accident. Arbitrator Dollison found that Petitioner credibly testified that she had some ongoing numbness and tingling with the right hand being worse than the left, that she has loss of grip, loss of strength, and some difficulties opening jars with both hands. Arbitrator Dollison found that those complaints were corroborated by the medical records (PX 8, p. 7 of the Arbitrator's decision). The Commission, by all three Commissioners, affirmed the decision on November 23, 2016 (PX 8).

Dr. Li, a board-certified orthopedic surgeon, testified on 8-12-19 that he had treated Petitioner in 2014 for bilateral carpal tunnel. Dr. Li testified that when he treated Petitioner for the bilateral carpal tunnel, he had discussed her job duties with Respondent in detail and that he was very familiar with her work environment (PX 1, 4-6). Dr. Li testified that in the past, he had treated Petitioner for some non-work-related conditions including her knee and heel. Dr. Li testified that the first time he treated Petitioner for right arm numbness and achiness, or cubital tunnel, was 7-9-18 (PX 1, p. 6).

Dr. Li testified that on 7-9-18, he took a history from Petitioner that she had worked for Respondent for 15 to 20 years and that she types all day. Dr. Li testified that while typing, Petitioner bent her elbows at a 90 degree angle and that she sometimes puts her right elbow on the arm rest. Dr. Li recorded a history that over the last several months, Petitioner began to notice numbness and tingling going into the ulnar nerve distribution, or the small and ring finger, with increasing pain and decreasing grip strength. Dr. Li stated that the more Petitioner typed at her desk, the worse the symptoms became. Dr. Li stated that Petitioner's symptoms were worse at the end of the workday and that they improved over the weekend (PX 1, p. 7).

Dr. Li testified that during the 7-9-18 exam, he found decreased sensation in the ulnar nerve with a bit of mild swelling around her right elbow. After taking the history and performing an examination, Dr. Li diagnosed Petitioner with right cubital tunnel syndrome from keeping her elbow bent around 90 degrees all day long and putting direct pressure on the cubital tunnel when she rested her elbow on the arm rest (PX 1, p.p. 7, 8). Dr. Li ordered an EMG with Dr. Trudeau on 7-24-18 which reflected ulnar neuropathy at the right elbow, cubital tunnel syndrome, moderately severe (PX 1, p.p. 8, 9).

Dr. Li said that he performed surgery on Petitioner on 9-21-18 consisting of a right cubital tunnel release with anterior transposition of the ulnar nerve (PX 1, p. 10, Deposition Exhibit 3). Dr. Li testified that during the surgery, he dissected out the ulnar nerve where it rested behind the elbow, mobilized it, and then moved it anterior, or in front of the axis, of the elbow. Dr. Li explained that he did this so that when she puts pressure on her elbow, it won't hit the ulnar nerve. Dr. Li testified that, by moving the nerve, when Petitioner bends her elbow, she is no longer tensioning, or stretching, the nerve (PX 1, p.p. 10, 11). Dr. Li testified that this is an anatomical change in the location of the nerve so that Petitioner would no longer put pressure on the nerve when resting her arm (PX 1, p. 11).

Dr. Li testified that Petitioner had typical post-operative pain and that he gave her a game ready vasopneumatic compression device to reduce the swelling. On 10-25-18, Dr. Li prescribed a Voltaren gel for pain (PX 1, p. 13).

Dr. Li testified that he last treated Petitioner for her cubital tunnel on 11-26-18. At that time, he prescribed ongoing use of the Voltaren gel to help control pain complaints as well as pain over the incision. Dr. Li prescribed a home exercise program on that date so that Petitioner could work on strength as Petitioner's strength was slightly less than normal (PX 1, p.p. 14, 15).

Dr. Li opined that Petitioner's work for Respondent in which she held her elbow at around 90 degrees and directly put pressure on the ulnar nerve when she rested her elbow on the arm rest, directly caused her cubital tunnel syndrome. Dr. Li stated that Petitioner had typed all day and that she maintained her flexed posture of the elbow most of the workday. Dr. Li explained that the typing was irrelevant to the development of the cubital tunnel and that it was his opinion that the cubital tunnel developed from the flexed position and from resting the right elbow on the arm rest directly on the cubital tunnel. Dr. Li explained that as the elbow goes from full extension to flexion, there is increased pressure on the cubital tunnel nerve. Dr. Li stated that literally as the pressure gets greater there is decreased blood supply and decreased nutrition to the nerve regardless of whatever force might be applied (PX 1, p.p. 16, 17). Dr. Li cited a study by James Sutton in the Journal of Hand Surgery from December of 2011 entitled, "Morphology of the Cubital Tunnel: An Anatomical and Biomechanical Study With Implications For Treatment of Ulnar Nerve Compression" which supported his opinions (PX 1, p. 18, PX 11). Dr. Li testified that the angle of the elbow (as in using a cell phone), can contribute to the development of cubital tunnel beginning at 60 degrees. Dr. Li stated that at 60 degrees, there is increased pressure on the ulnar nerve, but it was much greater pressure at 90 degrees (PX 1, p.p. 18, 19).

Dr. Li testified that since Petitioner's cubital tunnel surgery, she has had good relief of her numbness and tingling, however she will always have some pain in the medial aspect of the elbow as a result of this surgery. Dr. Li said that Petitioner has permanency of anatomical change in that her nerve is no longer where it was placed originally (PX 1, p. 19).

Dr. Li reviewed Dr. Stewart's report and stated that he disagreed with Dr. Stewart's opinions that Petitioner's work did not contribute to the development of the cubital tunnel. Dr. Li testified that he did not think menopause caused Petitioner's cubital tunnel (PX 1, p.p. 20, 21). On cross examination, Dr. Li testified that Petitioner's age at the time of the accident could be a very minor component to being a contributing factor to the development of the cubital tunnel (PX 1, p. 25).

On 10-25-19, Dr. Patrick Stewart testified by deposition that he was board certified in orthopedic surgery with a certificate of added qualification for hand and upper extremity surgery (RX 1, p.p. 3-5). Dr. Stewart testified that he performed an examination of Petitioner on 5-7-19. Dr. Stewart testified that he reviewed medical records and took a history of Petitioner's work duties wherein she actually demonstrated her body position while doing data entry (RX 1, p. 8). Dr. Stewart testified that Petitioner had resolution of her symptoms of right cubital tunnel release with anterior subcutaneous transposition, but she still had some concern about her nerve as it is in a vulnerable position and if she bumps it, she gets numbness and tingling. Dr. Stewart said that Petitioner would need to be careful as far as pressure over that area where the nerve is now laying in the subcutaneous fat (RX 1, p. 10).

Dr. Stewart testified that he did not believe that Petitioner's work activities contributed to the development of her cubital tunnel condition (RX 1, p. 10). Dr. Stewart testified that cubital tunnel can be caused by a prolonged forceful grasp which puts a patient at increased risk for cubital tunnel because of stabilizing the wrist. Dr. Stewart said that the force had to be more than just holding a glass of water, it required some amount of muscular tension. Dr. Stewart stated that in order for the work to be a contributing factor to the development of cubital tunnel, the elbow must be flexed beyond 90 degrees before the cubital tunnel actually decreases in size enough to cause cubital tunnel syndrome (RX 1, p.p. 10, 11).

Dr. Stewart opined that if Petitioner's work had contributed to the cubital tunnel, he would have expected the left side to develop cubital tunnel syndrome in addition to the right side (RX 1, p. 13).

On cross examination, Dr. Stewart opined that there were no studies that suggested that compression on the cubital tunnel can start at 60 degrees as opposed to 90 degrees flexion. On cross, Dr. Stewart testified that direct pressure on the cubital tunnel nerve can contribute to the development of cubital tunnel syndrome (RX 1, p.p. 14-16, 21, 22). Dr. Stewart said that Petitioner had some increased risk of developing cubital tunnel because she was post-menopausal, she was a woman, and she was older than 52 years old. Dr. Stewart said that Petitioner did not have other risk factors such as diabetes, hypothyroidism, or smoking (RX 1, p.p. 18, 19).

On cross examination, Dr. Stewart agreed that Petitioner's history stated that the cubital tunnel symptoms increased while she was at work and that they were alleviated when she took a weekend off (RX 1, p.p. 20, 21).

C. Did an Accident Occur that Arose Out of and in the Course of Petitioner's Employment by Respondent?

The Arbitrator finds that Petitioner's work activities with Respondent on and before 7-9-18 caused an accidental injury. In making this finding, the Arbitrator notes Petitioner's testimony that she held her elbows at approximately 90 degrees to work on her computer close to 7.5 hours a day and that she put pressure on her right ulnar nerve by resting the right elbow on her arm rest while turning pages for data with her left hand.

The Arbitrator therefore finds that Petitioner sustained an accidental injury that arose out of and in the course of her employment.

F. Is Petitioner's Current Condition of Ill-Being Causally Related to the Injury?

With regard to the issue of causation, the Arbitrator finds that Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on Petitioner's credible testimony, the medical evidence, and Dr. Li's opinions. Dr. Li testified that he had treated Petitioner for a prior work related bilateral carpal tunnel claim in 2014, as well as some non-work-related conditions for her knee and heel. Dr. Li testified that he was very familiar with Petitioner's work environment. Dr. Li recorded a history that Petitioner bent her elbows at a 90 degree angle and that she sometimes put weight on her right elbow on the arm rest while typing. Dr. Li stated that the more Petitioner typed at her desk, the worse the symptoms were and that they improved over the weekend. Dr. Li opined that Petitioner's right sided cubital tunnel syndrome requiring surgery developed from the flexed position and also developed from resting her right elbow on the arm rest directly on her cubital tunnel. Dr. Li stated that as the pressure gets greater, there is decreased blood supply and decreased nutrition to the nerve regardless of whatever force might be applied.

The Arbitrator acknowledges that Dr. Stewart, Respondent's Section 12 examiner, concluded that Petitioner's cubital tunnel syndrome was not causally related to her work as he was of the opinion that Petitioner kept her elbows flexed at 80 degrees as opposed to 90 degrees. Dr. Stewart stated that in order for cubital tunnel to develop, the elbow must be flexed beyond 90 degrees. Although Dr. Stewart stated that Petitioner showed him how she held her arms and that she demonstrated flexion at 80 degrees, this is not consistent with Petitioner's testimony at arbitration, with the contemporaneous medical records, with the opinions of Dr. Li, or with Dr. Stewart's occupational therapist's record on 5-7-19. Dr. Li's 7-9-18 record states that she bent her elbows at a 90 degree angle while working.

The Arbitrator further finds that Petitioner likely developed right cubital tunnel because she rested her right elbow on the arm rest while typing. Dr. Li testified that this contributed to the development of cubital tunnel as it placed direct pressure on the cubital nerve. Dr. Stewart did not take a history of Petitioner resting on her right elbow while she typed, but he admitted on cross examination that direct pressure on the cubital tunnel nerve can contribute to the development of cubital tunnel syndrome.

Dr. Stewart also testified that had Petitioner's work contributed to the cubital tunnel, he would have expected the left side to develop cubital tunnel in addition to the right side. The fact that Petitioner leaned on her right elbow on the arm rest while turning pages with the left arm would explain why the cubital tunnel developed in the right arm but not the left. This further supports a finding of causation.

Accordingly, the Arbitrator finds that Petitioner's current condition of ill-being in her right elbow is causally related to her 7-9-18 accident.

J. Were the Medical Services thatwere Provided to Petitioner Reasonable and Necessary? Has Respondent Paid All Appropriate Charges for All Reasonable and Necessary Medical Services?

Based on the Arbitrator's conclusion on the issue of causation, the Arbitrator further finds that the Petitioner's medical treatment for her right cubital tunnel is reasonable and necessary in treating her work-related condition. Accordingly, the Respondent shall pay any and all medical expenses related to the treatment of her cubital tunnel, subject to the Fee Schedule as set forth in Petitioner's Exhibit 9 including $19,836.66 to Orthopedic and Shoulder Center, $175 to Ambulatory Anesthesia, $2,138 to Memorial Medical Center, and $4,045.11 to Prescription Partners. Respondent shall be given a credit for any 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 $280 for expenses she paid out of pocket for medical bills.

L. What Is the Nature and Extent of the Injury?

With regard to the issue of nature and extent, the Arbitrator notes that pursuant to Section 8.1(b) of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using 5 enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305.8.1(b), the criteria to be considered are as follows:

(i) The reported level of impairment pursuant to subsection (a): AMA Guides to Evaluation of Permanent Impairment;
(ii) The occupation of the injured employee;
(iii) The age of the employee at the time of the injury;
(iv) The employee's future earnings capacity; and
(v) Evidence of disability corroborated by the treating medical records.

Applying this standard to the claim, the Arbitrator makes the following findings listed below:

(i) Impairment.
Neither party presented an AMA impairment rating. The Arbitrator gives no weight to this factor.

(ii) Occupation.
Petitioner was employed by Respondent as a Business Manager II. Post-surgically, Petitioner returned to her regular duties as a Business Manager II for Respondent. The Arbitrator gives less weight to this factor.

(iii) Age.
Petitioner was 55 years old at the time of the injury. The Arbitrator gives some weight to this factor.

(iv) Future Earning Capacity.
There was no direct evidence presented regarding Petitioner's future earning capacity, and therefore, the Arbitrator gives no weight to this factor.

(v) Evidence of Disability.
There was evidence of disability corroborated by the medical records which show that Petitioner suffered an injury resulting in a moderately severe ulnar neuropathy which required a right cubital tunnel release with anterior transposition of the nerve. When Dr. Li released Petitioner at MMI, he recommended that Petitioner use Voltaren Gel for her ongoing pain and he also recommended that Petitioner continue with her home exercise program. Dr. Li testified that Petitioner had permanency of change in her anatomy post-surgically in that her ulnar nerve is no longer where it was placed originally. Dr. Li testified that Petitioner would always have some pain in the medial aspect of the elbow as a result of the surgery. Dr. Li's records and testimony is consistent with Petitioner's testimony. The Arbitrator gives greater weight to this factor.

Based on all the factors above, the Arbitrator concludes that the injuries sustained by Petitioner caused a 15% loss of use of her right 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 Prospective Medical	☐ Second Injury Fund (§8(e)18)
☐ Modify	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KONTIA BOWDRY,

Petitioner,

vs. NO: 18 WC 28762

WALGREENS DISTRIBUTION CENTER,

Respondent.

20IWCC0753

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, and prospective medical, and being advised of the facts and law, reverses the award of prospective medical treatment and modifies the decision of the Arbitrator as set forth below. 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).

Correction

The parties stipulated Petitioner was temporarily and totally disabled from March 29, 2018 through October 5, 2018, and Respondent paid $10,433.44 toward its Temporary Total Disability benefit obligation. The Arbitrator's decision awarded Respondent's credit but failed to award Petitioner the associated Temporary Total Disability benefits. Therefore, the Commission corrects the decision to award the stipulated Temporary Total Disability benefits from March 29, 2018 through October 5, 2018.

Conclusions of Law

On Review, Respondent urges the Commission to find Petitioner's condition of ill-being reached maximum medical improvement as of October 2, 2018. The Commission disagrees.

On October 2, 2018, Dr. Doll placed Petitioner at maximum medical improvement and discharged her from care. PX2. In so doing, Dr. Doll noted "significant inconsistencies between her subjective complaints and her objective findings." PX2. Significantly, Dr. Doll's assessment was based, in part, on the July 2018 MRI which was read as negative. PX2.

Two weeks later, on October 16, 2018, Petitioner presented to DC Eavenson. Petitioner complained of persistent neck pain and left shoulder pain with burning type numbness into the left hand involving the thumb and index finger dating back to the March 28, 2018 work injury. Upon conducting an examination, which included a positive Spurling's test, DC Eavenson's impression was cervical disc protrusion and left upper extremity radiculitis; noting Petitioner had an MRI in July which was reported as negative for cervical disc protrusion, DC Eavenson indicated, "I am not sure if something was missed, but she has continued to have symptoms, so this warrants another MRI." PX4.

On October 23, 2018, a repeat cervical spine MRI was completed. The radiologist, Dr. Ruyle, interpreted the scan as follows: 1) central annular tears and protrusions at the C3-4, C4-5 and C6-7 levels. There is extension of the protrusion or possible a separate small protrusion in the right neural foramen at C6-7 resulting in mild right foraminal stenosis. No central canal stenosis is observed at any of these levels. 2) Right foraminal protrusion with spurring at C2-3 resulting in moderate right foraminal stenosis but no central canal or left foraminal stenosis. PX7. Upon review of the updated MRI, DC Eavenson referred Petitioner to Dr Gornet. PX4.

The Commission notes the October 2018 MRI findings represent a clear departure from those of the "negative" July 2018 scan. As Dr. Doll did not review this diagnostic imaging, the Commission finds Dr. Doll's opinion as to maximum medical improvement is entitled to less weight. *See, e.g., Sunny Hill of Will County v. Illinois Workers' Compensation Commission*, 2014 IL App (3d) 130028WC, ¶36, 14 N.E.3d 16 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.)

The initial evaluation with Dr. Gornet occurred on November 6, 2018. PX5. Petitioner reported an onset of symptoms following the March 28, 2018 work accident; she described a symptom set of including neck pain to the left side, left trapezius, left shoulder and down the left arm into her forearm, thumb, index finger with burning and tingling. After an examination and review of the recent MRI, Dr. Gornet diagnosed radiculopathy due to a C6-7 disc injury sustained during the work accident. Dr. Gornet recommended a steroid injection at C6-7; in the meantime, Petitioner was to continue working full duty while attending chiropractic/physical therapy with DC Eavenson. PX5.

On November 20, 2018, Petitioner underwent a C6-7 interlaminar epidural steroid injection. PX8. When Petitioner followed up with Dr. Gornet, she advised she did not obtain substantial relief from the injection; noting Petitioner's examination findings were unchanged, Dr. Gornet recommended a single level cervical disc replacement. PX5. Dr. Gornet continues to recommend disc replacement surgery, and this is the basis of Petitioner's request for prospective medical care.

The Commission finds Petitioner's current cervical spine complaints remain causally related to her undisputed work accident. Given this determination, we must resolve the corollary issue of Petitioner's request for prospective care in the form of disc replacement surgery.

Section 8(a) of the Act requires Respondent to pay for medical expenses which are "reasonably required to cure or relieve from the effects of the accidental injury..." *820 ILCS 305/8(a)* (West 2013). See *F & B Manufacturing Co. v. Industrial Commission of Illinois*, 325 Ill. App. 527, 534, 758 N.E.2d 18 (2001) ("Under Section 8(a) of the Act, the claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of claimant's injury"). The Commission finds Petitioner failed to prove the surgery recommended by Dr. Gornet is reasonable or necessary.

The Commission notes interpretation of the October 2018 MRI is critical to resolution of this issue. The images from that diagnostic test were reviewed by Dr. Ruyle, Dr. Gornet, and Dr. Kitchens. While Dr. Gornet identified an "obvious disc herniation" (PX6, p. 8-9), Dr. Ruyle observed a disc protrusion at C6-7 (PX7) and Dr. Kitchens noted a disc bulge at C6-7 (RX1, DepX2). Therefore, the Commission is not convinced the underlying pathology necessitates the proposed surgery. The Commission is further cognizant of Petitioner's broad spectrum of symptoms. During the March 29, 2019 Section 12 examination, Petitioner complained not only of pain in her neck, left shoulder, and arm, but also of pain in the left side of her face as well as numbness in the left side of her face, jaw, and the left side of her tongue. Moreover, Petitioner reported bilateral straight leg raise testing provoked pain in the left side of her face and up into her head. RX1, DepX2. Petitioner reiterated the facial numbness complaint ("numbness in my jaw and my mouth") at trial. T. 19. Notably, Petitioner did not voice these unusual symptoms to Dr. Gornet; instead, her complaints to Dr. Gornet have been limited to what you would expect from a cervical spine injury: neck pain to the left side, left trapezius, left shoulder and down the left arm into her forearm, thumb, index finger with burning and tingling. PX5. Given Dr. Gornet is unaware of the full constellation of Petitioner's complaints, the Commission finds the likelihood of a successful outcome from the proposed disc replacement surgery is diminished. See *Krantz v. Industrial Commission*, 289 Ill. App. 3d 447, 450-51, 681 N.E.2d 1100 (1997) (The Commission is an administrative tribunal that hears only workers' compensation cases and deals extensively with medical issues) and *Long v. Industrial Commission*, 76 Ill. 2d 561, 566, 394 N.E.2d 1192 (1979) (The Commission possesses inherent expertise regarding medical issues). As such, the Commission denies the request for disc replacement surgery as we find that specific intervention is neither reasonable nor necessary as contemplated by Section 8(a) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 12, 2020, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $384.39 per week for a period of 27 2/7 weeks, representing March 29, 2018 through October 5, 2018, that being the stipulated period of temporary total incapacity for work under §8(b). Respondent shall have credit of $10,433.44 for payments already made.

20IWCC0753

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses in the amount of $230.00 to Dr. Gornet and $560.00 to Multcare Specialists, pursuant to §8(a) and subject to §8.2.

IT IS FURTHER ORDERED BY THE COMMISSION that the recommendation of a cervical disc replacement is neither reasonable nor necessary, and Petitioner's request for same is 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 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: DEC 18 2020

L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

LEC/mck

O: 10/20/2020

43

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

BOWDRY, KONTIA
Employee/Petitioner

Case# **18WC028762**

WALGREENS D C
Employer/Respondent

20IWCC0753

On 3/12/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% 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:

4463 GALANTI LAW OFFICE
DAVID M GALANTI
PO BOX 99
E ALTON, IL 62024

0180 EVANS & DIXON LLC
MICHAEL A KARR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

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)

Kontia Bowdry
Employee/Petitioner

v.

Walgreens D.C.
Employer/Respondent

Case # 18 WC 28762

Consolidated cases: _____

20IWCC0753

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **12/18/19**. 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, **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 **$29,982.36**; the average weekly wage was **$576.58**.

On the date of accident, Petitioner was **47** 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 **$10,433.44** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$10,433.44**.

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

ORDER

Petitioner's current condition of ill-being in her cervical spine is causally related to the injury of 3/28/18.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee scheduled, of $230.00 to Dr. Gornet and $560.00 to Multicare Specialists, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize the single level disc replacement surgery recommended by Dr. Gornet at C6-C7.

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.

Carl Lee
Signature of Arbitrator

3/11/20
Date

ICArbDec19(b)

MAR 12 2020

20IWCC0753

STATEMENT OF FACTS

Petitioner, Kontia Bowdry, is employed by Respondent, Walgreens D.C., as a General Warehouse Worker. Petitioner had been employed at that capacity for approximately 7 years. On March 28, 2018, Petitioner was picking up a heavy box overhead when the box dropped. Petitioner noticed weakness into her left arm immediately and had pain into her shoulder. Petitioner immediately reported this injury. Petitioner testified that she had never had problems in her neck or left arm before. Petitioner had never seen a chiropractor, medical physician, surgeon, or had an MRI for treatment related to the neck or left arm.

Petitioner was directed by the Respondent to Gateway Occupational. Petitioner gave a history of injury consistent to Gateway Occupational. She complained of radiating pain into her shoulder which radiated down into her elbow and up into her neck. (PX 1 at 13). Petitioner was held on light duty which the Respondent could not accommodate. (Id.) Petitioner was last seen on May 24, 2018 by Gateway Occupational. Because she was not improving with their care and treatment, she was referred to Dr. Milne for a shoulder consultation. (Id. at 1). Petitioner testified that the treatment that she received at Gateway did not help her condition.

Petitioner was seen by Dr. Milne on June 14, 2018. (PX 2 at 11). Petitioner gave a consistent history of injury with her testimony at trial. After conducting a clinical examination, Dr. Milne diagnosed the Petitioner with left sided cervicalgia, muscular versus radiculopathy. (Id. at 12). Dr. Milne opined that Petitioner did not need any treatment for her shoulder, and referred her to a cervical spine specialist, Dr. Doll. (Id.).

Petitioner was seen by Dr. Doll on July 12, 2018. Petitioner gave a consistent history of injury (PX 2 at 9). After conducting a clinical examination, Dr. Doll diagnosed the Petitioner with left cervical/parascapular strain, as well as cervical spondylosis. (PX 2 at 10). Dr. Doll continued the Petitioner's lifting restrictions and ordered an MRI of her cervical spine. (Id. at 10). Following the cervical MRI, Petitioner was next seen by Dr. Doll on July 30, 2018. Dr. Doll reported that the MRI study was negative, but the Petitioner continued to have left sided neck and upper shoulder symptoms, as well as a generalized heaviness in her left arm. (PX 2 at 8). Petitioner was also undergoing physical therapy. (Id.). Petitioner was last seen by Dr. Doll on October 2, 2018. Dr. Doll noted inconsistencies during a physical examination and placed the Petitioner at MMI. (Id. at 2). Petitioner testified that she received little improvement with the physical therapy treatment ordered by Dr. Doll.

By stipulation of the parties, Petitioner missed work and was paid Temporary Total Disability from 3/29/18 – 10/2/18, a period of 27 & 2/7 weeks.

Petitioner sought additional medical care from Multicare Specialists as she was continuing to have symptoms on 10/16/18. (PX 4 at 66). Petitioner complained of neck pain, left shoulder pain with burning type numbness into the left hand involving the thumb and index finger. Dr. Eavenson opined that as the first MRI was negative for cervical disc protrusion and she was still symptomatic that this warranted another MRI. (Id. at 67).

A cervical MRI was performed on October 23, 2018 at MRI Partners. This study revealed central annular tears and protrusions at C3-C4, C4-C5, and C6-C7 with a protrusion into the right neural foramen at C6-C7. (PX 7 at 1). Based on this MRI finding, Dr. Eavenson referred the Petitioner to Dr. Gornet for consultation. (PX 4 at 55).

Petitioner was first seen by Dr. Gornet on November 6, 2018. (PX 5 at 14). After reviewing the MRI and conducting a clinical examination, Dr. Gornet opined that the Petitioner was suffering from a bilobular protrusion right and left at C6-C7 with a central herniation present at C4-C5 and C5-C6. (Id. at 16). Dr. Gornet recommended a steroid injection and that the Petitioner continued to work full duty so he had a better assessment on whether this helped her symptoms. (Id.). Dr. Gornet continued to recommend chiropractic and physical therapy services and would see her back after the injection. (PX 5 at 15). Petitioner underwent a steroid injection at C6-C7 by Dr. Blake on November 20, 2018. Dr. Gornet noted that this injection did not provide any substantial relief. (Id. at 13). Dr. Gornet recommended a single level disc replacement at C6-C7. (Id.).

Petitioner was directed by the Respondent for an Independent Medical Exam which took place on March 29, 2019. (RX 1 at Depo Ex 2). Petitioner gave a consistent history of injury to Dr. Kitchens. (Id.). After conducting a clinical examination, reviewing the medical records, as well as reviewing the MRIs, Dr. Kitchens concluded that the Petitioner had multiple level cervical degenerative disc changes. (Id. at 12). Dr. Kitchens opined that Petitioner had reached MMI as of 10/2/18 and that she should not have surgery as she did not have cervical radiculopathy. (Id. at 13). Dr. Kitchens spends 80% of his practice in treatment of the spine. (RX 1 at 29). Dr. Kitchens is not Fellowship trained in spine nor in any other subspecialty. (Id.). Dr. Kitchens is not currently participating in any FDA clinical trials and has never done so in the past. (Id.). Dr. Kitchens admitted that 12% to 18% of his practice is driven by referrals from insurance companies or employers. (Id. at 33). Dr. Kitchens did not review any medical records that would contraindicate Petitioner's statement to him that she never had any prior cervical treatment before this injury. (Id. at 34).

Dr. Gornet causally connected the Petitioner's accident to the need for her single level disc replacement. (PX 6 at 10). Dr. Gornet is a Fellowship trained spine surgeon who devotes 100% of his practice to spine surgery. (Id. at 4). Currently, Dr. Gornet is participating in an FDA clinical trial for genetically modified stem cells to treat structural low back pain. (Id.) Dr. Gornet has also participated in an additional 45 FDA trials in the past. (Id. at 5). Dr. Gornet diagnosed the Petitioner with a disc herniation at C6-C7, mainly on the left side. (Id. at 7). Dr. Gornet felt that this was a disc herniation and not degenerative changes at that level. (Id. at 8). Dr. Gornet marked the films from 11/6/18 and circled the disc herniation directly on the films during his deposition. (PX at 9). This film was admitted into evidence as Petitioner's Exhibit #10.

Currently, the Petitioner complains of pain into her left arm down into her index and thumb. She further testified that she never had these problems before the incident. Finally, the Petitioner stated that she is in pain every day while working and would like to undergo the single level disc replacement as recommended by Dr. Gornet.

The following medical bills were admitted into evidence:

Dr. Gornet: $230.00
Multicare Specialists: $560.00

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner's C6-C7 disc herniation is causally related to the injury of 3/28/18. The Arbitrator places more weight on Dr. Gornet's testimony as to Dr. Kitchens testimony because he is Petitioner's treating physician, Dr. Gornet has participated in multiple FDA trials and he is Fellowship trained in spine surgery. Dr. Kitchens is not Fellowship trained in spine and spends a portion of his practice treating body parts other than spine. Further, the Arbitrator notes that the disc herniation on the MRI on November 8, 2018 was circled by Dr. Gornet is obvious, and indicative of a herniation rather than generalized degenerative disc disease.

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

The following medical bills were admitted into evidence:

Dr. Gornet: $230.00
Multicare Specialists: $560.00

The Arbitrator finds that the bills listed above are both reasonable and necessary and awarded to be paid pursuant to the Illinois fee schedule.

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

The Arbitrator finds that the Petitioner is entitled to the C6-C7 disc replacement as recommended by Dr. Gornet.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JORDAN SCHOTT,

Petitioner,

vs. NO: 17 WC 23971

STATE OF ILLINOIS,
CHOATE MENTAL HEALTH,

Respondent.

20IWCC0754

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, prospective medical treatment, 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 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 January 17, 2020 is hereby affirmed and adopted.

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

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

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

DATED: DEC 18 2020

D. Douglas McCarthy

DDM/tdm
O: 11/10/20
052

Stephen Mathis

DISSENT

I respectfully dissent. I find Petitioner failed to prove his current condition of ill-being in his cervical spine and his need for surgery is causally related to his accident of April 4, 2017. As such, I would deny Petitioner's request for prospective medical care and award temporary total disability benefits for the period of April 12, 2017 through March 30, 2018.

Petitioner testified he sustained injury to his right shoulder and neck on two occasions- May 17, 2016 and April 4, 2017. T. 11-12. Following the May 17, 2016 accident, Petitioner testified he received limited medical treatment from his primary care physician. T. 11. Following the April 4, 2017 accident, Petitioner testified he again sought treatment from his primary care physician who subsequently referred Petitioner to Dr. Gornet. T. 15. Dr. Gornet is currently recommending surgery which Petitioner desires to undertake. T. 19.

On January 31, 2019, Dr. Gornet provided his opinions via evidence deposition. PX8. Dr. Gornet testified he initially evaluated Petitioner on August 31, 2017 at which time Petitioner provided a history of neck pain which he associated to an accident occurring on April 14, 2017. PX8, p. 7-8. Dr. Gornet further testified Petitioner denied any prior neck problems. PX8, p. 8. Dr. Gornet opined Petitioner suffered from both annual tears and herniations at the C5-C6 and C6-C7 disc levels which were acute in nature and caused by Petitioner's April 4, 2017 accident. PX8, p. 13. On cross-examination, Dr. Gornet testified as follows: "If you can demonstrate to me that he had an active problem at or near the time of his accident requiring treatment, and he was undergoing treatment, yes, absolutely that could change my opinion. Sure." PX8, p. 46.

On March 15, 2019, Dr. Chabot provided his testimony via evidence deposition. RX5.

In opposition to Dr. Gornet, Dr. Chabot testified Petitioner suffered from a right shoulder contusion, neck/right shoulder pain, and right shoulder trapezius muscle strain. RX5, p. 18. Dr. Chabot opined Petitioner's cervical condition was degenerative in nature. RX5, p. 26. Dr. Chabot explained the February 13, 2018 CT scan did not evidence disc herniations, and this interpretation was confirmed by a neuroradiologist, Dr. Cizek, an expert in reading spine-related studies. RX5, p. 16; 21-22. More importantly, Dr. Chabot testified the February 13, 2018 CT scan was consistent with the CT scan performed on April 17, 2017. RX5, p. 26.

I find Dr. Chabot's opinions more persuasive than those of Dr. Gornet, and as such, I afford greater weight to Dr. Chabot's opinions. Dr. Chabot reviewed the multiple CT scans and MRI which he interpreted as evidencing degenerative findings. Dr. Chabot's interpretation of the February 13, 2018 CT scan was confirmed by a neuroradiologist, Dr. Cizek, an expert in reading spine-related films.

Dr. Gornet at the time of his deposition, had no knowledge of Petitioner's prior CT scan of April 17, 2017 as Petitioner affirmatively denied any prior neck problems. In fact, it was only after Dr. Gornet's deposition that Petitioner filed his Application for Adjustment of Claim regarding his May 17, 2016 accident. Dr. Gornet testified Petitioner's accident of April 4, 2017 caused acute findings i.e. disc herniations at the C5-C6 and C6-C7 levels. Such opinion is simply not supported by the diagnostic testing especially the April 17, 2017 scan about which Dr. Gornet was not even aware. See *Gross v. Illinois Workers' Compensation Commission*, 2011 IL App (4th) 100615WC, ¶ 24 ("An expert opinion is only as valid as the reasons for the opinion." (Internal quotation marks omitted.)).

Further, to the extent the majority relied on the causation opinion offered by Dr. Gornet in his July 11, 2019 record, I believe such is error as Respondent's objection based upon hearsay should have been sustained, and the records redacted accordingly.

As the Court noted in *RG Construction Services v. Illinois Workers' Compensation Commission*, "[t]he provisions of Section 16 at issue in this appeal assist in accomplishing that goal by easing the *foundational requirements* for the admission of a treating physician's records. *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 50, 976 N.E.2d 1 (stating the 2005 amendments to section 16 were meant 'to ease the *foundational requirements* for the admission of medical bills and records')." (Emphasis added). 2014 IL App (1st) 132137WC, ¶ 39. The amendments to Section 16 of the Act were undertaken to allow the admission of medical records in a more efficient fashion not to shield objectionable hearsay statements.

Certainly, treating physicians' records "are likely to contain medical opinions relating to a variety of aspects in the care, treatment, and evaluation of the employee." *RG Construction Services* at ¶ 39. Such opinions are offered as part and parcel of the care and treatment of a patient. An opinion offered relating to a causal relationship between an accident and a claimant's resulting condition of ill-being is neither necessary nor relevant to the diagnosis or

treatment provided by a doctor. Such statements are hearsay and do not qualify under the exception defined in the Rules of Evidence- Rule 803(4)- Statements for Medical Diagnosis or Treatment. *Illinois Rules of Evidence*- Rule 803(4) (2011).

Again, as the Court noted in *RG Construction Services*, "'under certain circumstances the probability of accuracy and trustworthiness [of a document] may serve as a substitute for cross-examination under oath.' *United Electric Coal Co. v. Industrial Commission*, 93 Ill. 2d 415, 444 N.E.2d 115, 117 (1982)." 2014 IL App (1st) 132137WC, ¶ 42. The Court went on to explain the Supreme Court's holding in *United Electric Coal Co. v. Industrial Commission*, wherein, the Supreme Court allowed a hearsay causation opinion into evidence despite the employer's objection to the same. The Court reasoned that the opinion testimony offered by the treating physician was, in part, based upon the opinions provided by the employer's examining expert physician. In such circumstances, the Court reasoned the opinions offered were trustworthy.

Dr. Gornet's July 11, 2019 record contains the following statements: "At this point, we would state that at a minimum his accident of April 4, 2017 where he was kicked and pushed in the chest and neck area has aggravated his underlying condition, but we have documented what we believe are disc injuries. At this point, our *opinions* have not changed." (Emphasis added). PX7. Such statements are hearsay and do not qualify as an exception under Rule 803(4) as the statements were not made for the purposes of diagnosis or treatment. These opinions were offered presumably for use at hearing. Further, unlike *United Electric Coal Co. v. Industrial Commission*, there is nothing in the record which indicates these opinions are inherently trustworthy. These causation opinions should have been redacted from the record.

For the above-stated reasons, I respectfully dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

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

SCHOTT, JORDAN
Employee/Petitioner

Case# **17WC023971**

19WC010736

CHOATE MENTAL HEALTH
Employer/Respondent

20IWCC0754

On 1/17/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4377 MICHAEL MILES ATTORNEY AT LAW
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PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

JAN 17 2020

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jordan Schott
Employee/Petitioner

v.

Choate Mental Health
Employer/Respondent

Case # **17** WC **23971**

Consolidated cases: **19 WC 10736**

20IWCC0754

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 **Mount Vernon**, on **October 9, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [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, **4/4/2017**, 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 $**34884.41**; the average weekly wage was $**670.85**.

On the date of accident, Petitioner was **26** 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 $**33830.05** for other benefits, for a total credit of $**33830.05**.

ORDER

Respondent shall pay reasonable and necessary medical services of $22,124.01, as provided in Section 8(a) of the Act. Pursuant to a stipulation between the parties, the medical bills awarded shall be paid directly to the medical providers per the Illinois medical fee schedule or PPO agreement whichever is less. The parties further agree that Respondent shall receive a credit for all medical bills previously paid.

The Petitioner's claim for future medical treatment prescribed by his treating physician is reasonable and necessary and causally connected to the 4/4/17 work accident and is the responsibility of the Respondent pursuant to Section 8(a) and the Illinois medical fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $447.23/week for 117 3/7 weeks, commencing 4/17/2017 through 7/12/2019, 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.

The Arbitrator finds the facts and determines the issues on the consolidated cases as follows:

I. May 17, 2016, accident -- 19 WC 01073 – Combined findings of fact and determination of issues.

On May 17, 2016, the Petitioner was working in the usual course of his work activities as a mental health technician for the Respondent, Choate Mental Health. On that date, the Petitioner was assaulted by a resident. According the accident report (RX 1) the resident attempted to punch the Petitioner. The Petitioner blocked the punches but was treated for injuries to the neck and right shoulder. The medical records indicated that the Petitioner sought medical care by his primary care provider the following day and had a CT-scan and x-rays taken of the cervical spine on June 28, 2016. (Rx 7)

The radiologist's findings of the CT-Scan stated that "Vertebral bodies demonstrate normal height, disc space and alignment. There is no compression fracture or subluxation. There is straightening of the cervical spine. The facets and posterior processes are unremarkable. . . ." (Id.)

These were the last medical records showing treatment for the any of the body parts claimed to be injured in the May 17, 2016, accident. No lost time was reported. The Arbitrator find the Petitioner reached MMI on June 28, 2016.

Therefore, for this accident the Arbitrator denies additional medical benefits or TTD.

II. April 4, 2017, accident. 17 WC 23971.

On April 4, 2017, the Petitioner was working in the usual course of his work activities when he was involved in a physical confrontation with a resident at the Respondent's facility in Anna. The Petitioner testified that he was taking an agitated resident to a room away from a group of other residents. During the escort, the resident tried to take the Petitioner to the ground. The Petitioner was able to pull away and other employees came to assist and control the resident. During the incident, the resident kicked the Petitioner in the upper body two or three times. The Petitioner further testified that an incident report was filled out. (Tx pp 12-13, Rx 2)

As a result of the incident, the Petitioner received injuries to the chest, right shoulder and neck. (Tx 13) He went to the Respondent's health services office the same day and was ordered to follow up with an MD. (Rx 3, p. 2)

The Petitioner's medical treatment will be discussed in further detail below, but a brief outline of the medical treatment is as follows:

The Petitioner treated with his primary care provider at Rural Health in Anna for injuries to the right shoulder and cervical spine. He performed some physical therapy. He was placed on light duty, which as of April 12, 2017, the Respondent could not accommodate. In August 2017, he was referred to Dr. Mathew Gornet, MD, an orthopedic spine surgeon, Following orthopedic work up, a cervical MRI and epidural injections into the C5-6 and C6-C7 vertebral spaces, Dr. Gornet recommended a two-level cervical disc replacement at C5-6, C6-7, which he stated was causally related to the April 4, 2017, work accident. The Respondent scheduled a Section 12 evaluation with Dr. Michael Chabot, DO, an orthopedic spine surgeon. The

Petitioner attended the evaluation on January 11, 2018. Following a review of the medical records from the date of the April 4, 2017, accident to the date of the exam, a review of x-rays, a physical examination, and an new CT Scan, Dr. Chabot, provided the opinion that the Petitioner's cervical condition as of that date was due to a pre-existing condition and not related to the April 4, 2017, work accident. The Respondent denied all further claims for benefits at that point. The Petitioner's treatment following denial consisted of visits to his primary care provider for pain medication. The Petitioner continued with a light duty restriction until July 12, 2019, when he followed up with Dr. Gornet. Following the office visit, Dr. Gornet stated that the Petitioner would need to be completely weaned from pain medication before proceeding with the recommended surgery. Dr. Gornet provided the Petitioner with a full duty release to increase his employment prospects. The Respondent terminated the Petitioner in January of 2019.

A detailed summary of the Petitioner's relevant medical treatment is as follows:

The April 5, 2017, records from Rural Health indicate that the Petitioner complained of right shoulder and neck pain following the altercation. He was prescribed cyclobenzaprine, Medrol Dosepak and Norco. Following x-rays of the right shoulder, the Petitioner was diagnosed with rhomboid strain, trapezius strain. He was started on physical therapy and medication. The X-ray report of the cervical spine revealed no acute fracture or listhesis involving the cervical spine and was compared to the CT study of the cervical spine performed on June 28, 2016. X-rays of the right shoulder showed no fracture or dislocation. (Px 6. pp. 83-89)

On April 11, 2017, the Petitioner returned to Rural Health for re-evaluation. He complained of increased neck pain and pain to the shoulder blades. His medications remained the same. During physical examination, tenderness and reduced range of motion (ROM) was revealed. A CT scan of the cervical spine was ordered, which showed evidence of small posterior disc osteophyte at C5-6 with mild to moderate bony central canal stenosis, mild to moderate bilateral bony neural foraminal narrowing secondary to uncovertebral and facet hypertrophy. C6-7 had a small posterior disc osteophyte complex with mild bony central canal stenosis, moderate right and mild to moderate left bony neural foraminal narrowing secondary to uncovertebral and facet hypertrophy. (Px 6, pp. 79-80.)

On April 18, 2017, the Petitioner returned to Rural Health and reported no change. Physical therapy was ordered and a possible referral for a neurosurgical consult was discussed. (Px. 6, pp. 77-78)

On May 3, 2017, the Petitioner returned to Rural Health and reported no change. Medications and physical therapy were to continue. (Px. 6, pp. 72-76)

On May 31, 2017, the Petitioner returned to Rural Health with continued complaints of shoulder and neck pain. On physical examination, there was tenderness and reduced ROM to the right shoulder. Norco was prescribed and he was referred for a surgical consultation. (Px 6, pp. 69-72)

On August 23, 2017, the Petitioner returned to Rural Health for re-evaluation of neck and shoulder pain. Norco was continued and his surgical consultation for August 31, 2017, was noted. (Px 6, pp. 62-64)

On August 31, 2017, the Petitioner had an initial spine examination with Dr. Gornet. The Petitioner provided a history of the April 4, 2017, work accident and detailed symptoms of neck pain, intermittent headaches, pain to both trapezius, right shoulder, and pain between the shoulder blades. Dr. Gornet ordered a cervical MRI, which was performed and reviewed by Dr. Gornet the same day. Dr. Gornet noted a large annular tear and disc herniation centrally at C5-6 and also C6-7. He also found a large foraminal fragment essentially obliterating the foramen on the right side, which correlated with the Petitioner's increased symptoms on the right. (Px Exhibit 7, page 117-118)

Dr. Gornet diagnosed a disc injury which caused referred pain to the shoulder which could have been the source of symptoms in the shoulder verses a direct injury to that joint. He was placed on light duty, which included no direct patient contact. Dr. Gornet prescribed Meloxicam and Cyclobenzaprine. (Id.)

On October 5, 2017, Dr. Gornet referred the Petitioner to Kaylea Boutwell, M.D., for an epidural steroid injection (ESI) at the C5-6 interlaminar epidural space. Then on November 9, 2017, Dr. Boutwell provided an ESI into the Petitioner's right C6-C7 interlaminar space. (Px 7)

On January 31, 2018, Dr. Chabot conducted the Section 12 examination and review of x-rays and CT studies. Dr. Chabot reviewed the MRI report, but not the MRI images at that time. As stated above, Dr. Chabot opined that the Petitioner's symptoms were degenerative in nature and not related to the work accident.

On February 13, 2018, the Petitioner had a CT Cervical Spine ordered by Dr. Chabot. (Rx 5, p. 15-16) Dr. Chabot testified that the 2/13/18 CT Scan "suggested the presence of broad based posterior disc herniation at C5-6 also along with disc osteophyte complexes indenting the subarachnoid space causing narrowing in the spinal canal. C6-7 revealed diffuse disc bulging along with disc osteophyte complexes indenting the anterior subarachnoid space causing mild narrowing in the spinal canal." (Id at p. 15). Dr. Chabot testified that he did not agree with these findings. (Rx 5, p. 41)

On February 14, 2018, an "over-read" study of the 2/13/18 CT Scan was conducted at the request of Dr. Chabot. (Rx 6) According to Dr. Chabot, the study showed evidence of osteophytes and stenosis, but no evidence of significant disc herniation. The report suggested that the MRI scan might be of value to assess for soft discs at the abnormal levels. (Id). Dr. Chabot agreed with the findings the over-read. (Rx 5, p. 22)

On March 22, 2018, the Petitioner returned to Dr. Gornet with complaints of mostly neck pain and intermittent headaches to both traps and both shoulders. Dr. Gornet noted that the Petitioner had remained off of narcotic pain medications, according to a state website. Due to the ongoing complaints and lack of improvement following conservative care and injection therapy, Dr. Gornet recommended a two-level disc replacement at the C5-6, C6-7 levels. Light duty restrictions continued. (Px 7, p. 128)

On June 4, 2018, the Petitioner returned to Dr. Gornet for a follow up. Dr. Gornet reviewed Dr. Chabot's report and made the following comments in his record:

"Dr. Chabot gave no explanation as to why if head chronic degenerative changes causing his current pain why they were not symptomatic before his accident of 4/4/17. Dr. Chabot did not detail any previous problems of significance with his neck. It is my opinion doubtful that Dr. Chabot has actually looked at these films in spite of the discussion. The MRI scan shows a fairly significant disc herniation at C5-6 and to a lesser extent at C6-7. Both of these could easily cause the fairly significant symptoms. . . . [I]t is unclear to me why Dr. Chabot's opinion is such an outlier." Dr. Gornet restated his opinion that the Petitioner's condition was related to the work injury. (Px 7, p. 130)

On September 21, 2018, Dr. Chabot provided a supplemental report stating that he reviewed a CT scan study from 2/13,2018 as well as an "over read" study of the same scan from Dr. Cizek. Dr. Chabot also reviewed the MRI images from August 31, 2017. Following this review, Dr. Chabot stated that his opinion remained unchanged. (Rx 5)

On December 3, 2018, the Petitioner returned to Dr. Gornet, bringing with him "numerous medical records." (Px 5, p. 132) After reviewing the records, Dr. Gornet stated that the records did "not cause me to change my opinion. . . . Exam is unchanged. Work status is unchanged. He continues to have pain, which affects his life and his quality of life. We continue to request treatment as outlined." (Px 7, p. 132)

In Dr. Gornet's evidence deposition conducted on January 31, 2019, he stated that before proceeding with surgery, an updated MRI and CT myelogram would need to be done. Following the surgery, the Petitioner would be off work for approximately three months, but a full duty release would be anticipated. (Gornet depo, pp. 20-21)

On July 11, 2019, the Petitioner returned to Dr. Gornet. The Petitioner's complaints were similar to his past visits. Dr. Gornet reviewed the 6/28/16 CT scan of the cervical spine and stated that it showed mild degenerative changes at C5-6, C6-7. The Dr. Gornet further stated that

"At this point, we would state that at a minimum his accident of 4/4/17 where he was kicked and pushed in the chest and neck area has aggravated his underlying condition, but we have also documented what we believe are disc injuries. At this point, our opinions have not changed. We will continue to follow him. We are waiting for approval. He would like to try a full duty release. . . . He continues to take Hydrocodone 10s. He has now gone from three tablets per day to now four tablets per day. Obviously, this does not bode well for any treatment and he would have to be weaned off all narcotics prior to us even beginning on thinking on treating him. At this point, I can follow-up with him as needed." (Px 5, p. 133)

At arbitration, the Petitioner testified that he continues to have a lot of stiffness in his neck and a lot of pain. Some days are worse than others, but it's hard to get comfortable. The Petitioner also testified that his range of motion is not what it used to be. He further testified that he takes Norco prescribed by his primary care provider at Rural Health and that Dr. Gornet would have access to his records. The Petitioner testified that he has attempted some recreational activities but he is mainly limited to walking. He stated he requested that Dr. Gornet release him to full duty in July so that his prospects of getting a new job would be better. He was fired from his employment with the Respondent in January 2019 and he remains unemployed. He testified that would be willing to commence a formal drug weaning program if that was what Dr. Gornet required before commencing with the two-level disc replacement should it be awarded by the Commission. (Tx pp. 19-21)

The Arbitrator decides the disputed issues as follows:

F. Is the Petitioner's current condition of ill-being causally connected to the April 4, 2017, work accident?
J. Was the medical treatment reasonable and necessary?
K. Is the Petitioner entitled to prospective medical care?
L. TTD

The Arbitrator finds that the Petitioner's current symptoms in his cervical spine are causally related to the April 4, 2017, work accident. The Arbitrator further finds that the treatment recommended by Dr. Gornet is reasonable and necessary and hereby awarded. The medical treatment to date has been reasonable and necessary.

The Arbitrator specifically finds the Petitioner credible. He accurately reported the work accident, promptly sought medical care, and provided a consistent history to all health care professionals throughout his treatment. Although the Petitioner had a work-related neck injury in 2016, the intervening records between the two accidents show that the Petitioner had stopped treating and was asymptomatic long before April 2017. The Petitioner's testimony was consistent with the histories provided in the medical records.

The Arbitrator accepts radiologist Matthew Ruyle's reading of the August 31, 2017, MRI of the cervical spine. Dr. Ruyle's report showed that there were objective findings of disc injuries to the C5-6, C6-7 levels, including a right paracentral-foraminal protrusion with an annular tear at C5-6, and left paracentral and right foraminal disc protrusions at C6-7, as well as a left paracentral annular tear. (Px 7, p. 120) The radiologist's findings were corroborated by Dr. Gornet. Additionally, according to Dr. Chabot, the February 13, 2018, CT Scan that he ordered was read by the first radiologist as showing a broad-based posterior disc herniation at C5-6 and diffuse disc bulges at C6-7 (Rx 5, p. 15.) The arbitrator further finds Dr. Gornet's detailed explanations of the differences in the opinions found throughout his testimony to be persuasive. (Px 8)

The Arbitrator does not accept the opinion of Dr. Chabot that the Petitioner did not have disc injuries as a result of the accident. First, Dr. Chabot did not compare the 2016 CT scan with the one taken in 2017, even though the Respondent had those available. (Cf. Rx 7) Given the Petitioner's relatively young age, Dr. Chabot would have needed to provide an analysis of the advancement of the degenerative processes, if any, between June 28, 2016, and April 4, 2017. This did not happen. Nevertheless, in reviewing the 2016 CT report and Dr. Gornet's review of the report, the Arbitrator notes that the radiologist reported no degenerative findings and Dr. Gornet found only minimal degeneration. (Compare Px 6, p. 88, with Px 7, p. 133) Secondly, the first radiologist that read the February 13, 2018, CT Scan ordered by Dr. Chabot found disc pathology, but then Dr. Chabot personally selected a second radiologist to read the study, who concurred with him. While there is nothing wrong with have an imaging study re-read, in this case, the Arbitrator accepts the reading of the initial radiologist because it is more consistent with the patient's history of complaints and the treating radiologist and surgeon who read the MRI. Thirdly, Dr. Gornet's emphatic analysis of the differences in his opinions verses Dr. Chabot's during his testimony was persuasive.

The Arbitrator further awards the Petitioner TTD from April 17, 2017, to July 12, 2019, when he received a full duty release from Dr. Gornet. The Respondent will be given a credit for any Section 8(a) TTD it has paid.

Carl Lee
Signature of Arbitrator

1/14/20
Date

JAN 17 2020

STATE OF ILLINOIS)
) SS.
COUNTY OF KANKAKEE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HENRY SZYMANOWSKI,

Petitioner,

vs. NO: 16 WC 9261

STATE OF ILLINOIS/IDOT,

Respondent.

20IWCC0755

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of permanent partial disability (PPD) benefits, and being advised of the facts and law, 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 weight afforded to the first and fourth factors under Section 8.1b of the Act. For the first factor [level of impairment], the Arbitrator noted that no impairment rating was introduced into evidence by the parties, but did not state the weight assigned to this first factor. The Commission affirms the Arbitrator's finding of no evidence of any impairment rating in the record, and therefore assigns no weight to this factor.

The Commission further modifies the weight placed on the fourth factor – Petitioner's future earning capacity. The Arbitrator stated that Petitioner was unable to return to work as a

road maintainer and he was forced to retire from the work force. The Arbitrator gave greater weight to this factor. The Commission notes that the parties did not dispute the fact that Petitioner was unable to return to work for Respondent as a result of his work-related injuries; Petitioner had been earning $1,009.66 on average per week with Respondent. With this consideration, together with the Arbitrator's findings for the remaining factors, the Commission can reasonably infer that Petitioner's work-related injuries had a negative impact on his future earning capacity. The Commission, however, finds that this fourth factor should be given slight weight and modifies the Arbitrator's Decision accordingly.

The Commission additionally notes that the Arbitrator awarded Petitioner 60% loss of the person as a whole in PPD benefits for his hernia injury, as well as his injuries to the cervical spine, left hip, and left shoulder; the award also considered the fact that Petitioner was unable to return to work as a road maintainer. However, although the Arbitrator noted Petitioner's lumbar spine injury and treatment in her findings, the Decision failed to include the lumbar spine in the Conclusions of Law. Petitioner underwent a back fusion at L5-S1 on December 29, 2016. Respondent did not dispute that Petitioner's lumbar spine injury was causally related to the February 19, 2016 work accident.

In light of the foregoing modifications to the weight assigned to the first and fourth factors, as well as including Petitioner's lumbar spine injury to the conditions causally related to the February 19, 2016 work accident, and as corroborated by the treating medical records, the Commission affirms the Arbitrator's ultimate PPD award of 60% loss of the person as a whole. The Commission finds that this award corresponds with the evidence in the record and the injuries sustained by Petitioner as a result of the February 19, 2016 work accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed April 16, 2020, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $13,776.59, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $673.11/week for 200 weeks, as provided in Section 8(b) of the Act. Respondent is entitled to a credit of $133,275.94 for TTD benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $605.80 per week for 300 weeks, because the injuries sustained caused the sixty-percent (60%) loss of the person as a whole, as provided in Section 8(d)2 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.

20IWCC0755

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

DATED: DEC 18 2020

D. Douglas McCarthy

Stephen J. Mathis

L. Elizabeth Coppoletti

DDM/pm
D: 12/9/2020
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SZYMANOWSKI, HENRY
Employee/Petitioner

Case# **16WC009261**

STATE OF ILLINOIS/IDOT
Employer/Respondent

20IWCC0755

On 4/16/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% 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:

0320 LANNON LANNON & BARR LTD
MICHAEL S ROLENC
200 N LASALLE ST SUITE 2820
CHICAGO, IL 60601

6212 ASSISTANT ATTORNEY GENL
DREW DIERKES
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 BUREAU OF RISK MANAGEMENT
801 S 7TH ST
6TH FL
SPRINGFIELD, IL 62703

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

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

APR 16 2020

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

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

HENRY SZYMANOWSKI
Employee/Petitioner
v.
STATE OF ILLINOIS/IDOT
Employer/Respondent

Case # **16 WC 9261**

20IWCC0755

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Kankakee**, on **February 20, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 19, 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, the average weekly wage was **$1,009.66**.

On the date of accident, Petitioner was **68** 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 **$133,275.94** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$133,275.94**.

ORDER

- Respondent shall pay reasonable and necessary medical services of **$13,776.59**, as provided in Section 8(a) of the Act.

- Respondent shall pay Petitioner temporary total disability benefits of **$673.11/week** for **200** weeks, as provided in Section 8(b) of the Act. Respondent receives a credit for paying **$133,275.94** in TTD benefits.

- Petitioner sustained permanent partial disability to the extent of **60% loss of use of the man as whole** pursuant to §8(d)(2) of the Act (300 weeks x $605.80 = $181,740.00).

See attached Addendum for the Arbitrator's analysis pursuant to §8.1b(b)

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

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

Signature of Arbitrator

4-14-2020
Date

APR 16 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Henry Szymanowski	)	
	)	
Employee/Petitioner,	)	Case No. 16 WC 9261
v.	)	
	)	Kankakee, IL
State of Illinois/IDOT	)	
	)	
Employer/Respondent.	)	20IWCC0755

ADDENDUM TO THE DECISION OF THE ARBITRATOR

On February 20, 2020, this matter proceeded to hearing before the Arbitrator in Kankakee, Illinois for hearing (Arb. 1).

Petitioner testified he worked as a Road Maintainer for the Illinois Department of Transportation (Respondent) beginning in October 2015. Petitioner's duties included cutting trees, patching holes, responding to accidents, and plowing snow. Prior to starting work at IDOT, Petitioner worked as an over the road driver for 30 years. Petitioner passed a DOT physical exam before he was hired.

Regarding his physical condition prior to this accident, Petitioner had no neck, back or leg problems, although he did have his left knee scoped about 18 years ago. Petitioner also underwent a prior hernia repair and left shoulder surgery in 2006. Regarding his prior left shoulder surgery, Petitioner did not seek any medical treatment between the time he was discharged from treatment by his surgeon until he had this car accident. Prior to beginning his job for Respondent, Petitioner passed the mandatory physical exam.

The parties stipulated that on February 19, 2016 Petitioner was on road patrol picking up debris. At the end of his shift, the winds were extremely high. While unloading his truck in the stockyard, a 12 foot wooden 2 x 4 was knocked loose by the wind, knocking him unconscious. According to his co-workers, the 2 x 4 had knocked Petitioner over, slamming his groin area into side of his truck before Petitioner's body fell into the truck's bed. When he regained consciousness, Petitioner was disoriented and could not see. He was lifted from the truck bed by his co-workers but Petitioner was unable to stand up and could not move the left side of his body.

Petitioner's foreman rushed him to the emergency room at St. Mary's Hospital where he was examined and CT scans of his head and neck were performed. The head CT was negative and the cervical CT revealed disc degeneration and spondylosis at C2-C3 and C5-C6. Petitioner was diagnosed with a head injury, scalp abrasion, a cervical sprain and prescribed Cyclobenzaprine and Norco (PX #1).

On February 23, 2016 Physicians Immediate Care noted Petitioner's complaints of neck and left shoulder stiffness and pain. Petitioner was diagnosed with sprains to the left shoulder and cervical spine and was released to restricted work duties (PX #2).

On February 26, 2016 Petitioner's primary physician, Dr. Jordan Goodman of Presence Medical Group, noted a history of left shoulder and left hip pain. The doctor recommended an orthopedic consult (PX 3 at 1).

On February 27, 2016 Petitioner followed up at Physicians Immediate Care with a history of a burning sensation in his left hip joint which radiated into his left lower leg. Petitioner was released to restricted work and discharged to his primary care physician (PX #2). Petitioner returned to Dr. Goodman on March 10, 2016 and March 12, 2016 with persistent complaints of left shoulder and hip pain. Dr. Goodman referred Petitioner to Dr. Antkowiak, an orthopedic physician, for his left hip pain (PX #3).

On March 16, 2016 Dr. Antkowiak of Oak Orthopedics noted Petitioner's complaints of radiating left leg, hip, and groin pain. The doctor administered a cortisone injection into the left hip and reviewed x-rays noting evidence of acetabular impingement, an increased center edge angle and a decrease in the femoral head. Dr. Antkowiak diagnosed Petitioner with femoral acetabular impingement, SI joint pain and possible lumbar radiculopathy. He recommended a lumbar MRI, physical therapy, home exercises and released Petitioner to restricted work (PX #5).

On March 24, 2016 Petitioner returned to Dr. Goodman reporting the development of a left inguinal lump along with neck pain and spasms. Dr. Goodman diagnosed Petitioner with neck pain, spasms and a left inguinal hernia, referred Petitioner to a general surgeon for hernia repair and ordered a cervical spine MRI (PX #3).

On March 30, 2016 lumbar MRI at Oak Orthopedics revealed a bilateral L5 pars defects with grade 1 anterolisthesis of L5 and S1 with moderate asymmetric stenosis of both L5 infrapedicular level foraminal zones. Minimal degenerative retrolisthesis at L4 - L5 with moderate asymmetric L4-L5 degenerative facet hypertrophy. A small central bulging disc was noted at L2-L3 and L3-L4 (PX #5). Dr. Antkowiak reviewed the MRI noting the findings were consistent with lumbar radiculopathy. He referred Petitioner to a spine specialist in his group, Dr. Jimenez. Dr. Antkowiak also diagnosed Petitioner with moderate degenerative arthrosis of the left joint and the right hip joint. He noted a tear of the superior acetabular labrum of the left hip. Petitioner's prior work restrictions were continued (PX #5).

On April 4, 2016 Dr. Dong Ouk Kim recommended a diagnostic ultrasound related Petitioner's groin pain (PX #4).

On April 27, 2016 Petitioner underwent a cervical MRI that was significant for spondylitic changes at C5-C6 due to decreased disc space, anterior osteophyte and spondylitic ridge formation. Facet arthrosis was seen in multiple levels. Foraminal stenosis was seen especially at left C3-C4 and left C5-C6 (PX #3).

On April 27, 2016 an ultrasound of Petitioner's left groin revealed no evidence of any hernia although soft tissue scarring and a lymph node were noted (PX #4).

On May 4, 2016 Dr. Jimenez reviewed the cervical MRI's and diagnosed Petitioner with osteoarthritis of his spine with radiculopathy. Dr. Jimenez opined that Petitioner had exhausted conservative care and discussed performing a fusion at C5-C6 (PX #6).

On May 23, 2016 Petitioner returned to Dr. Kim and advised he had been doing well following his hernia repair of June 15, 2015 until the February 19, 2016 work accident at issue. Petitioner was complaining of pain in his groin, left hip, low back and neck. Dr. Kim noted that Petitioner had an enlarged lymph node in the left groin and recommended another ultrasound (PX #4).

On June 13, 2016 a pelvic ultrasound revealed densely shadowing surgical mesh related to the prior hernia repair (PX #4).

On June 15, 2016 Dr. Kim reviewed the ultrasound and advised that Petitioner would likely need an excisional biopsy (PX #4).

On June 23, 2016 Petitioner returned to Dr. Antkowiak complaining of left shoulder and left hip pain. He was advised to return in six months following his neck surgery (PX #5).

On June 24, 2016 Dr. Jimenez performed a C5-C6 anterior cervical discectomy with decompression and fusion, a C5-C6 anterior cervical instrumentation and a C5-C6 anterior use of interbody device with autograft (PX #7).

Petitioner returned to Dr. Jimenez on August 1, 2016 with complaints of posterior neck pain radiating into his right shoulder. Petitioner was advised to begin physical therapy (PX #6).

On August 19, 2016 Dr. Kim performed a repair of a recurrent left inguinal hernia on Petitioner (PX #4).

On August 29, 2016 Dr. Kim advised Petitioner of a buckling of the inguinal hernia mesh. Petitioner was then debrided and re-approximated. Petitioner advised that pain relief was almost immediate (PX #4).

On September 13, 2016 Petitioner returned to Dr. Jimenez reporting achy neck pain. He was noted to be making good progress following his surgery but still had residual weakness. Additional therapy was recommended regarding the lumbar spine. Dr. Jimenez recommended a fusion as a simple decompression could destabilize Petitioner. He recommended lumbar physical therapy first (PX #6).

Petitioner returned to Dr. Kim on September 19, 2016 advising he had minimal inguinal pain. Dr. Kim advised Petitioner could resume all normal activity and follow-up as needed (PX #4).

On October 26, 2016 Petitioner returned to Dr. Jimenez reporting 90% benefit from the physical therapy although he still had some neck pain radiating into the left shoulder. Lumbar surgery was discussed. Dr. Jimenez recommended a posterior spinal fusion with TLIF (PX #6).

On December 21, 2016 Petitioner returned to Dr. Antkowiak for his left hip and left shoulder pain. Petitioner was advised to follow-up as needed for his hip and to obtain advanced imaging to evaluate the left glenoid as over time the cartilage may wear and the glenoid component may need to be replaced (PX #5).

On December 29, 2016 Dr. Jimenez performed an L5-S1 interbody fusion, L5-S1 hemilaminectomy, facetectomy, L5-S1 instrumentation cage, screws, rod and placement of interbody device, use of intraoperative guidance navigation and autograft (PX #8).

On January 9, 2017 Petitioner returned to Dr. Jimenez noting increased pain following his lumbar fusion. He complained of a constant burning in his left hip and pain down his left leg. He noted his left hip pain had worsened since his back surgery. Petitioner was advised to go directly to the emergency room of Riverside Medical Center (PX #6). Petitioner was then admitted to Riverside Medical Center where he was diagnosed with acute bilateral low back pain without sciatica, status lumbar laminectomy. He had severe back pain radiating into the right leg and was found to have a recurrence of shingles in the right sacral area. Petitioner was improved enough to be discharged on January 10, 2017 (PX #8).

On January 23, 2017 Petitioner returned to Dr. Jimenez with complaints of constant burning in his left butt, calf and left great toe and left leg weakness which was present before the surgery. Dr. Jimenez recommended lumbar x-rays and physical therapy (PX #6).

On January 30, 2017 lumbar MRI at Riverside Medical Center revealed post-op changes from the posterior fusion and decompression at L5-S1; unchanged grade 1 anterolisthesis of L5 and S1; unchanged degenerative disc disease at L4-L5 (PX #5).

On February 6, 2017 Petitioner underwent a CT scan of his upper left extremity at Riverside Medical Center that revealed post-op changes from his left shoulder surgery (PX #5).

On February 15, 2017 Petitioner returned to Dr. Antkowiak complaining of constant burning in his left leg. He advised his buttock pain was the main issue. He also advised his hip pain had gotten worse (PX #5).

On February 22, 2017 Petitioner returned to Dr. Goodman who reviewed the recent MRI. He recommended Petitioner continue with physical therapy and referred him to pain management for consideration of a lumbar ESI. Dr. Goodman then further opined the leg burning may be due to scar tissue at the surgical site (PX #3).

On February 28, 2017 Petitioner was seen by Dr. Juan Santiago-Palma at Oak Orthopedics pursuant to Dr. Jimenez's referral. Dr. Santiago-Palma recommended an ESI which he performed on March 14, 2017 (PX #5).

On March 5, 2017 Dr. Kim, noting Petitioner's complaints of persistent left groin pain, recommended a repeat ultrasound which was performed on March 13, 2017 at Riverside Medical Center. The ultrasound did not show a recurrent hernia. Dr. Kim prescribed Neurontin and a pain doctor (PX #4).

On April 3, 2017 Petitioner returned to Dr. Santiago-Palma advising he obtained 60% relief after the ESI (PX #5).

On April 5, 2017 Petitioner returned to Dr. Antkowiak for his left hip pain and received a cortisone injection into the left hip (PX #5).

On April 24, 2017 Petitioner returned to Dr. Jimenez and advised that the numbness and tingling in his left foot and toes had slightly improved. He was doing well with physical therapy and continued to be authorized off work (PX #6).

On May 15, 2017 Petitioner was discharged from therapy at ATI. He underwent 46 therapy sessions related to his back.

On May 17, 2017 Petitioner returned to Dr. Antkowiak reporting persistent left hip pain. Dr. Antkowiak referred Petitioner for physical therapy (PX #5).

On May 22, 2017 Dr. Jimenez noted Petitioner's report of slight low back pain that did not radiate but was aggravated by sitting and laying down for long periods of time. He complained of occasional numbness and tingling in his left foot and toes (PX #6).

On May 30, 2017 Dr. Santiago-Palma noted Petitioner's complaints of low back pain. Dr. Santiago-Palma advised he was awaiting the results of an A/B index which he subsequently reviewed with Petitioner on June 27, 2017. Dr. Santiago-Palma then recommended an ESI using the left L5-S1 approach (PX #5).

On June 14, 2017 Petitioner returned to Dr. Antkowiak reporting improvement since his last visit. He still complained of mild to severe pain depending on the length of time sitting. The cortisone injection provided relief but the pain was now returning. Dr. Antkowiak opined that Petitioner may need a repeat injection as needed (PX #5).

On July 26, 2017 Petitioner returned to Dr. Antkowiak who diagnosed a labral tear/CAM/pincer impingement. Having failed five months of non-operative treatment, Dr. Antkowiak recommended surgery (PX #5).

On August 14, 2017 Petitioner underwent a lumbar epidural steroid injection from Dr. Santiago-Palma (PX #5).

On August 21, 2017 Petitioner returned to Dr. Jimenez complaining of constant pain with numbness and tingling in the top of his left foot. Petitioner was advised to return after he completed his orthopedic treatment for his left hip (PX #6).

On September 22, 2017 Dr. Antkowiak performed a left hip CAM resection and acetabular labral debridement at Riverside Medical Center (PX #5).

On September 25, 2017 Petitioner began left hip physical therapy at ATI. Petitioner then returned to Dr. Antkowiak on October 4, 2017 and was advised to continue with physical therapy. Petitioner was also authorized work (PX #5).

On October 25, 2017 Petitioner returned to Dr. Antkowiak who noted he was making the expected progress four weeks post-surgery (PX #5).

On January 24, 2018 Petitioner returned to Dr. Antkowiak and was advised to continue with his physical therapy. He also was informed that work conditioning would be ordered (PX #5).

Petitioner testified he was discharged from ATI on January 31, 2018. He had undergone 52 sessions of left hip physical therapy.

Petitioner began work conditioning at ATI on February 5, 2018 and was discharged on February 11, 2018.

On February 28, 2018 Petitioner returned to Dr. Antkowiak complaining of left shoulder pain. Dr. Antkowiak opined Petitioner might have a possible rotator cuff tear and recommended an MRI (PX #5).

Petitioner underwent a left shoulder MRI at Oak Orthopedics on March 13, 2018 that revealed intact rotator cuff tendons and a mild AC joint osteoarthrosis (PX #5).

On April 4, 2018 Dr. Antkowiak noted Petitioner's complaints of increased left hip and left shoulder pain. He now noticed constant stabbing pain which increases with range of motion and popping and clicking. He was noted to be making progress regarding his hip. Dr. Antkowiak opined Petitioner should consider a possible conversion to a total shoulder replacement (PX #5).

On May 7, 2018 Petitioner returned to Dr. Santiago-Palma complaining of low back pain. Petitioner was diagnosed with lumbosacral radiculopathy and post-laminectomy syndrome (PX #5).

On June 15, 2018 Dr. Antkowiak performed a left revision anatomic total shoulder arthroplasty, rotator cuff repair, subscapularis and biceps tendon transfer (PX #5).

On June 20, 2018 Petitioner commenced physical therapy for his left shoulder. He testified he remained in physical therapy until February 26, 2019 when he was discharged after undergoing 82 sessions for his shoulder.

Petitioner returned to Dr. Antkowiak for his shoulder on June 27, 2018. He was noted to be making expected progress (PX #5). Petitioner's next visit with Dr. Antkowiak was on July 11, 2018 with overall improvement noted (PX #5).

Petitioner had monthly visits with Dr. Antkowiak between August 15, 2018 and June 26, 2019. Petitioner was still complaining of rotator cuff weakness and was informed he may need further surgery in the future.

On July 31, 2019 Petitioner had his final visit with Dr. Antkowiak. At that time, Dr. Antkowiak suggested a reverse total shoulder arthroplasty due to evidence of a full thickness rotator cuff tear of the supraspinatus as seen on the ultrasound exam. Dr. Antkowiak opined Petitioner had reached MMI and released him with permanent restrictions for his left upper extremity which included no overhead activity, no lifting up and away from his body with forward flexion or abduction and no lifting more than 2 pounds above chest level (PX #5).

On July 1, 2019 Petitioner returned to Dr. Jimenez who noted excellent healing with the fusion. Petitioner reported experiencing fatigue and deconditioning so he was advised to continue with his physical therapy (PX #6).

On August 5, 2019 Dr. Jimenez noted Petitioner's report of improvement with his physical therapy. Petitioner was advised to continue with physical therapy and return in one month (PX #6). On August 19, 2019, Petitioner was discharged from ATI for his back therapy after 37 sessions.

On September 18, 2019 Petitioner underwent an FCE at ATI that concluded Petitioner was functioning at the medium physical demand level which fell below the DOT level for Petitioner's job. The results of the FCE were found to be valid (PX #14).

On October 2, 2019 Dr. Jimenez reviewed the FCE and released Petitioner to return to work pursuant to the permanent restrictions contained in the FCE. Petitioner was advised to follow-up as needed (PX #6).

Petitioner testified he has not worked anywhere since February 19, 2016. He applied for a job at Prairie State College but Petitioner was unable to pass the required physical exam.

Conclusions of Law

The Arbitrator adopts and incorporates the above findings in support of the following conclusions of law.

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

The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that some portion of Petitioner's current condition of ill-being as it relates to his neck, shoulder, back, and hip injuries are causally related to the injuries he sustained on February 19, 2016 as a result of the work accident. The Arbitrator's findings on this are fully set for the below in the issue L.

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

The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that the medical treatment for the injuries he sustained was necessary. The Arbitrator finds, based on the medical records contained in Petitioner's exhibits 1 through 14, that the charges for services contained in Petitioner's Exhibit 9, 12, 13, and 14 were reasonable and necessary. The Arbitrator notes remaining balances of $13,776.59 for Petitioner's treatment. Respondent-Employer shall pay $13,776.59, as provided in Sections 8(a) and 8.2 of the Act.

ISSUE (K) What temporary benefits are in dispute?

The Arbitrator concludes that Petitioner is entitled to TTD from February 22, 2016 through December 23, 2019, for a total of 200 weeks.

The Arbitrator notes that Respondent's Exhibit 1 shows payments totaling $133,275.94 in TTD for which Respondent shall have credit.

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

Section 8.1(b) of the Act addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b. Section 8.1b states:

> 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.
> 820 ILCS 305/8.1b

The Arbitrator notes that no impairment rating was introduced into evidence.

(ii) Occupation of the injured employee:

Petitioner was employed with the Illinois Department of Transportation as a road maintainer at the time of the accident. He was unable to return to work with said employer due to permanent restrictions being placed on him. The Arbitrator gives greater weight to this factor.

(iii) The age of the employee at the time of the injury:

Petitioner was 68 years old at the time of the accident and nearing the end of his work life. The Arbitrator also considers the fact that, due to his age, Petitioner had a more difficult time in

recovering from his injuries than a younger person. The Arbitrator gives some weight to this factor.

(iv) The employee's future earning capacity:

Petitioner was unable to return to work as a road maintainer and forced to retire from the work force. The Arbitrator gives greater weight to this factor.

(v) Evidence of disability corroborated by the treating medical records:

Cervical spine:

On June 24, 2016 Dr. Jimenez performed a C5-C6 anterior cervical discectomy with decompression and fusion; a C5-C6 anterior cervical instrumentation; a C5-C6 anterior use of interbody device and use of autograft. At Petitioner's last visit with Dr. Jimenez on September 13, 2016, Petitioner was reporting achy neck pain and residual weakness. Dr. Jimenez continued to recommend physical therapy.

Regarding the current condition of his cervical spine, Petitioner testified he has trouble turning his neck. He further testified that when he does turn his neck, he hears creaking and grinding.

Left hip:

On September 22, 2017 Dr. Antkowiak performed a left hip CAM resection and acetabular labral debridement at Riverside Medical Center. Petitioner was discharged from physical therapy for his left hip on January 31, 2018 after completing 52 sessions. In Petitioner's final visit with Dr. Antkowiak on June 6, 2018 Petitioner complained of numbness and was advised to continue with a home exercise program.

Regarding the current condition of his left hip, Petitioner testified he cannot lay on his left side and has slept in a recliner since the accident. He further testified his left leg feels like its "on fire" and he is unable to control his left leg well while walking. He has difficulty climbing stairs.

Left shoulder:

On June 15, 2018, Dr. Antkowiak performed a left revision anatomic total shoulder arthroplasty, rotator cuff repair, subscapularis and biceps tendon transfer. During his monthly visits with Dr. Antkowiak between August 15, 2018 and June 26, 2019, Petitioner was still complaining of rotator cuff weakness and was informed he may need further surgery in the future. On July 31, 2019, Petitioner had his final visit with Dr. Antkowiak. At that time, Dr. Antkowiak suggested a reverse total shoulder arthroplasty due to evidence of a full thickness rotator cuff tear of the supraspinatus as seen on the ultrasound exam. Dr. Antkowiak opined Petitioner had reached MMI and released him with permanent restrictions for his left upper extremity which included no overhead activity, no lifting up and away from his body with forward flexion or abduction and no lifting more than 2 pounds above chest level (PX #5).

Regarding the current condition of his left shoulder, Petitioner testified he has very little strength and has difficulty raising his left arm. In order to raise his left arm, he must use his right arm to manually lift it but then it locks in that position.

Hernia:

On August 19, 2016, Dr. Kim performed a repair of a recurrent left inguinal hernia on Petitioner. On August 29, 2016 Dr. Kim advised Petitioner of a buckling of the inguinal hernia mesh. Petitioner was then debrided and re-approximated. In his final visit with Dr. Kim on September 19, 2016 it was noted that Petitioner had minimal pain and was released to resume all normal activity.

Regarding his current condition, Petitioner testified he still has discomfort in his abdomen from the hernia repair.

The Arbitrator finds Petitioner's testimony regarding his current condition is corroborated by the treating medical records. The Arbitrator gives greater consideration to this factor.

Section 8(d)2 of the Act addresses Person-as-a-Whole Awards when employees are unable to return to their prior employment and opt out of a wage differential award under Section 8(d)1. 820 ILCS 305/8.1b. states:

> If such injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in impairment of earning capacity, or having resulted in an impairment of earning capacity, the employee elects to waive his right to recover under the foregoing subparagraph 1 of paragraph (d) of this Section then in any of the foregoing events, he shall receive in addition to compensation for temporary total disability under paragraph (b) of this Section, compensation at the rate provided in subparagraph 2.1 of paragraph (b) of this Section for that percentage of 500 week that the partial disability resulting from the injuries covered by this paragraph bears to total disability.
> 820 ILCS 305/8(d)2

As a result of his injuries, Petitioner was incapacitated from returning to work as a road maintainer.

As no labor market survey or vocational rehabilitation report was entered into evidence, the Arbitrator finds Petitioner waived his right to recover a wage differential award.

The Arbitrator finds Petitioner has suffered a loss of trade.

Based upon the above this Arbitrator finds that the Petitioner suffered a 60% loss of the person as whole (300 weeks x $605.80 = $181,740.00).

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Allan Rainey,

Petitioner,

vs. No. 16 WC 026060

20IWCC0756

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent, 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.

On August 22, 2016, Petitioner, a sanitation worker for Respondent, was riding on the back of a garbage truck, when he noted that the truck was perilously close to a building. He leapt from the truck and landed on a steel I-beam, falling forward onto his right knee. An ambulance delivered him to the University of Chicago Medical Center where he reported tailbone, bilateral buttocks pain and rectal pain. The emergency room doctor prescribed pain medication, sitz baths and stool softeners. Petitioner testified that on his way home from the hospital, he noticed right knee pain.

Dr. Sean Salehi evaluated Petitioner on August 25, 2016. Dr. Salehi ordered and reviewed x-rays of Petitioner's lower back and pelvis and found degenerative conditions but no structural damage. The doctor ordered physical therapy and placed Petitioner on light duty. Because light duty was not available, Petitioner remained off work and continued with his physical therapy. Dr. Salehi released him from care for his buttocks injury on October 11, 2016.

Dr. Kevin Tu evaluated Petitioner's right knee on September 29, 2016 on Dr. Salehi's referral. Dr. Tu ordered a right knee MRI and found an aggravation of Petitioner's pre-existing

20IWCC0756

chondromalacia and a right medial meniscus tear, for which he recommended physical therapy and a cortisone injection. Petitioner continued with physical therapy until December 1, 2016, when Dr. Tu returned him to work full duty. Petitioner reported that his symptoms were improved and he declined further treatment. Medical costs and temporary total disability were not at issue.

Petitioner voluntarily retired on November 30, 2017. He testified that he continues to have some discomfort with prolonged sitting or walking.

The Commission notes that the Arbitrator set forth facts relevant to a determination of permanent partial disability. However, the Commission evaluates the evidence in this case differently, based upon the following factors under Section 8.1b:

(i) Disability impairment rating: *no weight,* because neither party offered an AMA impairment rating.

(ii) Employee's occupation: *little weight.* Although Petitioner had worked as a laborer, he retired 11 months after returning to work following this accident and was retired from the workforce at the time of arbitration.

(iii) Employee's age: *significant weight.* Petitioner was 60 at the time of this accident. Petitioner's age may have affected the speed at which he could recover from an injury.

(iv) Future earning capacity: *no weight,* as no evidence on this issue was presented, and Petitioner testified that he had retired prior to arbitration.

(v) Evidence of disability corroborated by the treating records: *significant weight.* Petitioner sustained painful bruising to his coccyx and buttocks, an aggravation of his right knee chondromalacia, and a meniscal tear. Petitioner testified that he continued to have some discomfort from prolonged sitting or standing. Petitioner's injuries were treated conservatively with physical therapy and a cortisone injection. His ongoing complaints were minimal and intermittent.

Based on the foregoing factors, the Commission finds that Petitioner sustained a 4% loss of use of the person-as-a-whole and a 10% loss of use of the right leg as a result of this work accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator awarding Petitioner 7.5% loss of use of the person-as-a-whole under §8(d)2 and 12.5% loss of use of the right leg, filed June 15, 2020, is hereby modified to award 4% loss of use of the person-as-a-whole (or 20 weeks at $775.18 per week) related to the coccyx/buttocks bruising and 10% loss of use of the right leg (or 21.5 weeks at $775.18 per week) for the aggravated chondromalacia and torn meniscus.

20IWCC0756

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 21 2020
o-12/17/20
MP/dak
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RAINEY, ALLAN
Employee/Petitioner

Case# **16WC026060**

14WC033216

CITY OF CHICAGO
Employer/Respondent

20IWCC0756

On 6/15/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2675 COVEN LAW GROUP
MARK J SCHECHTER
180 N LASALLE ST SUITE 3650
CHICAGO, IL 60601

0010 CITY OF CHICAGO DEPT OF LAW
MATTHEW LOCKE
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

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

20IWCC0756

☐ 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

ALLAN RAINEY
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **16** WC **26060**

Consolidated cases: **14 WC 33216**

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 **Tiffany Kay**, Arbitrator of the Commission, in the city of **Chicago**, on **02/24/20**. By stipulation, the parties agree:

On the date of accident, **08/22/16**, 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 $**73,291.02**, and the average weekly wage was $**1,409.44**.

At the time of injury, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**18,522.36** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**18,522.36**.

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 $**775.18**/week for a further period of **37.5** weeks, as provided in Section **8(d-2)** of the Act, because the injuries sustained caused **of 7.5% person as a whole** and **26.88** weeks, as provided in Section **8(e)** of the Act, because the injuries caused a loss of use **of 12.5% of the right leg.**

Respondent shall pay Petitioner compensation that has accrued from **01/08/17** through **02/24/20**, and shall pay the remainder of the award, if any, in weekly payments.

Please see Findings attached.

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

05/28/2020
Date

ICArbDecN&E p.2

JUN 15 2020

PROCEDURAL HISTORY

This matter was heard before Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") on February 24, 2020 in Chicago, Illinois. This matter is consolidated with case # 14wc33216.

The parties went to hearing with the sole issue of the nature and extent of Mr. Allan J. Rainey's (hereinafter "Petitioner") injury while working for the City of Chicago (hereinafter "Respondent") on August 22, 2016. (Arb.X2)

The submitted records have been examined and the decision rendered by Arbitrator Kay.

STATEMENT OF FACTS AND EVIDENCE

Petitioner testified that he was employed as a laborer for Respondent in the Department of Streets and Sanitation as a refuse collector. Petitioner testified that while in the course of his duties he was riding on the side of a garbage truck. While the driver of the truck was driving through a narrow alleyway attempting to make a sharp turn, Petitioner was forced to jump off the truck, fearing being caught between the truck and a railing, falling on top of a protruding I-beam, landing between his buttocks and then falling to his right side, striking his right knee onto the ground. He testified that he experienced great pain between his buttocks and his low back and then to his right knee shortly thereafter. Petitioner testified that he was taken by ambulance to University of Chicago Medical Center for treatment. (Pet. Ex. #3). Petitioner was diagnosed with a soft tissue rectal injury. He was prescribed pain medication and instructed to take sitz baths.

Petitioner continued to complain of pain in the rectal region, low back and right knee. On 8/25/16 Petitioner was seen by Dr. Sean A. Salehi, a Board-certified neurosurgeon. (Pet. Ex. #5) with continuing complaints of pain in the tailbone and bilateral buttocks. His pain was worse with sitting. Dr. Salehi preliminary diagnosis was sacral and buttocks pain and ordered an X-ray. He was instructed to remain off work. Petitioner returned to Dr. Salehi on 9/8/16 with continued buttocks pain while sitting. Dr. Salehi prescribed physical therapy and instructed Petitioner to remain off work. Petitioner was again seen by Dr. Salehi on 9/22/16 with continuing buttocks pain while sitting. Dr. Salehi released Petitioner to return to work with restrictions. Petitioner continued to undergo physical therapy until 9/30/16. Upon return to Dr. Salehi, Petitioner noted reduced buttocks pain while sitting but was required to shift his weight to be comfortable. Dr. Salehi maintained Petitioner's work restrictions.

Petitioner was also seen by Dr. Kevin Tu on 9/29/16 due to increased pain in the medial aspect of the right knee as a result of the fall off the I-beam that and described to Dr. Tu that he had difficulty with kneeling, squatting and pivoting activities. Dr. Tu ordered an MRI of the right knee that was performed on 9/30/16. The MRI revealed tiny right knee effusion with degenerative intrameniscal signal in the horn of the medial meniscus. Dr. Tu's impression was right knee aggravation of preexisting chondromalacia of the medial compartment and right knee medial meniscal tear. Petitioner had undergone a cortisone injection to the right knee but according to Dr. TU's 1/5/17 note contained in Petitioner's Exhibit #4 Petitioner rejected Dr. Tu's suggestion of surgical management of his right knee because his condition had improved. Petitioner was instructed to continue with physical therapy. Petitioner continued to see Dr. Tu and was released from his care on 1/5/17 following Petitioner's last visit to Dr. Salehi. Petitioner returned to work and retired thereafter. Petitioner indicated that he was doing well with respect to the affected areas but still experienced discomfort in his posterior region while sitting down, forcing him to periodically shift his weight around while seated.

CONCLUSIONS:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section §8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on August 22, 2016, making section §8.1b applicable.

In determining the nature and extent of Petitioner's injury, the Arbitrator considered five factors as set forth in Section 8-1(b) of the Act, as follows:

With regard to subsection (i), 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), the occupation of the injured employee, the Arbitrator notes that Petitioner was employed as a laborer for Respondent, which entailed the physical demand of removing refuse. However, the Arbitrator notes that Petitioner testified that he is now retired. The Arbitrator therefore gives lesser weight to this factor.

With regard to (iii) the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 60 at the time of the accident and was at an advanced age where such injuries take longer to recover than that of a younger worker. In addition, the Arbitrator notes that physical jobs such as Petitioner's places greater physical strain on an individual of Petitioner's age. The Arbitrator therefore gives greater weight to this factor.

With regard to (iv) the employee's future earning capacity, Petitioner was able to return to work as a laborer without restrictions. The Arbitrator takes note of Petitioner's testimony that he is now retired. The Arbitrator therefore gives lesser weight to this factor.

With regard to (v) evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner's unrebutted testimony, supported by the medical records of University of Chicago Hospital (Pet. Ex. #3), Dr. Kevin Tu (Pet. Ex. #4) and Dr. Sean Salehi (Pet. Ex. #5). (Pet. Ex. #2) that he sustained a work-related injury to his coccyx and buttocks regions, consisting of painful and severe bruising to that area, requiring conservative treatment and physical therapy, along with his right knee consisting of a meniscal tear, according to Dr. Tu, which responded to conservative treatment consisting of a cortisone injection to the right knee and physical therapy, enabling Petitioner to return to work without restrictions. The Arbitrator finds that Petitioner was truthful in testifying that he still experienced discomfort in his posterior region while seated.

For the foregoing reasons, the Arbitrator finds that Petitioner sustained a loss of use of 7.5% person as a whole and 12.5% of the right leg, equivalent to 64.38 weeks of benefits under Sections 8(d)2 and 8(e) of the Act, respectively.

Signature of Arbitrator

05/28/2020
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)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
WINNEBAGO		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronda Abrego,

Petitioner,

vs. NO: 17 WC 37744

Martanga Industries, Inc.,

Respondent.

20IWCC0757

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, notice, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 30, 2020, 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.

20IWCC0757

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: DEC 21 2020
o12/15/20
TJT:yl
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

ABREGO, RONDA
Employee/Petitioner

Case# **17WC037744**

MATRANGA INDUSTRIES INC
Employer/Respondent

20IWCC0757

On 1/30/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1131 GESMER & REYNOLDS PC
BRAD A REYNOLDS
526 E JEFFERSON ST SUITE 118
ROCKFORD, IL 61107

2837 LAW OFFICE OF JOSEPH MARCINIAK
NADINE NEUE
200 W MADISON ST SUITE 501
CHICAGO, IL 60606

20IWCC0757

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Ronda Abrego
Employee/Petitioner

v.

Martanga Industries, Inc.
Employer/Respondent

Case # **17** WC **037744**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Rockford, Illinois**, on **July 11, 2019 and October 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

20IWCC0757

FINDINGS

On the date of accident, **October 5, 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 an accident ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner earned **$17,160.00** ; the average weekly wage was **$330.00**

On the date of accident, Petitioner was **54** years of age, ***married*** with **0** dependent children.

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

ORDER

Because Petitioner failed to prove that she sustained an accident that arose out of and in the course of her employment with Respondent, benefits are denied.

Credits

Respondent shall be given a credit of **$1,948.57** for TTD and for medical paid of **$4,979.70,** for a total credit of **$6,928.27.**

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. Mgntz

Signature of Arbitrator

January 24, 2020

Date

ICArbDec19(b)

JAN 30 2020

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RONDA ABREGO	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No: 17 WC 037744
	)	
MATRANGA INDUSTRIES, INC.	)	
	)	
Respondent.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

This matter proceeded to hearing on 7/11/19 & 10/15/19 before Arbitrator Jessica Hegarty in Rockford, Illinois. (Arb. 1).

STATEMENT OF FACTS

Petitioner's Testimony

Ronda Abrego ("Petitioner") was hired by Matranga Industries, Inc. ("Respondent"), a commercial cleaning company, nine years prior to her alleged 10/5/17 work injury. (Tr. p. 7-8). Petitioner worked throughout her employment for the Respondent as a janitor. (Id.). Petitioner's primary janitorial duties included dusting, vacuuming, sweeping, mopping and taking out the trash. (Id.).

Petitioner reported to work on Thursday, 10-5-17 when her shift began at 4:15 a.m. As was her usual practice, Petitioner called the owner of Respondent, Carlo Matranga, and notified him she was on her way to work at Applied Products prior to beginning her shift. (Id., pp. 9-10). Petitioner had been cleaning the Applied Products building, full time for six years prior to her alleged accident. (Id., p. 11). The Applied Products building was two stories, including a shop floor. Petitioner was responsible for cleaning the entire building including bathrooms, offices, lunchrooms, and a lab room. (Id., p. 12).

On 10-5-17, after mopping the lunchroom floor, Petitioner moved the wheeled mop bucket into the janitor's closet from the lunchroom so she could empty the dirty water into a sink. (Id., p. 14-15). As she lifted the 25-30 pound mop bucket onto the sink, she felt soreness in her lower back as if she had pulled a muscle. (Id., pp. 13, 16-17). Petitioner testified this event happened at 1:15 p.m. and that her work shift ended at 1:30 p.m. (Id., p. 17). Petitioner went home following her alleged accident.

On the evening of 10/5/17 Petitioner accompanied her husband and a little boy (friend of the family's) to a school function at Midway Village to build a scarecrow. (Id., pp. 18-19). Petitioner drew the face on the cloth head and held the scarecrow while her husband put stuffing inside of it. (Id., p. 20). Once completed, the scarecrow weighed less than five pounds. At the hearing, Petitioner identified several photos that her husband took at the Midway Village event. (Px 10; Tr. p. 21).

The following day, 10/6/17, Petitioner woke up with lower back pain that radiated down her right leg into her right ankle. (Id., p. 22). Petitioner called Carlo Matranga to notify him that she was not feeling well and could not work. (Id., p. 23). Petitioner testified that on the Saturday following the work injury, 10/7/17, her lower back and right leg symptoms had worsened and she sought treatment at the emergency room. (Id., p. 24).

Petitioner testified she told both the triage nurse and the ER doctor that she had lower back and leg pain after lifting a mop bucket at work on 10/5/17. (Id., pp. 24-25).

Petitioner testified that she spoke on the phone with Michael Matranga (supervisor and son of the owner) on Sunday afternoon, 10/8/17, and notified him of her 10/5/17 work-related accident and that she would be unable to work the following day. (Id., pp. 25-26). Petitioner testified that she did not work on the Monday or Tuesday following the work injury.

Petitioner testified she spoke directly with Carlo Matranga on the Tuesday after the work accident and asked him about applying for workers' compensation benefits because she had hurt her lower back emptying a mop bucket on 10/5/17. (Id., pp. 26-27). According to Petitioner, during this conversation Carlo Matranga told her that Michael Matranga had informed Carlo that Petitioner had hurt her lower back but that Michael Matranga did not tell Carlo that it had happened at work. In that conversation, Carlo Matranga agreed he would get in touch with the insurance company regarding workers' compensation benefits. (Id., p. 27). Petitioner testified she followed up a few days later and asked Carlo Matranga if he had the workers' compensation information but Carlo told her he had not yet contacted his insurance company. (Id., p. 28).

Petitioner then described a conversation with Michael Matranga that happened two weeks later when Michael Matranga called her home phone and asked for a statement about how the accident happened. Petitioner to Michael that she hurt her low back emptying her mop bucket. (Id., pp. 29-30). According to Petitioner, Michael Matranga told her he would be provide her statement to Respondent's workers' compensation carrier. Petitioner testified she received a telephone call from a representative of Respondent's carrier at which time Petitioner again described her work-related accident. (Id., p. 30-31).

Testimony of Senon Abrego

Senon Abrego, the husband of the Petitioner, testified that on the evening of 10/5/17 he and his wife took Chase (friend of family) to Midway Village for a school function so that Chase could make a scarecrow. (Id., pp. 46-47). Mr. Abrego testified that most of the scarecrow work was done by himself and Petitioner. Chase was more interested in playing with the other children. (Id., p. 48). Mr. Abrego testified that Petitioner drew the face and she tied the pants and the head and did a little bit of the stuffing. Mr. Abrego did most of the stuffing of the scarecrow which was an easy task although the stuffing kept falling out. When finished, the scarecrow weighed less than 5 pounds. (Id., pp. 48-49). Mr. Abrego obtained photos on his cell phone of their evening at Midway Village on 10/5/17 using his camera and that the photos accurately depicted the size and nature of the scarecrow that was built that evening. (Id., p. 49).

Testimony of Carlo Matranga

Respondent called owner Carlo Matranga who testified he had owned Matranga Industries for four years and that his business serviced/cleaned between 12 to 15 buildings. (Id., p. 53). As the owner, all of his employees are required to call in to him directly before the start of their work shift to check in. (Id., p. 52). Carlo Matranga testified he received a phone call early in the morning from Petitioner on 10/6/19 and that Petitioner reported to him that she would not be able to report to work that day because she was in pain or that she had hurt something. (Id., p. 53). Mr. Matranga testified that during this phone call Petitioner did not report that the reason she was unable to work that day was due to a work injury on 10/5/17. (Id., p. 54). Carlo Matranga testified that he received an additional phone call from Petitioner on the Monday following 10/5/17 when Petitioner told him that she was not able to come to work because she had sustained a work injury to her lower back on 10/5/17. (Id., p. 55-56).

Carlo Matranga testified he recalled a separate conversation with Petitioner where she asked him about applying for workers' compensation and he told her he would have to get in touch with his insurance man and that papers would have to be completed but that Michael (son) would be responsible for completing the paperwork. (Id., pp. 56-57). Carlo Matranga testified he had a separate conversation with his son Michael where Michael reported that Petitioner did not get hurt on the job but that Petitioner's doctor had told Petitioner that she was hurt on the job. (Id., p. 56).

On cross-examination Carlo Matranga testified that Petitioner worked for him for at least 9 years prior to the injury. (Id. p. 58). Carlo Matranga testified that on the morning of 10/5/17 that Petitioner did call him on his cell phone and reported to him that she was on her way to Applied Products. (Id., p. 59). Carlo Matranga agreed that as part of her duties as a janitor at Applied Products that Petitioner would mop floors and that she would be expected to empty mop buckets full of dirty water before the end of each of her work shifts. (Id.). Carlo Matranga agreed that in the one year period prior to 10/5/17 Petitioner had not missed any work because of reported low back pain and he could not recall a time when Petitioner presented work restrictions from a physician that limited her ability to perform her job due to lower back pain. (Id., p. 60). Carlo Matranga considered Petitioner to be a good employee. (Id.).

Medical Records

On 10/7/17 Petitioner presented to Rockford Memorial Hospital Emergency Room where a history of low back pain radiating into the right lower extremity was noted. Petitioner reported lifting things "all of the time" at her job such as mop buckets. She denied numbness and tingling to any extremities. (Px. 3). Petitioner was seen later that day by ER physician Nicole Mott, MD., who noted a history of "chronic, intermittent low back pain onset over several weeks worsening last night" with pain radiating down the front side of her right thigh. (Id). Dr. Mott noted Petitioner worked as a custodian in a factory and thought "repetitive walking" was the cause. Petitioner denied trauma or a fall. (Id.).

On exam, diffuse tenderness to the right lumbar L-5 area that radiated around the hip into the right anterior thigh was noted. (Id.). A diagnosis of acute right-sided lower back pain with sciatica was noted. Petitioner was given 10 mg. of Valium and 60 mg. of Prednisone and sent home with instructions to follow up with her primary care physician in two to three days. (Id.). Petitioner was given an off work note until 10/9/17.

On 10/12/17 Petitioner presented to Mercy Health Rockford for initial consult with Anthony Rizzo, DO., who noted a history of back pain from Thursday night 10/5/17 "building scarecrows" which required a lot of bending. The doctor noted, "[s]he may have hurt her back then. She has never had back pain like this before". (Px9).

Dr. Rizzo ordered an X-ray and instructed the Petitioner to take Tylenol and to be off work until re-evaluated in one week. (Px. 7).

Petitioner participated in doctor-ordered physical therapy at ATI Physical Therapy. (Px. 1). Despite conservative treatment, Petitioner's lower back and right leg pain symptoms did not resolve. Dr. Rizzo referred the Petitioner to Rockford Spine Center for further evaluation. (Px. 9).

Petitioner was seen initially at Rockford Spine Center on 12/12/17 when she completed questionnaire where she reported her lower back symptoms were due to an injury that happened on her job on 10/5/17 while lifting a heavy object. (Px. 2). Dr. Christopher Sliva noted Petitioner's complaints of low back and right leg pain since a work-related lifting injury on or around 10/5/17 when Petitioner was emptying a mop bucket, twisted, and felt a twinge into her lower back and buttock. Petitioner reported that in the 24 hours following the accident, she developed severe pain that radiated into her right buttock to the anterior thigh and into the lateral leg and calf. Dr. Sliva noted the failure of conservative treatment to improve her symptoms and that as of 12/12/17 the Petitioner reported some weakness in her leg and had difficulty putting weight on the leg. Pain was reported as a 5 out of 10. (Id.). Physical exam noted the patient had an antalgic gait. Regarding her neurological exam and regards to motor strength her right quad was approximately 4+/5. She had a mild positive tension sign, both in the sitting position as well as with the femoral nerve stretch test. X-rays were reviewed that showed disc degeneration at L4-5 and to a lesser extent L5-S1. Lumbar MRI dated 11/20/17 was reviewed which revealed significant severe neuro foraminal stenosis on the right side at L4-5 in addition to spinal stenosis and lateral recess stenosis due to a disc protrusion at L4-5. Dr. Sliva's diagnosis was spinal stenosis at L4-5 with severe right lateral recess stenosis and right neuro foraminal stenosis due to both disc pathology as well as facet degeneration. (Px. 2). Regarding his plan for care, Dr. Sliva ruled out an epidural due to her recently diagnosed diabetes and concern with her blood sugars. Dr. Sliva recommended surgery due to the fairly severe spinal stenosis and recommended a facetectomy to decompress the neural elements in addition to the extensive disc removal and subsequently this would require a spinal fusion at L4-5. (Id.).

On 1/12/18 Dr. Sliva noted an additional month of physical therapy had not improved Petitioner's symptoms. (Id.). She report persistent right leg and lower back pain and was limping. She was unable to work. According to the office note, Dr. Sliva considered whether Petitioner's presentation could be explained by her visit to Midway Village with a family member where she helped hold a scarecrow to be stuffed with straw. Dr. Sliva understood that the scarecrow did not weigh more than a few pounds and that her symptoms progressed over the 24 hours after her work injury when she lifted the mop bucket. On physical exam, antalgic gait and difficulty performing a single leg stance were noted along with diminished pinprick sensation on the anterior right side. Diagnosis remained the same. Dr. Sliva continued to recommended spinal fusion surgery, given the fact that Petitioner would require extensive laminectomy to decompress the neural elements as well as neuroforaminal decompression on the right side thus resulting in instability. The doctor noted a complete facetectomy and disc removal would be necessary for the soft disc protrusion and herniation into the L4-5 level which would require removal. (Id.).

On 2/27/18 Petitioner submitted a request for an amendment of health information pursuant to HIPAA. Petitioner's Request for Amendment to the initial emergency room record of 10/7/17 and to her initial visit with Dr. Rizzo on 10/12/17 were accepted. (Px. 7).

The amended medical record from the ER on 10/7/17 reads in part as follows:

> Ronda Abrego is a 54-year-old female who presents to the emergency department with complaints of right lower back pain that started two days ago while at work in a factory. Patient states the pain worsened last night. She reports pain radiating down the front side of her right thigh. The pain is sharp, shooting and aching that is exacerbated by bearing weight and sitting down. She states that it feels as if she pulled a muscle. She has tried Ibuprofen, Biofreeze, and heat but nothing has worked. Patient works as a custodian in a factory where she is continuously walking and bending. She states the pain started as she was lifting a mop pail. No other trauma or fall. (Id.).

Dr. Rizzo's 10/12/17 amended record now contains the following history:

> Ronda Abrego is a 54-year-old female. Patient is a new patient. She was seen in the ED. Patient hurt her back on Thursday, 10/5/17. Patient developed lower back pain and right leg pain due to a work-related injury. She was lifting a heavy mop bucket at work and felt strain in her lower back. On physical exam Dr. Rizzo noted that the Petitioner exhibited decreased range of motion and tenderness in her lower back. His diagnosis was acute right-sided low back pain with right-sided sciatica. (Id.).

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner has failed to sustain her burden of proof regarding this issue.

First, Petitioner's testimony that she injured her back on 10/5/17 while emptying a 25-30 pound mop bucket towards the end of her work shift is not corroborated by the original ER records from 10/7/17. Dr. Nicole Mott noted Petitioner reported "with a hx of chronic lower back pain" and "with complaints of intermittent lower back pain onset over several weeks worsening last night". (Px3). Dr. Mott further noted Petitioner was a "custodian in a factory reporting repetitive walking, believes to be cause. Denies trauma or fall". (Id.). The triage nurse noted, "Pt presents to the ED for c/o low back pain and radiates into RLE. States she lifts things all of the time at her job such as mop buckets". (Id.).

Petitioner's testimony regarding the mechanism of injury is not corroborated by the original treating record of Dr. Rizzo who noted a history of low back pain the evening of 10/5/17 "building scarecrows".

Although Petitioner's request to amend the above records was granted (to reflect a history consistent with her testimony at arbitration), the Arbitrator places greater weight on the original records taken

days after the alleged accident by trained medical professionals than records amended nearly five months after the alleged occurrence and after Petitioner has obtained legal representation.

Based on the foregoing, and after careful consideration of the evidence contained in the record, the Arbitrator finds Petitioner failed to sustain her burden of proof with respect to this issue.

Respondent is entitled to an 8(j) credit for any and all TTD and medical bills previously paid as contained in RX 2 and RX 3.

All remaining issues are moot. Benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Marilyn Tipton,

Petitioner,

vs. NO: 15 WC 27274

Carbondale Elementary School
District #95,

20IWCC0758

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, 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 19, 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.

20IWCC0758

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: DEC 21 2020
TJT:yl
o 12/8/20
51

Thomas J. Tyrrell

Kathryn A. Doerries

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TIPTON, MARILYN
Employee/Petitioner

Case# **15WC027274**

CARBONDALE ELEMENTARY SCHOOL DISTRICT #95
Employer/Respondent

20IWCC0758

On 8/19/2019, 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 1.89% 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:

3101 PRINCE LAW FIRM
TYLER N DIHLE
404 N MONROE ST
MARION, IL 62959

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

20IWCC0758

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Marilyn Tipton
Employee/Petitioner

v.

Carbondale Elementary School District #95
Employer/Respondent

Case # 15 WC 27274

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on July 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 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 not sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned $53,383.51; the average weekly wage was $1,026.60.

On the date of accident, Petitioner was 58 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

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

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

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

William R. Gallagher, Arbitrator

August 16, 2019
Date

AUG 19 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 December 1, 2014, and Petitioner sustained an accident "In course of and scope of employment" which caused an injury to her "Wrist" (Arbitrator's Exhibit 2). Respondent disputed liability on the basis of accident, notice and causal relationship (Arbitrator's Exhibit 1).

Petitioner became employed by Respondent in November, 1990, and worked for Respondent for over 26 years. Petitioner retired in May, 2017. Petitioner was initially hired as a brail transcriber. Petitioner later worked as an instructional aide, school board secretary, purchasing clerk and Administrative Assistant to the Superintendent, which was the position Petitioner had for the last 12 years of her employment by Respondent.

Petitioner testified that all of the jobs she had with Respondent were clerical positions which required typing. As the Administrative Assistant to the Superintendent, Petitioner would also attend various meetings and handwrite the minutes which she would subsequently type. Petitioner estimated she spent 80 to 85% of her work day typing.

Petitioner testified she began having right wrist/hand problems sometime in 2012. Petitioner experienced pain in her right wrist which would go to her fingertips as well as numbness in her right hand. Petitioner stated that, over time, her symptoms got progressively worse.

On July 28, 2014, Petitioner was seen by Dr. Amar Sawar, a neurologist, for low back and right shoulder pain as well as right hand numbness/tingling. In regard to Petitioner's right hand, Dr. Sawar opined Petitioner had mild bilateral carpal tunnel syndrome. Dr. Sawar's record did not make any reference to Petitioner's job duties (Respondent's Exhibit 5).

Dr. Sawar performed EMG/nerve conduction studies on August 15, 2014. They revealed mild right wrist carpal tunnel syndrome (Respondent's Exhibit 5).

Petitioner was subsequently seen by Dr. Sawar from October, 2014, through August, 2018. Except as noted herein, these visits were for Petitioner's other health issues, specifically, her low back, neck, right shoulder, facial pain and arthritis (Respondent's Exhibit 5).

On October 28, 2014, Petitioner was evaluated by Dr. Roland Barr, an orthopedic surgeon. At that time, Petitioner complained of neck and right shoulder pain as well as right hand numbness. Petitioner did not describe a specific injury, but informed Dr. Barr she had done quite a bit of gardening and moving bricks during the summer. Petitioner also advised Dr. Barr she worked as an administrative assistant for the Carbondale School District, but Dr. Barr's record did not include a description of her job duties (Petitioner's Exhibit 2).

Dr. Barr opined Petitioner had a right rotator cuff tear, neck pain with probable right upper extremity radiculopathy and possible right carpal tunnel syndrome. Dr. Barr subsequently performed surgery on December 1, 2014 (the date of manifestation alleged in the Application). The

surgical procedure consisted of a right rotator cuff repair and right carpal tunnel release (Petitioner's Exhibit 2).

Dr. Barr saw Petitioner on December 16, 2014, in regard to her right hand. At that time, Petitioner advised that the tingling/numbness symptoms had improved. Dr. Barr continued to see and treat Petitioner, primarily for her right shoulder problems (Petitioner's Exhibit 2).

Petitioner was seen by Dr. Sawar on April 1, 2015. At that time, Dr. Sawar performed EMG/nerve conduction studies which revealed mild bilateral carpal tunnel syndrome without active denervation (Respondent's Exhibit 5).

Dr. Barr saw Petitioner on April 7, 2015. At that time, Petitioner had numbness/tingling in left hand. Dr. Barr reviewed the EMG/nerve conduction studies and noted they revealed evidence of carpal tunnel syndrome on the left and residual changes on the right. Dr. Barr made no treatment recommendations in regard to Petitioner's hands; however, he continued to treat Petitioner's neck and right shoulder conditions (Petitioner's Exhibit 2).

Dr. Sawar saw Petitioner on November 17, 2017, in regard to her bilateral hand symptoms. He again performed EMG/nerve conduction studies. The findings were virtually identical to those of the prior EMG/nerve conduction studies of April 1, 2015 (Respondent's Exhibit 5).

Dr. Barr was deposed on May 31, 2019, and his deposition testimony was received into evidence at trial. In regard to his diagnosis and treatment of Petitioner's bilateral carpal tunnel syndrome, Dr. Barr's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. When questioned about whether Petitioner's work activities were a contributing cause of her hand condition, Dr. Barr testified "Based on her report of symptoms she felt were caused by her work, which was to some degree repetitive manual activity, I think it's reasonable to conclude that her work was a contributing factor to her symptoms, yes." (Petitioner's Exhibit 1; p 11).

On cross-examination, Dr. Barr was questioned about Petitioner's gardening and brick moving activities and he opined this did not affect his opinion in regard to causality. Dr. Barr was then questioned about a prior left wrist surgery that was performed on September 29, 2010, on the scapolunate. Dr. Barr agreed this prior surgery would make Petitioner more predisposed to carpal tunnel syndrome than the type of office work performed by Petitioner. Dr. Barr also never reviewed a written job description of Petitioner's duties (Petitioner's Exhibit 1; pp 14-16). The Arbitrator notes that the medical records of the prior left wrist surgery were not tendered into evidence at trial.

At trial, Petitioner testified she informed Mike Shemshank, the Superintendent of Schools, of her hand symptoms six months to one year prior to diagnosis. She agreed she did not initially report the symptoms as being work-related. Petitioner explained she was not aware her condition was, in fact, work-related. She did complete an incident report on December 23, 2014.

The incident report was received into evidence at trial. The date of accident was noted as October 28, 2014. The nature of the injury was described as carpal tunnel syndrome, but no cause was indicated (Respondent's Exhibit 4).

Justin Miller, the Assistant Superintendent of Schools testified for Respondent at trial. Miller stated he was not aware Petitioner was claiming to have sustained a work-related injury until she completed the incident report of December 23, 2014. However, he had no knowledge if Petitioner had reported it to Mike Shemshank. Further, he did not know how much of Petitioner's time at work was spent typing.

Petitioner testified she retired in May, 2017, because of a number of health issues. Petitioner still experiences some symptoms in both hands, including numbness in the fingertips of both hands and swelling in the wrist.

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 that manifested itself on December 1, 2014, and her current condition of ill-being in regard to her right and left hands is not related to her work activities.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding repetitive use of her hands and that she typed 80 to 85% of her work day was unrebutted.

Petitioner's primary treating physician was Dr. Barr. While he noted in his records Petitioner was an administrative assistant for the Carbondale School District, there was no description of Petitioner's job duties.

When Dr. Barr was deposed, he testified Petitioner's hand conditions were related to her work; however, this was based upon Petitioner's belief her symptoms were caused by work. Dr. Barr's description of Petitioner's work was extremely vague, namely, "...to some degree repetitive manual activity."

Dr. Barr did not testify as to any specifics of Petitioner's repetitive use of her hands at work and agreed he never reviewed a written job description of Petitioner's duties. Further, Dr. Barr agreed the prior surgery on Petitioner's left wrist could make Petitioner more predisposed to carpal tunnel syndrome then the office work performed by her.

In regard to disputed issues (E), (J) 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 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

JOSEPH PATE,

Petitioner,

20IWCC0759

vs.

NO: 15 WC 25533

STATE OF ILLINOIS – ILLINOIS DEPARTMENT OF CORRECTIONS - PAROLE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability benefits and permanent partial disability benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

I. FINDINGS OF FACT

A. Background

On June 16, 2015, Petitioner was 48 years old. Petitioner testified that in 2015, he was 5' 8" tall and weighed 280 pounds. Petitioner also testified that he obtained a bachelor of science degree in criminal justice in 1990. He stated that he worked in loss prevention for seven or eight years and the construction trades for a couple of years before joining Respondent as a parole agent in 2000. Petitioner additionally stated that he became a senior parole agent after approximately 18 months on the job. He added that he joined the sex offender unit in 2007.

20IWCC0759

Petitioner explained that his duties involved visiting parolees at their homes, investigating whether a particular house was suitable for a parolee release, checking on parolees' progress with facilities providing various types of counseling and treatment, transporting parolees back to the penitentiary, attending court dates, training and weapons range dates. He described his territory as including most of Will County and southwestern Cook County, with occasional visits to Lake County.

Petitioner further testified that he was assigned a squad car to perform his duties, which he stated began when he left his driveway and ended when he returned home. According to Petitioner, his squad car was his office. He explained that he spent a majority of his time in the squad car and went to the physical office in Chicago maybe one or two days per month. He described the squad car as a 2009 Chevrolet Impala outfitted with emergency lights, siren and siren box, radios, cage, and computer scanner for his laptop. Petitioner stated while he was generally alone in his vehicle, the space was confining because the cage restricted seat movement and the radios and siren box were in the right side of the passenger compartment and pushed against his weapon when he sat down. Petitioner testified that he had to shimmy in order to exit the vehicle. He estimated that he might enter and exit his car as few as two times and as many as 30 times in a given day.

Petitioner additionally testified that in 2015, he logged anywhere between 1,500 and 2,000 miles per month in the squad car. He stated that he used his state-issued laptop, which is on a stand in the car, to enter contacts, check emails and messages, and even to participate in some training.

B. Accident

Petitioner testified that in June 16, 2015, at approximately 2:34 p.m., he arrived at 907 Dartmouth in Matteson to conduct an investigation of the prospective placement of a parolee named Timothy Carlock, a/k/a Tony Porter. Petitioner stated that he parked his squad car on the wrong side of the street such that the driver's door was on the curb side. He explained that he parked this way so that other local patrol cars will notice he is there, in the event that something happens. Petitioner testified that he began to shimmy out of his squad car, wearing his sidearm and a protective vest which Petitioner described as thick and heavy. He indicated that the shimmy would cause his weight to shift to the right.

Petitioner stated that he put his foot down in order to use his steering wheel for leverage in exiting the car. Petitioner indicated that he was wearing "hiking boot type shoes." He also stated that "[i]t was a low spot or something there" covered by the grass. According to Petitioner, his foot went down and he felt his knee pop and twist. Petitioner testified that he staggered a bit, but went up to the house and performed his investigation. He estimated the visit took approximately 30 minutes. He further stated that a few minutes after returning to his vehicle, he noticed that his knee was hot, throbbing, and swelling. Petitioner testified that he emailed his temporary assigned commander regarding the injury and created an incident report at

approximately 3:30 p.m. He stated that he finished the day performing administrative work on his computer.

C. Medical Treatment

On June 18, 2015, Petitioner sought treatment with his primary care physician, Dr. F. Wilford Germino, complaining of a left knee injury "a few days ago." Dr. Germino noted:

> "Has pain in the left knee while getting out of the car, felt a twinge and then it got worse as it[sic] sat in the car. Has no pain iwth [sic] walking, Has pain is worse after sitting for awhile. Has been having pain after sitting and worse with bending."

The physical examination revealed tenderness over the medial aspect of the left knee with pain with pressure across the site and a mild effusion in the left knee. The doctor also recorded a negative drawer sign. Dr. Germino assessed Petitioner with hypertension and a medial meniscus tear. Petitioner was prescribed Lisinopril-Hydrochlorothiazide and Naprosyn. On the same date, Dr. Germino referred Petitioner to a doctor at MidAmerica Orthopedics.

On June 19, 2015, Petitioner was seen by Dr. Sarkis Bedikian, D.O. at MidAmerica Orthopedics. Petitioner reported a sharp pain on the medial side of his left knee, noting that he felt this pain and a pop while performing his duties at work. Petitioner also rated his pain at 10/10 at worst and probably 6-7/10 at the time of the visit. Petitioner was trying only ice for pain relief and reported difficulties with prolonged standing or sitting, and standing from a seated position. A physical examination revealed a full active and passive range of motion in the left knee, but medial joint line tenderness and tenderness over the medial collateral ligament. The doctor found negative anterior drawer, posterior drawer and Lachman's tests. The doctor also noted Petitioner had some pain during the McMurray's test, but not extreme. He further noted Petitioner had sustained dorsiflexion, plantar flexion and extensor hallucis longus.

Dr. Bedikian's assessment was left knee pain status post work related injury. He informed Petitioner that he had either a partial tear of the medial collateral ligament, or medial meniscal tear. He also recommended an MRI of the left knee, noting that a meniscal tear may require surgery. He further recommended that Petitioner not return to work until they had a better idea of Petitioner's condition.

On July 9, 2015, Petitioner underwent a left knee MRI at High tech Medical Park South. The interpreting radiologist's impressions were of: (1) a radial tear in the anterior aspect of the lateral meniscus, which had a somewhat discoid configuration; (2) an intact medial meniscus; (3) intact tendons and ligaments; and (4) no osteocartilaginous abnormality.

Petitioner followed up with Dr. Bedikian on July 10, 2015, reporting that he had no left knee pain since taking the prescribed Naproxen, noting significant improvement in the three

prior days. Dr. Bedikian reviewed the MRI results, noting a tear of the lateral meniscus without evidence of a medial meniscal tear. His assessment was of left knee pain with possible radial tear in the lateral meniscus versus discoid meniscus. The doctor recommended that Petitioner could return to light duty work on July 14, 2015 to see whether the left knee would hold up. The doctor did not believe the lateral meniscus to be the causative factor in Petitioner's pain because Petitioner had majority medial sided knee pain after the injury.

On July 31, 2015, Petitioner revisited Dr. Bedikian, reporting that he had no pain and was ready to return to work without restrictions. He also reported that he was seeking a second opinion on the advice of his attorney. Dr. Bedikian released Petitioner to return to work without restrictions.

D. Section 12 Examination by Dr. Steven Chudik for Petitioner[1]

On April 5, 2019, Petitioner underwent an examination by Dr. Steven Chudik at the request of Petitioner's counsel. Petitioner recounted the June 16, 2015 incident. Dr. Chudik summarized Petitioner's subsequent treatment with Dr. Germino and Dr. Bedikian.

Dr. Chudik noted that Petitioner had no treatment since 2015. However, Petitioner stated he had left knee pain all the time. Petitioner complained of medial pain mostly but also lateral knee pain. Petitioner also complained of increased knee pain after prolonged sitting (particularly in his car at work), when he first arises in the morning, and when the weather is damp. Petitioner reported he has pain after walking for a few minutes or standing for prolonged periods. He further complained of left knee swelling and an inability to kneel, squat, or lift weights. He additionally reported right knee pain secondary to compensation.

Petitioner also stated that anti-inflammatories helped initially and that he was doing better in July 2015 because he was taking Naprosyn which allowed him to return to work. He stated that he also bought a copper brace that helped a little.

Dr. Chudik's physical examination of Petitioner's left knee indicated that the medial and lateral facets of the patella were not tender to palpation, but the medial and lateral tibiofemoral joint line were tender. The medial and lateral femoral condyle were not tender. The medial tibial plateau was tender, but the lateral tibial plateau was not. The passive range of motion was full and the knee extension and flexion were noted as 5/5. The McMurray's test was positive.

Dr. Chudik's diagnosis was of left knee pain with MCL sprain, radial tear in the lateral meniscus, possible occult medial meniscus tear status post the work-related injury of June 16, 2015. Dr. Chudik opined that Petitioner's current condition was the direct result of the June 16, 2015 injury. He reported that the mechanism of injury of stepping on an uneven surface while

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[1] The Decision of the Arbitrator refers to this as a Section 12 examination and Dr. Chudik's report refers to it as "independent." Note that Petitioner indicated he would be seeking a second opinion at his counsel's request in 2015, and even though Dr. Chudik recommends further treatment, the parties proceeded to a hearing on permanency.

20IWCC0759

turning, followed by pain and swelling, is consistent with an MCL sprain and lateral meniscus tear, with a possible occult injury to the medial meniscus. Dr. Chudik also opined that Petitioner's medical care and bills, including doctor's visits and diagnostic testing, was appropriate and necessary. The doctor further opined that Petitioner was not at MMI and required another MRI to evaluate the current condition of his knee. He offered that depending on the MRI results, Petitioner may require injections, therapy, or possibly surgery. Dr. Chudik additionally opined that without further treatment, Petitioner's condition was permanent. The doctor reported that Petitioner has limitations with kneeling, squatting, and prolonged standing, walking and sitting. However, Dr. Chudik opined that Petitioner was able to continue working "full duty but with symptoms."

Petitioner also submitted Dr. Chudik's Curriculum Vitae, which indicates that the doctor is board-certified in orthopedic surgery and orthopedic sports medicine, holds numerous professional appointments, and has held numerous teaching positions since 2001.

E. Additional Information

Petitioner testified that he never had any problems with his left knee prior to June 16, 2015. Petitioner testified that he thought he returned to light duty work on July 14, 2015 before returning to full duty on July 31, 2015, but he could not definitively recall it. He added that he still had symptoms at that time.

On June 23, 2015, Petitioner completed a Notice of Injury recounting the June 16, 2015 incident, though indicating it occurred at 12:30 p.m.

Regarding his current condition of ill-being, Petitioner testified that his knee continues to hurt every day and that he has to wear a brace most days. He stated that he experiences sharp pains on both sides of the knee and he has started to experience right leg pain from compensating for the left leg. He also stated that the knee cannot bear weight for more than 10 or 15 minutes before it begins to hurt, requiring him to sit or elevate his knee. Petitioner further testified that as a result, he can no longer play with his grandchildren, perform home improvement tasks, or engage in outdoor activities with his spouse as he once did. He stated that he has reported his ongoing symptoms to his supervisors and sat out some annual training sessions in weapon retention, handcuffing skills, and inmate control. Petitioner indicated that there are days when he takes Tylenol for the pain, but not often due to the effect it has on the stomach.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found Petitioner proved that he sustained an accident that arose out of and in the course of his employment which resulted in a disabling injury. To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" 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 Arbitrator determined – and the parties agree – that Petitioner was a traveling employee, who is required to travel away from his employer's premises in order to perform his job. *Cox v. Illinois Workers' Compensation Comm'n*, 406 Ill. App. 3d 541, 545 (2010). Employees whose duties require them to travel away from their employer's premises are treated differently from other employees when considering whether an injury arose out of and in the course of employment. *Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 17; *Cox*, 406 Ill. App. 3d at 545. If a traveling employee is injured, the Commission then considers whether the employee's activity was compensable. See *id.* ¶ 18.

The Illinois Supreme Court has found that injuries arising from three categories of acts are compensable: (1) acts the employer instructs the employee to perform; (2) acts which the employee has a common law or statutory duty to perform while performing duties for his employer; and (3) acts which the employee might be reasonably expected to perform incident to his assigned duties. *Id.* Considering the third category, our supreme court has found that traveling employees may be compensated for injuries incurred while performing an act they were not specifically instructed to perform. *Id.* The act, however, must have arisen out of and in the course of his employment. *Id.* To make this determination, Illinois courts consider the reasonableness of the act and whether it might have reasonably been foreseen by the employer. *Id.* Illinois courts have further characterized the analysis as considering whether the conduct "'might normally be anticipated or foreseen by the employer.'" *Pryor v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130874WC, ¶ 20 (quoting *Robinson v. Industrial Comm'n*, 96 Ill. 2d 87, 92 (1983)); *Kertis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120252WC, ¶ 16; see also *Cox*, 406 Ill. App. 3d at 545-46.

Respondent claims that Petitioner's injury was not foreseeable because he did not fall and there was no evidence that the grass where Petitioner exited the squad car was defective in any way. However, Petitioner's unrebutted testimony was that "[i]t was a low spot or something

there" covered by the grass. The record indicates that Petitioner was acting in the ordinary course of his duties, exiting his squad car to investigate a parole placement after parking in a manner common for parole agents for safety reasons. It is foreseeable that parole agents will encounter hazards at the various locations they visit to carry out their job duties. Accordingly, Petitioner established a compensable accident by a preponderance of the evidence in this matter.

The Respondent argued in the alternative that Petitioner was exposed to a neutral risk no different than members of the general public by virtue of his employment. See *Kertis*, 2013 IL App (2d) 120252WC, ¶ 20. However, even if Petitioner were not a traveling employee, Respondent's argument is unpersuasive.

Illinois courts considering whether an injury "arose out of" the course of employment 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.

As noted above, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing: (1) acts he or she was instructed to perform by the employer; (2) acts that he or she had a common-law or statutory duty to perform; or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. See *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848, ¶ 46. In this case, Petitioner was acting in the ordinary course of duties as a parole agent when he suffered the injury to his knee. Exiting a squad car and entering onto a property which is the subject of Respondent's investigations are acts Petitioner might reasonably be expected to perform. Consequently, the risk to Petitioner was distinctly associated with his employment, not a neutral risk. Moreover, the unrebutted evidence establishes that Petitioner's injury was due at least in part to a hazard on the property. In addition, as there is no evidence that Petitioner had a prior health issue with his left knee, it cannot be said that Petitioner suffered an idiopathic fall.

In sum, regardless of the analysis employed, Petitioner proved by a preponderance of the evidence that he sustained an accident that arose out of and in the course of his employment.

B. Causal Connection

The Arbitrator ruled that Petitioner also established a causal connection between his injury and her current condition of ill-being. In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003).

Respondent argues that the Commission should conclude that Petitioner reached maximum medical improvement on July 31, 2015 and discount Dr. Chudik's report as not credible. The Commission agrees. Petitioner reported no pain and asked to be released to work without restrictions on July 31, 2015. Moreover, there is a treatment gap of over three and one-half years before Petitioner obtained a second opinion from Dr. Chudik. Shorter gaps in treatment have been considered in affirming that a claimant failed to prove a causal connection between an accident and the claimant's current condition of ill-being. See, *e.g.*, *Centeno v. Illinois Workers' Comp. Comm'n*, 2020 IL App (2d) 180815WC, ¶¶ 64-65.

As Respondent notes in its Statement of Exceptions, it is reasonable to infer that if Petitioner were experiencing ongoing pain of the sort potentially requiring surgery while continuing to work full duty at a physically demanding job, he would have sought treatment between July 31, 2015 an April 5, 2019. Petitioner testified that he was able to return to work in July 2015 due to taking Naprosyn, yet the record contains no indication that he sought to continue that prescription. Indeed, Petitioner testified that he does not even take Tylenol on a regular basis due to his concern about its effect on his stomach. Based on this record, the Commission concludes that Petitioner reached maximum medical improvement on July 31, 2015, when Petitioner was released to full duty without restrictions at his own request and that the lengthy gap in treatment creates a break in the chain of causal connection. Consequently, the Commission also concludes that there is no causal connection regarding the compensatory injury of Petitioner's right knee.[2]

C. Medical Expenses

The Arbitrator awarded Petitioner the medical expenses represented in Petitioner's Exhibits 4, 5, and 6. Having concluded that Petitioner reached maximum medical improvement on July 31, 2015, the Commission further determines that Respondent is not liable for expenses Petitioner incurred after that date. Accordingly, the Commission concludes that Respondent is not liable for $75.00 charged for three contacts with Dr. Bedikian (on February 29, 2016, March

[2] Although not determinative, the Application for Adjustment of Claim refers solely to Petitioner's left knee and does not appear to have been amended.

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9, 2018, and August 17, 2018) listed in Petitioner's Exhibit 6 for which, additionally, there are no corresponding treatment notes in the record.[3]

D. Temporary Total Disability

The Decision of the Arbitrator awarded temporary total disability benefits of $1,123.69 per week for the period from June 17, 2015 through July 14, 2015. The Commission corrects the Order to reflect that this period constitutes four weeks of benefits.

E. Permanent Partial Disability

The Arbitrator awarded Petitioner permanent partial disability (PPD) benefits to the extent of 12.5% loss of use of the left leg, and 2.5% loss of use of the right leg. Having concluded that Petitioner reached maximum medical improvement on July 31, 2015, the Commission vacates the award regarding the right leg, as Petitioner raised no complaint regarding the right knee until April 2019. The Commission also reconsiders the award regarding the left leg.

Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of PPD benefits to which a claimant is entitled, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2014). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

The Commission places no weight on factor (i) because there is no impairment report. The Commission places some weight on factor (ii), noting that Petitioner works as a senior Parole Agent, which is a dangerous job which Petitioner now has some difficulty performing in full (presumably referring to the training sessions). Regarding factor (iii), the Commission places some weight to Petitioner's age (48), given that Petitioner likely will remain in the workforce for many years to come. The Commission places no weight on factor (iv) due to a lack of evidence regarding Petitioner's future earnings capacity.

Given the Commission's determination that Petitioner reached maximum medical improvement on July 31, 2015, our consideration of factor (v) requires further explanation. Although the Commission does not agree with Dr. Chudik's opinion regarding a continuing causal connection between the accident and his current condition of ill-being, his report corroborates Petitioner's testimony that he is not free of symptoms brought on by the June 16, 2015 accident. Petitioner's testimony regarding his medical condition is credible. Accordingly,

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[3] Those bills are coded as "99080 – Spec Reports Usual Med Commuicaj Stand Reporting" and "Other & Unspecified Complications Medical Care Nec," while the billing prior to July 31, 2015 is mostly coded as "99213 – Office Outpatient Visit 15 minutes" and "Pain in Joint, Lower Leg."

the Commission places some weight on this factor, rather than the greater weight assigned by the Arbitrator.

Having considered all of the statutory factors, the Commission finds that Petitioner suffered a permanent partial disability representing a 10% loss of use of the left leg, viewing Petitioner's disability in light of his return to full duty work in July 2015 without further treatment beyond the second opinion rendered by Dr. Chudik in April 2019.

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

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner proved that he sustained a compensable accident on June 16, 2015.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner failed to prove that the current condition of ill-being of his right leg is causally connected to the accident alleged in this case.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner failed to prove that the current condition of ill-being of his left leg is causally connected to the accident alleged in this case, as the causal connection terminated as of July 31, 2015.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay Petitioner's reasonable and necessary medical expenses represented in Petitioner's Exhibits 4, 5, and 6 incurred through July 31, 2015, under the fee schedule and pursuant to §§8(a) and 8.2 of the Act. Respondent is awarded a credit for any medical expenses already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,123.69 per week for the period from June 17, 2015 through July 14, 2015, a period of 4 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 that Respondent pay to Petitioner the sum of $735.37 per week for a period of 21.5 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused a 10% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 10, 2019 is hereby affirmed as modified herein.

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 the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

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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: DEC 22 2020
o: 12/17/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Deborah L. Simpson

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0759

PATE, JOSEPH
Employee/Petitioner

Case# **15WC025533**

STATE OF ILLINOIS DOC PAROLE
Employer/Respondent

On 12/10/2019, 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 1.52% 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:

0924 BLOCK KLUKAS & MANZELLA PC
MICHAEL BLOCK
19 W JEFFERSON ST
JOLIET, IL 60432

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

DEC 10 2019

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

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

20IWCC0759

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Joseph Pate
Employee/Petitioner

Case # **15** WC **25533**

v.

Consolidated cases: _____

STATE OF ILLINOIS DOC PAROLE
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 **GREGORY DOLLISON**, Arbitrator of the Commission, in the city of **NEW LENOX**, on **11/06/2019**. 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 **06/16/2015**, 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 **$87,648.08**; the average weekly wage was **$1,685.54**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and $79.85 for other benefits, for a total credit of $79.85.

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

ORDER

Respondent shall pay reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,123.69/week for 3 and 4/7 weeks, commencing 06/17/2015 to 07/14/2015 as provided in Section 8(b) of the Act.

The Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 12.5% loss of use of the left leg and 2.5% loss of the use of the right leg pursuant to §8(e)(12) of the Act.

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

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

Signature of Arbitrator

12/9/19
Date

DEC 10 2019

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FINDINGS OF FACT:

Petitioner, Joseph Pate ("Petitioner"), testified that he began working as a parole agent for the State of Illinois DOC Parole ("Respondent") in approximately 2000. After approximately 15 months, he was promoted to Senior Parole Agent, a job title he has held up to and include the date of hearing. Around 2007, Petitioner began working in the Sex Offender Unit. Prior to working for Respondent, Petitioner worked 8 years in loss prevention and 2 years in construction with no reported left knee injuries or medical treatment.

On Petitioner's June 16, 2015, date of accident, he was 48 years old, 5'8" inches tall, and weighed approximately 235 lbs. Petitioner testified that he did not have any left knee injuries or medical treatment prior to his alleged date of accident. Petitioner offered into evidence his primary care medical records dating back to approximately 2002. Pet. Ex. 1-2. These records are devoid of any mention of a prior left knee injury.

Petitioner testified that on June 16, 2015, he was working as a Senior Parole Agent in the Sex Offender Unit. His job required covering most of Will Southwestern Cook Counties. Petitioner stated that although his job was technically based out of the DOC Parole office located at 1110 S. Oakley, Chicago, Illinois, he would only travel there 1 to 2 times per month, to either turn in his monthly mileage report or attend a staff meeting. Aside from those two reasons, he would not travel to the 1110 S. Oakley location. He testified that in 2015, his typical work hours were 8 am to 4 pm. He further testified that his "office" was his State issued cruiser, a 2009 Chevy Impala, which was equipped with lights, sirens, radios, a cage, computer stand (with computer), and siren box. He testified that he did not use his cruiser for personal reasons. At the time of his alleged accident, he averaged driving between 1,500 – 2,000 miles in his cruisier per month. Petitioner kept his cruiser at his personal residence. He testified that he performed a lot of work duties on his State issued laptop in his cruiser, including but not limited to, sending messages, sending email, undergoing training, and "entering contacts (e.g. entering notes into the State of Illinois DOC Parole's online portal)."

Petitioner testified that his true "office" was his cruiser and he would spend lots of time inside of it. Petitioner described the layout of his cruiser at trial. He noted that, in general, the cruiser was "confined." For example, he could not move the driver's seat back as far as a normal vehicle due to the restraint cage installed. Additionally, a computer stand was installed to his right which took up additional space, housing his State issued laptop. Moreover, Petitioner wore a State issued Glock Model 23 sidearm and protective vest, which was described as thick and heavy, both of which made it difficult to fasten his seat belt. Petitioner testified that as a result, he "couldn't exit [the cruiser] like a normal person." Rather, he had to "shimmy" and slide out. Petitioner also testified that his job duties began the moment he got into his cruiser which is parked in his driveway and that his job duties did not end until he arrived home at the end of his work day.

With regard to job duties, Petitioner testified that each day was different but his general job duties included home visits (e.g. performing face to face visits with parolees who have already been released at their home), performing placement evaluations (e.g. traveling to and performing onsite investigations of proposed living locations provided by inmates upon release and making sure the living arrangement comported with the terms of release), going to court, providing transports (e.g. taking parolees to and from jail), undergoing State mandated training, performing check-ins and calls, and meeting with drug, alcohol, domestic battery, and sex offender counselors to check on the status of parolees. Petitioner testified that in 2015, he entered and exited his cruiser, on average, 12 times per day. This included beginning and ending his shift, taking bathroom and lunch breaks, and performing the aforementioned job duties.

Although Petitioner did not have an independent recollection of all the cases he worked on his June 16, 2015, alleged date of accident, his memory was refreshed after reviewing Petitioner's Exhibit 9(a), a spreadsheet listing "contacts" that Petitioner contemporaneously logged into the BI/AMS System on his work computer. Petitioner testified that the information in Petitioner's Exhibit 9(a) is from the same source as Petitioner's Exhibit 9(c), that is, the BI/AMS system. Moreover, he testified that the contacts entered into BI/AMS, and listed in Petitioner's Exhibits 9(a), (c), were both accurate and made contemporaneously and in the usual course of his employment. He explained that the number on the far left was the parolee's number, and as he entered a contact, a time stamp was automatically created. As such, he testified he had the occasion to travel to 907 Dartmouth Lane in Matteson, Illinois, to perform a placement evaluation at approximately 2:30 pm on June 16, 2015. At that time, he recalled parking on the "wrong" side of the street, so that his driver's side door was next to the curb. He explained this was common practice while in the field so that other first responders would notice his cruiser faster in case of an emergency. Petitioner testified that he often traveled to unsafe locations. That day, Petitioner was wearing light weight hiking boots. After parking, and due to the aforementioned confined interior of his cruiser, service weapon, and protective vest, Petitioner testified that he had to "shimmy" and slide out of his cruiser. He explained this meant first placing his left foot and leg outside onto a grassy parkway. Next, he grabbed the steering wheel and pulled up, as he simultaneously "shimmied" and slid his body out of the cruiser. During this process, his weight shifted onto his left leg as he twisted and rose from his cruiser. Petitioner's felt his left knee twisted and he heard a pop. Of note, Petitioner stated that his left foot was in a depression, or low spot, that was concealed by the parkway grass. Petitioner testified that he initially experienced warmness and throbbing in his left knee but continued to perform his job duties.

After completing the placement evaluation, Petitioner sent an email from his cruiser to his commander to report his left knee injury at approximately 3:30 pm, complaining of pain in his left knee after hearing a pop when exciting his cruiser at approximately 2:30 pm. Pet. Ex. 9. Petitioner finished working that day by completing administrative tasks on his work computer from his cruiser.

On June 18, 2015, Petitioner first sough medical treatment with his primary care physician, Dr. Wilford Germino, at Orland Primary Care, and complained of left knee pain after getting out of his car at work a few days prior. On examination, Dr. Germino noted tenderness over the medial aspect of the left knee and diagnosed Petitioner with a medial meniscal tear, ordered Naprosyn, and referred Petitioner to Mid America Orthopaedics, SC. *See* Pet. Ex, 1(a), p. 6, 10, 29-30.

On June 19, 2015, Petitioner was evaluated by Dr. Sarkis Bedikian, DO, at Mid America Orthopaedics. *See* Pet. Ex. 2, p. 6-8. Petitioner reported sharp medial sided left knee pain after noticing a pop in his knee on June 16, 2015, while working. Petitioner noted continued pain with sitting with his knees flexed and having to get in and out of his car multiple times per day working as a parole office. After undergoing x-rays and a physical evaluation, Dr. Bedikian opined that Petitioner either had a partial tear of his MCL versus a medial meniscal tear and recommended an MRI. Dr. Bedikian noted that surgery may be necessary and ordered Petitioner off work until his next visit.

On June 23, 2015, Petitioner completed a Tristar Employee's Notice of Injury. Respondent's Ex. 1. The injury report corroborates Petitioner's date, location, and mechanism of injury. At trial, Petitioner explained that he inadvertently wrote on the Tristar form that his injury occurred at 12:30 pm, when in fact, he injured his left knee at 2:30 pm, which was the time he initially reported on his date of accident.

On July 9, 2015, Petitioner underwent a left knee MRI at High Tech Medical Park South. Pet. Ex. 3, p. 3-4. The radiologist read the films to show a radial tear in the anterior aspect of the lateral meniscus with discoid configuration.

On July 10, 2015, Petitioner returned to see Dr. Bedikian. Pet. Ex. 2, p. 9- 10. Petitioner reported that his symptoms were being managed with Naproxen and Dr. Bedikian interpreted Petitioner's left knee MRI films to show a tear of the lateral meniscus. Petitioner was diagnosed with left knee pain with possible radial tear in the lateral meniscus versus discoid meniscus and ordered to return to light duty work to see if the knee would hold up.

On July 31, 2015, Petitioner once again saw Dr. Bedikian. Pet. Ex. 2, p. 11-12. Petitioner did not report any pain and was allowed to return to work full duty without restrictions and ordered to follow-up on an as needed basis.

On April 5, 2019, Petitioner underwent a Section 12 Examination with Dr. Steven Chudik, at Hinsdale Orthopaedics, at the bequest of his attorney. Pet. Ex. 7. Petitioner testified that although he had been working for 4 years before seeing Dr. Chudik, he continued to have daily pain that he described as painful and burning on both sides of his left leg. He had to wear a knee brace most days and used over the counter creams, like Tiger Balm, to treat his symptoms. He could not work out, play with his grandchildren the way he wanted, had to sit down after 10-15 minutes because he feels like he will fall, and had to forego outdoor activities with his wife, which they previously did. Additionally, Petitioner said that he could not and cannot cross his left leg while seated. It causes right leg to hurt because of overcompensation.

Dr. Chudik noted that Petitioner injured his left knee on June 16, 2015, getting out of his police vehicle and reviewed Dr. Germino's primary care records, Dr. Bedikian's records, and Petitioner's left knee MRI. Pet. Ex. 7. Dr. Chudik noted Petitioner had not received any care or treatment for his left knee since 2015, despite his current symptoms of left knee pain with prolonged sitting, particularly in his work car, pain when he first gets out of bed in the morning, pain when it is damp outside, pain with walking for more than a few minutes. Petitioner reported that he avoided prolonged standing due to pain and that he could not kneel, squat, or lift weights. Petitioner also reported right knee pain secondary to overcompensation. After performing a physical evaluation and reviewing Petitioner's medical records and diagnostic imagine, Dr. Chudik opined that Petitioner sustained a left knee MCL sprain and lateral meniscal tear. Dr. Chudik further opined that all of Petitioner's past medical treatment was reasonable, necessary, and causally related to his June 16, 2015, work accident; that Petitioner was not at MMI and required a repeat MRI to determine if injections, therapy, and/or surgery was necessary; that Petitioner's knee condition was permanent; and that Petitioner could continue working full duty.

At trial, Petitioner testified that although he was allowed to return to work, he was still symptomatic. In particular, Petitioner's left knee was still swollen, hot, throbbed, and he had trouble putting weight on his left leg. He noted that his right knee was also symptomatic due to overcompensation. On cross-examination, Petitioner stated he has reported his ongoing left knee symptoms at annual training events. Even more, other parole agents and supervisors are aware of his continued left knee issues because he has to sit out physical training, such as hand cuffing, physical control, and self-defense courses due to his left knee.

In Support of the Arbitrator's Decision regarding "C" (Accident Arising out of it and the course of the employment), the Arbitrator makes the following findings and conclusions:

Respondent denied benefits in this claim arguing that Petitioner did not sustain accidental injuries that arose out of and in the course of his employment as a parole agent (Arb. Ex. 1). However, the Arbitrator finds that June 16, 2015, Petitioner was a traveling employee and that, accordingly, his left knee and subsequent right knee overcompensation injuries arose out of and in the course of his job duties as a senior parole agent while performing a placement evaluation in Matteson, Illinois.

The general rule is "that an injury incurred by an employee going to or coming from the place of employment does not arise out of or in the course of the employment and, hence, is not compensable." (Internal

quotation marks omitted.) *Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶16. An exception applies for traveling employees, whose injuries are compensable if the employee was injured while engaging in conduct that was reasonable and foreseeable, *i.e.*, conduct that "'might normally be anticipated or foreseen by the employer.'" *Pryor v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130874WC, ¶20. The Arbitrator relies on several recent Commission decisions and Petitioner's unrebutted testimony in finding that Petitioner was a traveling employee.

In *Carroll v. State of Illinois IDOC*, 07 I.W.C.C. 1684, the Commission found that a Senior Parole Agent who worked for the State of Illinois Department of Corrections - just like Petitioner in this case – was a traveling employee where he injured his right arm retrieving an item from underneath a shelf installed in the trunk of his State issued Chevy Impala. In the instant case, it is undisputed that Petitioner was issued a Chevy Impala cruiser by the State of Illinois, began and ended his work day in his driveway, only went to his official office 1 to 2 times per month to accomplish administrative tasks, traveled between 1,500 and 2,000 miles per month throughout Will and Cook Counties to perform his job duties as Senior Parole Agent, and otherwise used his cruiser as an office to complete telephone calls and work on his State issued computer.

Similarly, in *Kraly v. Cook County Forest Preserve Dist.*, 14 I.W.C.C. 0443, the Commission awarded benefits after finding that a forest preserve police officer was a traveling employee where his job duties included patrolling forest preserves, on foot and in his assigned patrol vehicle. The officer in *Kraly* was ordered to travel in his patrol vehicle to a field office and tripped and fell on an elevated piece of sidewalk after exiting his vehicle and walking towards the building. One Commissioner dissented because the officer was on county property, which is contrary to the facts in the case at hand where Petitioner was injured in the field. Just like the officer in *Kraly*, Petitioner's job duties required him to patrol Will and Cook Counties in his State issued cruiser to perform his job duties. The facts in this case, however, are more compelling than *Kraly*, where Petitioner kept his work vehicle at home and started and ended his work day in his driveway, unlike the office in *Kraly* who was assigned a vehicle each day upon arriving at work.

The Arbitrator finds that the evidence presented overwhelming supports the finding that Petitioner was a traveling employee, especially in light of *Carrol* and *Kraly*.

Nonetheless, a traveling employee, just like a non-traveling employee, is required to prove that his accidental injury arose out of and in the course of his employment with the employer. *Hoffman v. Industrial Comm'n*, 109 Ill. 2d 194, 199 (1985). However, the rules for traveling employees differ from non-traveling employees to accommodate the traveling nature of their employment. Accordingly, a traveling employee is considered to be "in the course of" his employment from the time he leaves his home until he returns. *Pryor v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130874WC, ¶20. An injury sustained by a traveling employee "arises out of" his employment if he is injured while engaging in conduct that was reasonable and foreseeable. *Id.*

Here, and as discussed supra, the unrebutted facts of this case are compelling evidence that the "in the course of" prong of proving accident have been met. Specifically, Petitioner testified his typical work day was 8 am to 4 pm, that he would begin his work day by entering his cruiser at home, and end his work day when returned his cruiser to his driveway and exited, and that he injured his left knee at approximately 2:30 pm on June 16, 2015, exiting his car to perform a placement evaluation. Thus, under *Pryor*, Petitioner was a traveling employee from the time he began his work day until the time he ended it.

Similarly, the unrebutted facts of this case satisfy the "arises out of" prong of proving accident. Petitioner's mechanism of injury was both reasonable and foreseeable where he credibly testified that his job duties included performing placement evaluations, that on June 16, 2015, he traveled to Matteson, Illinois, to perform such an evaluation, and that it was common practice for parole agents to park facing the wrong

direction on a street while in the field to alert first responders in case of emergency. Even more, and as discussed supra, the unique modifications of his State issued Chevy Impala – in addition to wearing a sidearm and protective vest – made it difficult to exit the vehicle. It was also reasonable and foreseeable that he would need to "shimmy" and slide out of the cruiser in a fashion where he first places his left leg outside and transferred his weight onto his leg as he exited to vehicle. As such, Petitioner's conduct in parking the wrong way on June 16, 2015, and exiting his cruiser to perform a placement evaluation was neither unreasonable or unforeseeable.

A case dispositive to the facts herein is *Luloh v. Federal Express*, 18 I.W.C.C. 0189. Having found Petitioner to be a traveling employee in *Luloh*, the Commission awarded benefits for a left knee injury where Petitioner was performing her normal job duties as a Federal Express delivery person when she exited her work truck, planted her left foot, and twisting her left knee. The Commission found Petitioner was in the foreseeable performance of duties. Just like in *Luloh*, Petitioner was performing his regular job duties when he exited his work cruiser, planted his left foot, and twisted his left knee. The facts of the instant case are even stronger than *Luloh*, where in that case Petitioner was not carrying anything, she was not in an unusual hurry, nor was there any defect on the ground. In the case at bar, the unrebutted testimony was that Petitioner was wearing a sidearm and protective vest while "shimmying" and sliding out of his State issued and modified police cruiser and stepped onto a defect, that is a low spot in the ground, concealed by the parkway grass.

There are several other bases beyond the status as a traveling employee to support a finding Petitioner's accident arising out of and in the course of his employment, the first of which would not require a neutral risk analysis going to the issue of risks to the general public. In *Caterpillar v. Industrial Commission*, 215 Ill. App. 3d 229 (1991), a case was presented to the Arbitrator claiming specific accident, and on review the Commission found the case compensable on the basis of repetitive trauma, a theory that had not been raised at Arbitration.

The Appellate Court held that pleadings and proceedings in Workers' Compensation cases are informal and designed to achieve a right result, and that the Commission must decide the case on evidence presented and on the merits of the case and not be restricted to the Claimant's Application for Adjustment of Claim. *See Caterpillar*, 215 Ill. App. 3d 229 (1991). In that regard, multiple theories of compensability exist through the medical records and Petitioner's testimony.

Petitioner's accident is also compensable because his injuries resulted from a risk distinctly associated with his employment. The rule is that injuries resulting from a risk distinctly associated with employment, *i.e.*, an employment-related risk, are compensable under the Act. 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." *Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58 (1989).* "A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Id.* When a claimant is injured due to an employment-related risk, it is not necessary to perform a neutral risk analysis. *Young v. Illinois Workers' Compensation Comm'n, 2014 Ill. App. (4th) 130392WC, ¶23.* In the instant case, and as discussed supra, Petitioner's injuries were an employment related risk where was instructed by Respondent to perform the placement evaluation and it was reasonably foreseeable and expected by Respondent that Petitioner would follow in-field protocol and park on the wrong side of the street to potentially alert first responders, given the inherently dangerous nature of his job as a parole agent. *See also Young v. I.W.C.C.*, 2014 Ill. App. (4th) 130392WC (act of reaching for spring clip deemed risk distinctly associated with employment and no neutral risk analysis necessary); *Mytnik v. I.W.C.C.*, 2016 Ill. App. (1st) 152116WC (act of bending and reaching deemed risk distinctly associated with employment and no neutral risk analysis necessary).

The Arbitrator notes that even if Petitioner's injury should be considered a neutral risk, a traveling employee may still be exposed to that risk to a greater degree than the general public. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App 3d 149, 163 (2000). The increased risk may be either qualitative, that is when some aspect of the employment contributes to the risk, or quantitative, where the employee is exposed to the risk more frequently than the general public. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill App. 3d 1010, 1 014 (2011).

The facts of this case establish that Petitioner was exposed to both qualitative and quantitative risks than that of the general public. With regard to qualitative increased risk, as outlined above, Petitioner testified at length about the modification to his State issued cruiser. As a result, his "office" was confined and difficult to exit "like a normal person." The confined nature of his work vehicle, coupled with the fact he had to wear a State issued service weapon and protective vest, unequivocally establish a qualitative risk where the only testimony is that these employment aspects required Petitioner to "shimmy" and slide out of his cruiser in an awkward manner. Common sense dictates, and Petitioner's testimony corroborates, that the general public would be able to configure their car's seating arrangements in a way more easily to exit because they do not have a State issued cruiser and do not wear a State issues sidearm or protective vest. With regard to quantitative risk, Petitioner testified that on *average* he would get in and out of his car 12 times per day wearing the aforementioned accessories and maneuvering in and out of the aforementioned modified Chevy Impala. This unrebutted testimony is evidence of increased quantitative risk than that of the general public. *See Carter v. City of Aurora*, 10 I.W.C.C. 0239 (Commission held that police officer's testimony of getting in and out of a squad car 40 times per day wearing a 30 pound gun belt and accessories and protective vest substantially increased risk of injury); *Preston v. Palatine Police Department*, 08 I.W.C.C. 1067 (Commission found that job requirement of getting into and out of a car 20 to 30 times a day with belt weighing 9-10 pounds, causing Petitioner to twist to get in and out, placed Petitioner in greater risk of injury than the general public). While it is clear that it was twisting of the knee which caused the MCL sprain and lateral meniscus tear, as explained by Dr. Chudik, a hidden defect existed on the parkway creating an increased risk. In the context of *Sisbro v. Industrial Commission*, 207 IL 2d 193 (2003), where an employee's physical structures, even if diseased, break down under the stresses of usual employment, it is an accident arising out of an in the course of the employment. In *Sisbro*, Petitioner was awarded benefits after being injured exiting his work vehicle, a truck, when his ankle, which, unlike here, suffered from a preexisting disease collapsed. Although the instant case is similar to *Sisbro* in that Petitioner was injured exiting his work vehicle, the facts here are more compelling because Petitioner was exiting a confined space created by his employer and his foot landed on a hidden depression in the ground, where his knee suffered from no previous disease or condition.

The Arbitrator finds Petitioner was a credible witness. The only discrepancy in his testimony was stating, approximately one week after his accident, that he was injured at 12:30 pm, instead of 2:30 pm. The Arbitrator notes, however, the two-hour difference in time is of little probative value where the accident was immediately reported and both reported times were in the afternoon on the proper date of accident.

Accordingly, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent.

In Support of the Arbitrator's Finding regarding the admission of Petitioner's Exhibit 9(c), the Arbitrator makes the following findings and conclusions:

Respondent argues Exhibit 9(c) should not be admitted into evidence because it is in violation of 730 ILCS 5/3-5-1(b).

Petitioner's unrebutted testimony was that Petitioner's Exhibit 9(c) was made in the regular course of business at the time of the event or a short time thereafter, and that the exhibit was not made in contemplation of litigation.

Although the statute states that "all files shall be confidential," Respondent acknowledged the information contained in Petitioner's Exhibit 9(c) is subject to subpoena. Moreover, Respondent's Exhibit 3 contains similar information from the same database. On one hand, Respondent offered its exhibit subject to 730 ILCS 5/3-5-1(b) into evidence to defend this claim, but on the other hand, objects to Petitioner offering similar information from the same source.

Therefore, the Arbitrator finds that Respondent's offering of Exhibit 3 into evidence constitutes a waiver of any objection to Petitioner offering his Exhibit 9(c) into evidence, which contains information from the same source, and would be admissible in any event as a business record subject to process. Thus, Petitioner's Exhibit 9(c) is thus entered into evidence accordingly for the limited purpose of this hearing only.

In Support of the Arbitrator's Findings regarding "F" (Causal Connection) the Arbitrator makes the following findings and conclusions:

See the Arbitrator's findings and conclusions regarding "C" accident arising out of *supra*. Both the chain of events, Petitioner's unrebutted testimony, and the medical opinions of Dr. Bedikian and Dr. Chudik strongly support causal connection. Petitioner clearly had no prior left knee symptoms preceding the incident. Although Respondent attempted to argue that Petitioner had a prior left knee in jury in 2006, the primary care records of Orland Primary Care clearly establish this was a right, not left, knee injury. Pet. Ex. 1-2. Even more, Dr. Chudik had the opportunity to review these records and did not find evidence of a prior left knee injury. Pet. Ex. 7, p. 6. Also, Petitioner credibly testified that he did not have any prior left knee injuries. Thus, Petitioner's testimony and the medical records support a consistent mechanism of injury, namely, that he twisted his left knee while exiting his work vehicle and felt a pop with immediate pain, throbbing, and swelling.

The Arbitrator finds the evidence in Petitioner's favor that he had no prior left knee injuries or medical treatment at the time of his accident, and that an MRI revealed a left MCL sprain and lateral meniscus tear only after Petitioner's reported mechanism of injury. The Arbitrator also finds evidence in the form of Petitioner's credible testimony and Dr. Chudik's medical records that Petitioner sustained a minor overcompensation injury to his right knee as a result of the June 16, 2015, work accident. The Commission has routinely found compensable overuse injuries to the contralateral extremity where an individual injures on extremity and during the course of treatment through overuse in favoring that injured member, suffers a deteriorating condition on the contralateral side. *See Michael Healey v. University of Illinois*, 09 I.W.C.C. 1267 (contralateral shoulder condition compensable due to overuse); *Body Elec. Co. v. Dec*, 356 Ill. App. 3d 851 (1st Dist. 2005) (the Commission "has seen many instances where the contralateral side has developed symptomology which required more aggressive treatment simply because the claimant has had to bear weight or rely on it almost exclusively). Therefore, the Arbitrator finds causal connection with respect to the conditions of ill being in both knees and the medical treatment described in the records and in Dr. Chudik's narrative report.

In Support of the Arbitrator's Findings regarding (k) (Temporary Total Disability/Maintenance), the Arbitrator makes the following findings and conclusions:

After missing two days of work, Petitioner saw Dr. Bedikian on June 19, 2015, who ordered him off work. Petitioner testified that he returned to work on July 14, 2015, and did not miss any other time from work. No other evidence was presented. As such, the Arbitrator finds that Petitioner was temporarily and totally disabled for a period of 3 and 4/7 weeks.

In Support of the Arbitrator's Decision regarding "J" (Medical Treatment), the Arbitrator makes the following findings and conclusions:

Petitioner submitted medical bills into evidence related to his work accident. Pet. Ex. 4, 5, 6. Dr. Chudik opined that the bills were reasonable, necessary and causally related to the accident in question. Pet. Ex. 7, p. 4. Respondent only objected to the bills at trial on the basis of liability. Dr. Chudik also opined that Petitioner will require additional left knee care and treatment, including possible surgery, that is related to his June 16, 2015, date of accident.

Accordingly, all medical bills are awarded, subject to the Fee Schedule. Respondent shall have a credit for any payments made by group insurance, and shall hold Petitioner harmless with respect to any such payments pursuant to Section 8(j) of the Act.

With respect to the Arbitrator Decision regarding (L) "Nature and Extent of the Injury" the Arbitrator makes the following findings and conclusions:

In determining the level of permanent partial disability for injuries incurred on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to the most current edition of the AMA's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records. (820 ILCS 305/8.1b)

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. (820 ILCS 305/8.1b)

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall 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;
(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.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a Senior Parole Agent at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury. The Arbitrator notes, however, Petitioner has difficulties performing his job duties and works in an inherently dangerous profession. The Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 48 years old at the time of the accident. Because of the fact Petitioner will remain in the work force for many years to come, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes no evidence was presented and 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 notes Petitioner has significant continuing work limitations. Dr. Chudik opined four years after Petitioner's work accident that his left knee MCL sprain and meniscal tear were permanent without further treatment, and noted limitations with kneeling, squatting, prolonged standing, prolonged walking, and prolonged sitting. Petitioner testified that the current condition of his left knee affects his job performance and ability to perform activities of daily living. Petitioner also testified that he has right leg pain due to overcompensation. Dr. Chudik also indicated that Petitioner might be a future surgical candidate and noted Petitioner's right knee pain complaints due to overcompensation. Pet. Ex. 7, p. 2. The only evidence in the record is Petitioner's unrebutted testimony and the medical records. Respondent has offered no medical evidence to refute Dr. Chudik's opinions, nor has it offered any evidence to contradict Petitioner's testimony that his left leg affects his ability to perform his full job duties. The Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, including the permanent condition of pain and limitations noted by Dr. Chudik, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 12.5% loss of use of the left leg and 2.5% loss of the use of the right leg pursuant to §8(e)(12) of the Act.

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

KURT MONTGOMERY,
Petitioner,
vs.
CATERPILLAR LOGISTICS SERVICES, INC.,
Respondent.

94 WC 26240

20IWCC0760

DECISION AND ORDER ON 8(a) PETITION ON REMAND

This matter now comes before the Commission on remand from the Appellate Court of Illinois, Third District, Workers' Compensation Commission Division. In its April 21, 2020 Rule 23 Order, the Appellate Court found the Commission's order of June 26, 2018 was interlocutory and therefore the Court did not have subject matter jurisdiction to hear the parties' appeals. The Court found the Commission's order was interlocutory because the Commission did not specify which of Petitioner's claimed medical expenses Respondent had to pay, leaving the dispute between Petitioner and Respondent unresolved. The Court therefore vacated the Circuit Court's order affirming the Commission's decision and remanded the case to the Commission for further proceedings.

On remand, Petitioner filed a Motion to Reverse/Modify the Commission Order on Remand, arguing the Commission can and should reconsider the portions of the Order that did not address the medical expenses claimed by Petitioner. Respondent argued the remand was limited to providing specifics on the medical expenses in order for there to be a final and appealable order.

The Commission denies Petitioner's motion. The only issue to be resolved on remand from the Appellate Court is the medical expenses for which Respondent is liable and should pay.

As to the medical expenses in dispute, Petitioner introduced into evidence $55,464.58 as the balance due for medical pursuant to Section 8(a) and $29,495.30 in alleged out-of-pocket, travel and mileage expenses ("other expenses"). Respondent disputed liability for all charges claimed.

20IWCC0760

The parties recently reached an agreement to resolve all issues and disputes as to the unpaid balance and the other expenses Petitioner claimed for $44,000.00. The Commission therefore orders Respondent to pay the sum of $44,000.00 to Petitioner and his attorney. The agreement reached between the parties is the full extent of Respondent's liability for the unpaid balances and other expenses claimed by Petitioner. Petitioner, in turn, waives any and all claims for outstanding medical expenses and other expenses incurred by Petitioner through June 14, 2017.

Much of Petitioner's treatment was paid for by either Medicare or Medicaid. At page C5801-2 of Volume 3 of the Appellate Court Record, Respondent agreed it would be liable to Medicare and Medicaid to the extent the Commission awarded the underlying medical expenses. The Commission therefore finds Respondent is liable for the following medical services paid by either Medicare or Medicaid:

1. Presence St. Joseph Medical Center for dates of service of 1/28/2007-2/2/2007, 3/4/2011-3/6/2011, 6/13/2012.
2. Morris Hospital for dates of service of 3/8/2017, 3/21/2017.
3. Silver Cross Hospital for dates of service of 2/25/2011-3/1/2011
4. Allied Anesthesia Associates for dates of service of 4/10/2020.
5. Associated Anesthesiologist of Joliet for dates of service of 7/24/2013.
6. Joliet Radiological for dates of service of 8/30/2016.
7. Associated Pathologists of Joliet for dates of service of 7/28/2010-6/16/2012.

The Commission finds the dates of service listed above were the only dates of service related to the treatment of the injuries Petitioner sustained on April 8, 1994. In the event either Medicare of Medicaid asserts a lien for payment of said bills, Respondent shall be responsible for payment of the lien and shall hold Petitioner harmless from any claim asserted by Medicare for the awarded dates of service. Any Medicare or Medicaid payments for the remaining dates of service claimed by Petitioner are unrelated to the work injury and are therefore denied.

This award and the agreement reached by the parties has no legal effect on the parties' rights, disputes and obligations for the 8(a) expenses incurred by Petitioner after the 8(a) hearing on June 14, 2017.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay the sum of $44,000.00 to Petitioner for disputed medical expenses and other expenses incurred through June 14, 2017 pursuant to the agreement reached by the parties.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall hold Petitioner harmless and pay the Medicare or Medicaid lien if asserted by either for the dates of service listed herein. All other dates of service are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that all other facts findings and conclusions in the Order & Decision on 8(a) Petition of June 26, 2018 are adopted and incorporated herein.

20IWCC0760

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $44,000.00 based on outstanding medical expenses and other expenses of $84,959.88. $44,000.00 paid by Respondent will satisfy the obligation. The party commencing the proceedings for review in the Circuit Court file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: DEC 23 2020

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O: 120820
49

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

Anthony D. Eillis,

Petitioner,

20IWCC0761

vs. NO: 19 WC 018069

Holtgrave Distributing,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, prospective medical, medical causation 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 January 22, 2020 is hereby affirmed and adopted.

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

20IWCC0761

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: DEC 23 2020
MEP/ypv
o111020
049

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

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

EILLIS, ANTHONY D
Employee/Petitioner

Case# **19WC018069**

HOLTGRAVE DISTRIBUTING
Employer/Respondent

20IWCC0761

On 1/22/2020, 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:

0969 RICH RICH COOKSEY & CHAPPELL P
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

1256 HOLTKAMP LIESE SCHULTZ ET AL
JOHN KAFOURY
217 N 10TH ST SUITE 400
ST LOUIS, MO 63101

20IWCC0761

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)

Anthony D. Eillis
Employee/Petitioner

Case # 19 WC 18069

v.

Consolidated cases: n/a

Holtgrave Distributing
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 November 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. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, April 22, 2019, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $1,207.25.

On the date of accident, Petitioner was 42 years of age, single with 0 dependent child(ren).

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

Respondent shall be given a credit of $9,772.94 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $9,772.94. 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 authorize and pay for prospective medical treatment including, but not limited to, the partial knee replacement surgery recommended by Dr. Matthew Bradley.

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)

January 22, 2020
Date

JAN 22 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on April 22, 2019. The Application alleged he sustained an injury to his "Left knee" when his "Left knee was struck by milk bossy while unloading truck" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills as well as prospective medical treatment. Respondent stipulated Petitioner sustained a work-related accident, but disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a truck driver. On April 22, 2019, Petitioner was making a delivery of milk at an Aldi's grocery store. The milk was in gallon containers and on a metal cart with wheels that Petitioner called a "bossy." When loaded with milk, these devices weighed approximately 600 to 800 pounds each. One of the "bossy" carts rolled out of the truck and pinned Petitioner's left knee between it and another bossy.

Petitioner testified that the bossy struck the inside of his left knee and caused him to experience extreme pain. An employee of Aldi's provided assistance to Petitioner and moved the bossy away from him. Petitioner reported the accident to Respondent and was able to complete his shift that day. However, the following day, Petitioner's left knee was painful and swollen.

Petitioner sought medical treatment at Urgicare on April 23, 2019. At that time, Petitioner provided a history of the work-related accident which occurred the preceding day. On examination, it was noted Petitioner had soft tissue swelling. An x-ray of the left knee was obtained which revealed tricompartmental osteoarthritis greater than expected for Petitioner's age. Petitioner was provided with a hinged knee brace and medication (Petitioner's Exhibit 3).

Petitioner subsequently sought medical treatment at HSHS Medical Group and was evaluated by Kimberly Burgess, a Nurse Practitioner. NP Burgess saw Petitioner on May 1, 2019, and ordered an MRI scan (Petitioner's Exhibit 4).

The MRI scan was performed on May 12, 2019. According to the radiologist, the MRI revealed tricompartmental chondromalacia and arthritis most pronounced in the medial compartment, moderate knee joint effusion, degenerated, but intact ACL and a full thickness complex tear of the posterior horn of the medial meniscus (Petitioner's Exhibit 3).

Petitioner was seen by NP Burgess on May 14, 2019, and she reviewed the MRI scan. NP Burgess opined Petitioner could benefit from a cortisone injection, but would need a total knee replacement in the future (Petitioner's Exhibit 4).

On June 17, 2019, Petitioner was evaluated by Dr. George Paletta, an orthopedic surgeon. At that time, Petitioner advised Dr. Paletta of the work-related accident of April 22, 2019. Petitioner informed Dr. Paletta he had ongoing complaints of left knee pain and had continued to wear the knee brace. Dr. Paletta ordered x-rays which revealed osteoarthritis and marked medial joint space narrowing. He also reviewed the MRI scan and his reading of it was consistent with that of the radiologist. Dr. Paletta's impression was medial compartment DJD with varus alignment and

associated medial meniscus tear and chronic ACL laxity. He recommended conservative treatment including an injection in the left knee, and imposed work/activity restrictions (Petitioner's Exhibit 5).

In regard to causality, Dr. Paletta opined Petitioner's current knee symptoms were related to the accident of April 22, 2019. He noted the work injury did not cause the underlying osteoarthritic condition, but given the fact Petitioner was asymptomatic prior to the accident, it would have been a "reasonable mechanism" by which the underlying condition could have been caused or increased. Dr. Paletta opined the mechanism of injury could have caused or increased symptoms related to the underlying condition (Petitioner's Exhibit 5).

Petitioner underwent a steroid injection in his left knee on July 1, 2019. When seen by Dr. Paletta on July 29, 2019, Dr. Paletta noted Petitioner was not responding well to non-surgical treatment and indicated he was going to refer Petitioner to Dr. Lyndon Gross, an orthopedic surgeon (Petitioner's Exhibits 5 and 6).

Dr. Gross was not able to see Petitioner. Accordingly, Dr. Paletta referred Petitioner to Dr. Matthew Bradley, an orthopedic surgeon (Petitioner's Exhibit 5).

Dr. Bradley evaluated Petitioner on August 13, 2019. At that time, Petitioner advised Dr. Bradley of the work-related accident of April 22, 2019, and that he had no significant left knee pain prior to the accident of April 22, 2019, and was able to perform all of his job duties without difficulty or pain. Dr. Bradley read the MRI and his interpretation of it was consistent with that of Dr. Paletta and the radiologist. Dr. Bradley recommended Petitioner undergo a left medial unicompartmental arthroplasty (Petitioner's Exhibit 7).

In regard to causality, Dr. Bradley opined the injury of April 22, 2019, directly caused Petitioner's knee pain and was the reason for Petitioner's ongoing pain and the need for further treatment, including surgery. He did recommend Petitioner continue with conservative treatment (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. W. Christopher Kostman, an orthopedic surgeon, on September 26, 2019. In connection with his examination of Petitioner, Dr. Kostman reviewed medical records and diagnostic studies provided to him by Respondent for treatment Petitioner received both before and after the accident of April 22, 2019. Most of the medical records which predated the accident of April 22, 2019, were for conditions not involving the left knee. The one exception to this was an x-ray of the left knee taken on April 8, 2008, which revealed some degenerative narrowing of the medial femorotibial compartment (Respondent's Exhibit 3; Deposition Exhibit 2).

Dr. Kostman opined Petitioner had advanced degenerative arthritis in the left knee. He opined this was not causally related to the accident of April 22, 2019. Dr. Kostman's opinion was based, in part, on his interpretation of the MRI which he noted did not reveal any evidence of a traumatic injury. He also opined the treatment recommended by Dr. Bradley would be for management of the underlying condition and not related to the accident of April 22, 2019, and

Petitioner's work restrictions were not related to the accident of April 22, 2019 (Respondent's Exhibit 3; Deposition Exhibit 2).

Dr. Kostman was deposed on November 6, 2019, 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 stated his current diagnosis in relation to Petitioner's left knee was not related to the accident of April 22, 2019. Dr. Kostman opined Petitioner had sustained a contusion as a result of the accident and the MRI did not reveal any traumatic injury. He attributed Petitioner's need for further treatment and the work restrictions to the advanced osteoarthritis in Petitioner's left knee which was not related to the accident of April 22, 2019 (Respondent's Exhibit 3; pp 8-11).

On cross-examination, Dr. Kostman agreed the x-ray of April 8, 2008, did not have any other medical records which pertained to it. In regard to his reading of the MRI, Dr. Kostman stated the medial meniscus looked abnormal, but it appeared to be a degenerative tear, not a focal tear. Further, Dr. Kostman agreed he had no documentation of Petitioner having left knee symptoms, being subject to work restrictions or taking pain medication for left knee symptoms any time prior to the accident of April 22, 2019 (Respondent's Exhibit 3; pp 17-18, 22, 28-30).

Dr. Bradley was deposed on November 21, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Bradley's testimony was consistent with his medical record and he reaffirmed the opinions contained therein. He testified Petitioner informed him of the history of the accident of April 22, 2019, and that he had no left knee problems prior to same. In regard to causality, Dr. Bradley testified Petitioner had pre-existing arthritis and the meniscus already had some degeneration in it, but the accident caused the arthritis become symptomatic and the meniscus to be torn. He specifically noted that, prior to the accident of April 22, 2019, Petitioner did not have left knee pain and had not missed work (Petitioner's Exhibit 9; pp 14-17).

In regard to treatment, Dr. Bradley testified Petitioner should undergo a partial knee replacement which would be limited to the compartment that had the arthritis and torn meniscus. He also stated that if Petitioner did not undergo this surgery, Petitioner's condition would worsen (Petitioner's Exhibit 9; p 17).

On cross-examination, Dr. Bradley was interrogated about the x-ray of April 8, 2008. He agreed the x-ray was probably obtained because Petitioner had some level of pain referable to his left knee, but, on redirect, he stated the x-ray of April 8, 2008, did not change his opinion regarding causality because it was a single x-ray taken 11 years prior to the accident which showed some arthritis (Petitioner's Exhibit 9; pp 24-27, 41).

At trial, Petitioner testified he had no prior left knee symptoms. When questioned about the x-ray performed in April, 2008, Petitioner had no specific recollection regarding same. Petitioner has been able to work because Respondent provided him with a truck that has an automatic transmission. However, Petitioner continues to have significant left knee symptoms and wants to proceed with the surgery recommended by Dr. Bradley.

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 April 22, 2019.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related injury to his left knee on April 22, 2019.

Prior to the accident of April 22, 2019, Petitioner had no left knee symptoms, was able to work and had not received any medical treatment for his left knee at any time before the accident, other than an x-ray which was taken 11 years prior, on April 8, 2008.

Both Dr. Paletta and Dr. Bradley, Petitioner's primary treating physician, opined Petitioner's left knee condition was caused by the accident of April 22, 2019. Both agreed the degenerative osteoarthritic condition in Petitioner's left knee pre-existed the accident of April 22, 2019, but it was asymptomatic prior to the accident.

Respondent's Section 12 examiner, Dr. Kostman, opined Petitioner's left knee condition was not related to the accident of April 22, 2019. However, on cross-examination, Dr. Kostman agreed there was no evidence of Petitioner having left knee pain prior to the accident or that Petitioner was taking medication for left knee pain. Dr. Kostman also agreed Petitioner was able to work prior to the accident. Further, Dr. Kostman conceded there were no medical records pertaining to any treatment Petitioner may have received when the x-ray of April 8, 2008, was obtained.

Dr. Bradley testified that an x-ray obtained 11 years prior to the accident which revealed some arthritic changes did not cause him to change his opinion regarding causality.

Given the preceding, the Arbitrator finds the opinions of Dr. Paletta and Dr. Bradley to be more persuasive than that of Dr. Kostman in regard to causality.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner 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:

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the partial knee replacement surgery recommended by Dr. Matthew Bradley.

In support of this conclusion the Arbitrator notes the following:

Dr. Bradley, Dr. Paletta and Dr. Kostman agreed Petitioner needs left knee surgery.

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AUDREY REISCHAUER,

Petitioner,

vs.

20IWCC0762

NO: 16 WC 13564

GOVERNORS STATE UNIVERSITY,

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 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.

The Commission affirms the Arbitrator's decision as to accident, medical expenses, and permanency of the left great toe. However, the Commission modifies the Arbitrator's award from 17.5% loss of use of the right hand to 15% loss of use of the right hand.

The Commission performs an analysis under Section 8.1(b) as follows:

1) There was no impairment rating performed so this factor is given no weight.
2) Petitioner worked as a trainer for DCFS, employed by Governor's State University, prior to her right hand and left great toe injury and was able to return to her same occupation, albeit for a different employer. This factor is given some weight.
3) Petitioner was 50 years-old at the time of her right hand and left great toe injury. She has many working years ahead of her and will have to live with the residual effects from her work accident. This factor is given less weight.

20IWCC0762

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: DEC 23 2020

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O:112420
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REISCHAUER, AUDREY
Employee/Petitioner

Case# **16WC013564**

GOVERNORS STATE UNIVERSITY
Employer/Respondent

20IWCC0762

On 7/16/2018, 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:

1608 MOSS & MOSS PC
DAVE MOSS
122 WARNER CT PO BOX 655
CLINTON, IL 61727

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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 62794-9208

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

JUL 16 2018

KRISTEN A. ROBERTS, ACTING Secretary
Illinois Workers' Compensation Commission

20IWCC0762

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

AUDREY REISCHAUER
Employee/Petitioner

v.

GOVERNORS STATE UNIVERSITY
Employer/Respondent

Case # **16 WC 13564**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **May 11, 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. [ ] 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 **March 22, 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 $**46,970.16**; the average weekly wage was $**903.27**.

On the date of accident, Petitioner was **51** years of age, ***single*** with **-0-** children under 18.

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 $**12,301.00** for other benefits, for a total credit of $**12,301.00**.

Respondent is entitled to a credit of $**12,301.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $22,935.80, 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 by Respondent, 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 permanent partial disability benefits of $541.96 a week for 39.675 weeks, because the injury sustained caused 17-1/2% loss of use of the right hand (35.875 weeks) and 10% loss of use of the left great toe (3.8 weeks) 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

7/12/18
Date

JUL 16 2018

FINDINGS OF FACT:

On March 22, 2016, Petitioner, Audrey Reischauer, was employed by Respondent, Governor's State University. Petitioner testified that she began working for Respondent in January of 2014. Petitioner indicated that she left her employment with Respondent on June 3, 2017, but continued the same duties with the University of Illinois.

Petitioner's job title with Respondent was a Statewide Trainer where she acted as a Training Specialist. Petitioner testified this position was a contract position with the Department of Children and Family Services. Petitioner indicated that DCFS would contract with Respondent, Governor's State University, for DCFS training positions. Petitioner testified that she trains DCFS case workers and private agency case workers, who serve DCFS through contract.

Petitioner testified that her principal place of employment is at the DCFS Office of Training at 607 East Adams Street, Springfield, Illinois. Petitioner testified that she commuted from her home in Bloomington to Springfield, Illinois, every day. Petitioner testified that she works Monday through Friday 8:00 a.m. to 5:00 p.m.

Petitioner testified that her job duties involve being sent by the DCFS Office of Training to different sites throughout Illinois for DCFS training purposes. Petitioner testified that that travel depended on the training needs.

Petitioner testified that on March 22, 2016, she was sent to Joliet, Illinois, by Respondent to the Easter Seal Rehab Center. There, Respondent, through its contract with DCFS, had scheduled a "training of trainers" (TOT) to take place at the Joliet Easter Seal Rehab Center. Petitioner testified that she was required to attend that TOT. Petitioner testified this was a quarterly TOT and would be scheduled every three months. Petitioner testified that the quarterly TOT will be scheduled at different locations throughout the State of Illinois. This conference took place from March 22, 2016 through March 24, 2016.

Petitioner testified that on March 22, 2016, she drove from her home in Bloomington to Joliet to the Easter Seal Rehab Center. Petitioner testified that in these trips, and in this trip specifically, she received mileage reimbursement. Petitioner received a per diem for meals and her employer paid for her to stay in a hotel for the duration of the conference.

Petitioner testified that the meetings started at 10:00 a.m. Petitioner testified that the seminar broke for lunch between 12:00 p.m. and 1:00 p.m. Petitioner testified that she was not required to leave the building for lunch, but lunch was not provided at the conference. Petitioner testified that she went to McDonald's and Dairy Queen.

Petitioner testified that she drove back to the Easter Seal Rehab Center parking lot. Petitioner testified that while walking along a sidewalk in front of the building, she caught her toe on an uneven area in the sidewalk and fell. Petitioner testified that she was not hurrying; she was not late; and that there may have been automobiles driving by, who saw the incident, but no official witnesses were present.

Petitioner testified that she proceeded into the building. Petitioner testified that she noticed pain in her right hand, left foot, and right knee. Petitioner testified that she reported the incident to her employer. Petitioner testified that her employer drove her to DuPage Medical Group.

Records submitted show Petitioner was initially seen at DuPage Medical Center by Dr. Kimberly

Middleton. The doctor confirmed Petitioner's accident as having tripped and fallen on uneven pavement. It was noted Petitioner had tried to break her fall with her hands. It was also noted that Petitioner was experiencing bilateral hand pain with the right hand being worse. Petitioner presented with right hand pain, right fifth finger pain, right knee pain, and left great toe pain. X-rays of the right hand demonstrated a displaced fracture of the base of the fifth (5th) metacarpal bone. Also demonstrated was a non-displaced fracture of the base of the forth (4th) metacarpal. X-rays taken of the left great toe showed a non-displaced fracture and lateral side of the proximal phalanx. Dr. Middleton diagnosed 1.) right hand fourth (4th) and fifth (5th) metacarpal fracture; and 2.) left great toe fracture. The doctor referred Petitioner to Dr. Cohen for further management of the hand fracture and to Dr. Bailey for management of the toe fracture (PX 1, P. 13)

Based on Dr. Middleton's referral, Petitioner saw Dr. Bailey and Dr. Cohen that same day at DuPage Medical Center. Dr. Bailey diagnosed a non-displaced intraarticular fracture of the proximal phalanx of the left hallux. Petitioner was prescribed closed treatment in a surgical shoe for six weeks. It was indicated that Petitioner would return to Bloomington, Illinois and receive follow up care there. Petitioner was restricted to sedentary duty with the use of a surgical shoe (PX 1, P. 5)

As noted above, Petitioner was also seen by Dr. Cohen. The doctor noted that Petitioner was right handed. Dr. Cohen interpreted the x-rays as showing a non-displaced fracture at the base of the fourth (4th) metacarpal and a minimally displaced fracture at the base of the fifth (5th) metacarpal with no ulnar subluxation of the joint. Dr. Cohen applied a cast with the little and ring fingers buddy taped. Dr. Cohen referred Petitioner to Dr. Oakey for follow up. (PX 1, P.8)

Following treatment at DuPage Medical Group, Petitioner returned to the Easter Seals Building at approximately 4:50 p.m. Petitioner retrieved her car and stayed at the prearranged hotel in Joliet, Illinois. Petitioner testified that she returned to the training session the next day, March 23, 2016, during which time she noticed pain in her hand and in her foot. Petitioner testified that she attended the third day of the training session, on March 24, 2016, again noticing pain. Petitioner testified that she drove herself home following the training session. She went to work on March 25, 2016, again noticing pain in her right hand and left foot.

On March 25, 2016, Petitioner completed and submitted a Notice of Injury Report. Specifically, Petitioner described the details of how the injury occurred, indicating "While walking a normal pace with no weather factors involved, I caught my toe on an uneven place in the sidewalk and went down headlong. One square of the sidewalk was raised a couple inches higher than the others. I was carrying a drink in my hand (which of course I dropped) and had my purse hanging on my shoulder. People in cars saw the fall, but nobody stopped. I was not distracted in any way at the time of the incident." (RX 1)

Petitioner submitted what was admitted as Petitioner's Exhibit 5, that being a group of photographs of the accident site, which were taken by Petitioner the day after the accident. Petitioner has marked on the photographs the sidewalk defect which caused her to fall. (PX 5)

On March 28, 2016, Petitioner was seen by Dr. Oakey at McLean County Orthopedics. Dr. Oakey obtained x-rays which showed a comminuted displaced proximal metacarpal base fracture of the small finger with irregularity at ring finger, which was thought to suggest a fracture at the metacarpal base. Dr. Oakey prescribed a closed reduction percutaneous pinning with possible ORIF under axillary block plus general anesthetic. (PX 2, PP. 17-20)

On March 31, 2016, Petitioner was surgically treated at the Center for Outpatient Medicine by Dr. Oakey. At that time, Petitioner underwent percutaneous pinning of the right small finger with monitored intraoperative fluoroscopy. The postoperative diagnosis was right small finger reverse Bennett's fracture (closed, comminuted, displaced intraarticular metacarpal base fracture). (PX2, P. 9) Following surgery, Petitioner was allowed to return

to work on April 4, 2016, with restrictions of no lifting more than one pound with the right hand and the requirement that she wear a splint. (PX 2, P. 20) Petitioner testified that she returned to work on Monday, April 4, 2016.

On April 6, 2016, Petitioner returned to Dr. Oakey. The doctor examined Petitioner's surgical site. Dr. Oakey transitioned Petitioner into a forearm-based ulnar gutter orthotic to include the middle ring and small finger fabricated by the hand therapist. Petitioner was instructed on pin care. It was noted Petitioner had been back to work since Monday (April 4, 2016). Petitioner was continued on restrictions. (PX 1, PP. 15-17)

Petitioner also saw Dr. Snoeyink, DPM, of OSF Medical Group on April 6, 2016. It was noted that Petitioner complained of some pain at times to the left toe. It was concluded there was no injury to the remainder of her foot or ankles. X-rays obtained by Dr. Snoeyink noted a small irregularity over the lateral aspect of the head of the proximal phalanx of the left hallux. There was no significant displacement and no other injury. Dr. Snoeyink indicated the findings were consistent with a small chip fracture of the lateral head of the proximal phalanx. (PX 3, PP. 6, 7)

Petitioner testified and the medical records show she continued to follow with Dr. Oakey. On April 25, 2016, Petitioner's pins were removed and she was prescribed physical therapy. (PX 2, PP. 11-12) Petitioner returned to Dr. Snoeyink on May 3, 2016. Petitioner was allowed to continue wearing sturdy shoes and was allowed to increase walking as tolerated. Dr. Snoeyink indicated Petitioner could return on an as needed basis. (PX 3, P. 10)

On May 5, 2016, Petitioner commenced physical therapy at McLean County Orthopedics. (PX 2, P. 21) Petitioner was next seen by Dr. Oakey on June 3, 2016. It was noted that Petitioner was experiencing some minor achiness and working full duty. (PX 2, P. 56) Petitioner was also discharged from physical therapy on June 3, 2016. At that time, she reported that "[her hand is] not painful, it's just obnoxious. I can't make a full fist in the morning, but it gets better." (PX 2, P. 66)

Petitioner was last seen by Dr. Oakey on July 18, 2016. At that time, Petitioner reported that she had some improvement since her last visit. She had stiffness with a mild ache in her small, ring, and middle fingers since discontinuing therapy. Petitioner reported soreness upon palpation at the fracture site and associated stiffness in the morning which was not present prior to her injury. During examination, it was noted that Petitioner's middle finger on the right demonstrated tenderness at the A1 pulley. The ring finger on the right demonstrated tenderness at A1 pulley. The little finger of the right reflected normal passive range of motion and tenderness at the A1 pulley. The left little finger reflected a normal A1 pulley, active range of motion, and passive range of motion. Dr. Oakey reported that Petitioner demonstrated an uneventful treatment of her closed displaced small finger metacarpal based fracture that was treated with closed reduction percutaneous pinning. Dr. Oakey indicated that Petitioner has mechanical synovitis of the middle ring and small fingers that was causally connected to this injury. Dr. Oakey indicated that Petitioner may return for future treatment, such as injections or potentially surgery, if her symptoms worsen. Dr. Oakey discharged Petitioner to return on an as needed basis noting she was performing full duty without restrictions. (PX 2, P. 55-56)

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 WITH RESPONDENT, the Arbitrator finds the following:

Based on the undisputed evidence regarding Petitioner's job description and work duties, the Arbitrator concludes that on March 22, 2016, Petitioner was a traveling employee. Based on the description of the accident, which caused Petitioner's injuries, together with Respondent's Exhibit 1, it is clear that Petitioner fell

as a result of a defect in a city sidewalk. The Arbitrator finds that as a traveling employee, Petitioner was subject to the Street Risk Doctrine.

Under the "street risk" doctrine, where the evidence establishes that the claimant's job requires that she be on the street to perform the duties of her employment, the risks of the street become one of risks of the employment, and an injury sustained while performing that duty has a causal relation to her employment. *Metropolitan Water Reclamation District of Greater Chicago v. Ill. Workers' Comp. Comm'n, 407 Ill. App. 3d 1010, 1014 (1st Dist. 2011)*

The hazards and risks inherent in the use of the street became the risks of her employment. *Metropolitan Water Reclamation District of Greater Chicago at 1015.* In the instant case, there was a special hazard. One square of the sidewalk was raised a couple inches higher than the others. See *Brais v. Ill. Workers' Comp. Comm'n, 2014 Ill. App. (3d) 120820WC, ¶27* where the facts demonstrated that the sidewalk was cracked and uneven. In that case, the courts noted the matter did not merely involve the risks inherent in walking on a sidewalk which confront all members of the public. The case involved a cracked and defective sidewalk which was a contributing cause of the claimant's injury. *Brais* at ¶29

Based on the undisputed facts surrounding Petitioner's employment and her accident, together with the description of the accident site as contained in Petitioner's Exhibit 5, which consists of a series of photographs taken by Petitioner on the day after the accident and, which specifically designate the uneven concrete surface which caused Petitioner's injuries, the Arbitrator finds that Petitioner sustained a work accident which arose out of and in the course of her employment with Respondent on March 22, 2016.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (L.) WHAT IS THE NATURE AND EXTENT OF THE INJURY, the Arbitrator finds the following:

In determining the level of permanent partial disability for injuries incurred on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to the most current edition of the AMA's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records. (820 ILCS 305/8.1b)

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. (820 ILCS 305/8.1b)

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall 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;
(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.

With regard to Section 8.1(b)(i) of the Act, the 8.1(a), the Arbitrator finds neither party presented an AMA Impairment Rating. Therefore, the Arbitrator gives no weight to this factor.

With regard to Section 8.1(b)(ii) of the Act, the occupation of the injured employee, the Arbitrator finds Petitioner's job title with Respondent was a Statewide Trainer where she acted as a Training Specialist. Petitioner is employed in a light duty occupation. Although Petitioner testified that the injury to her dominant right hand has impacted how she performs her job, her job duties as an employee with Respondent, Governor's State University, are substantially the same job duties she now performs for the University of Illinois. Therefore, the Arbitrator gives some weight to this factor.

With regard to Section 8.1(b)(iii) of the Act, the age of the injured employee at the time of the injury, the Arbitrator finds Petitioner was 52 years old at the time of the accident. As Petitioner is in the fifth decade of life, she will live with disability for a shorter period than a younger individual, the Arbitrator gives less weight to this factor.

With regard to Section 8.1(b)(iv) of the Act, the employee's future earning capacity, the Arbitrator finds that no evidence was submitted regarding Petitioner's future earning capacity. As such, the Arbitrator gives no weight to this factor.

With regard to Section 8.1(b)(v) of the Act, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner credibly testified as to her limitation of motion and soreness which is well corroborated by the medical and surgical records. The Arbitrator notes the medical findings of Petitioner's treating physicians as noted above. The Arbitrator specifically notes Dr. Oakey's statement that Petitioner has mechanical synovitis of the middle ring and small fingers which may require future treatment, including the need for potential surgery. The Arbitrator gives significant weight to this factor.

Based on the foregoing, the Arbitrator finds that Petitioner sustained 17-1/2% loss of use of the right hand and 10% loss of the left great toe.

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 RESONABLE AND NECESSARY MEDIACL SERVICES, the Arbitrator finds the following:

Respondent's dispute the medical bills submitted as Petitioner's Exhibit 4 on the basis of liability. Of the total amount submitted or $22,935.80, Respondent has paid $12,301.00. The exhibit also shows that BlueCross BlueShield has paid $1,926.13. Petitioner testified that the BlueCross BlueShield policy which tendered payment on medical bills is her husband's employment group carrier. As such same is not subject to an 8(j) credit.

Petitioner's Exhibit 4 reflects a payment of $67.71 tendered by Petitioner and an unpaid balance owed for medical bills in the amount of $3,396.55.

Having found for Petitioner on the threshold issue of accident, the Arbitrator finds that the medical bills submitted into evidence are reasonable and necessary to cure Petitioner of the condition of ill-being caused by

her work-related injury. The Arbitrator awards Petitioner medical bills. Specifically, Respondent shall pay reasonable and necessary medical services of $22,935.80 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 by Respondent 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.

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

STEVEN MARSHALL,

Petitioner,

20IWCC0763

vs. NO: 19 WC 1582

WASTE MANAGEMENT,

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, prospective medical treatment and temporary total disability benefits and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

On Page 9 in the first paragraph under Subsection "F" under "Conclusions of Law", we correct the first line of the first sentence and last line of the third sentence to correct the accident date from "November 27, 2019" to "November 27, 2018".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 10, 2019, is hereby affirmed and adopted with the corrections noted above.

20IWCC0763

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,300.00. 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: DEC 23 2020

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MP/DMM
O: 120820
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

MARSHALL, STEVEN
Employee/Petitioner

Case# **19WC001582**

20IWCC0763

WASTE MANAGEMENT
Employer/Respondent

On 10/10/2019, 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 1.69% 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:

1747 SEIDMAN MARGULIS & FAIRMAN LLP
STEVEN J SEIDMAN
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0766 HENNESSY & ROACH PC
HEATHER MacKINNON
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

20IWCC0763

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
19(B)/8(A) ARBITRATION DECISION

Steven Marshall,
Employee/Petitioner

v.

Waste Management,
Employer/Respondent

Case # **19** WC **1582**

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 **August 20, 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 care**

FINDINGS

On **November 27, 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 $**44,213.00**; the average weekly wage was $**850.25**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **4** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

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

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

ORDER

PETITIONER HAS NOT REACHED MAXIMUM MEDICAL IMPROVEMENT AT THIS TIME AND THEREFORE ANY DETERMINATION OF PERMANENCY IS PREMATURE PURSUANT TO SECTION 19(B).

RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL SERVICES OF $994.54, AS FOUND IN PET. EX. NO. 1, AS PROVIDED IN SECTIONS 8(A) AND 8.2 OF THE ACT.

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $16,600.12 (29-2/7 WEEKS X 2/3 X $850.25) PURSUANT TO SECTION 8(B) OF THE ACT.

RESPONDENT SHALL PROVIDE PETITIONER WITH PROSPECTIVE MEDICAL BENEFITS FOR HIS CONDITION OF ILL-BEING AS PROVIDED IN SECTION 8(A) OF THE ACT, IN ACCORDANCE WITH THE RECOMMENDATIONS OF DR. BERNSTEIN, INCLUDING A MULTILEVEL CERVICAL DECOMPRESSION AND FUSION.

THIS AWARD SHALL NOT BE A BAR TO A FUTURE DETERMINATION OF ADDITIONAL TTD OR OTHER BENEFITS, IF ANY, PURSUANT TO SECTION 19(B).

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

October 10, 2019
Date

OCT 10 2019

Steven Marshall v. Waste Management

Case No. 19 WC 1582

Memorandum of Decision of Arbitrator

FINDINGS OF FACT

Petitioner Steven Marshall was 41 years old and an employee of Waste Management on November 27, 2018. (AX1.) He had been an employee there for three years, working as a garbage truck driver in the City of Chicago. (T 12.) His job required him to drive down alleys, push containers of trash and recycling from each house to the truck, pump up the contents, and then dump it. (T 12-13.)

Petitioner had had two claims prior to November 27, 2018: one for an injury sustained on November 20, 2017, and one for an injury sustained on March 26, 2018. (T 17.) Both accidents involved injuries to petitioner's neck. (T 17-18.) Petitioner missed work from late March to early June 2018; he was treated by several doctors including Dr. Phillips at Midwest Orthopedics, who recommended a cervical fusion. (T 18.) Petitioner did not undergo a cervical fusion, however, after Respondent's Section 12 expert, Dr. Ghanayem, denied that Petitioner needed any medical attention. (T 19.) Petitioner settled these claims in August 2018 based on a cervical strain. (T 19.) Petitioner then returned to work at full duty. (T 20.)

Sometime in October 2018, Petitioner underwent an epidural steroid injection in his neck, which reduced the pain and stiffness he was experiencing from his neck to his left shoulder. (T 21.) Immediately prior to November 27, 2018, Petitioner had only a little soreness at 2 or 3 out of 10 at the injection spot on the left side of his neck. (T 22.) He had no pain in his right arm, shoulder, or neck at all prior to November 27, 2018. (T 22.)

On November 27, 2018, there had been a blizzard and Petitioner was working in heavy snow, dumping containers. (T 13.) Petitioner's shift began at 6:00 AM. (T 20.) It was very hard; everything was covered in snow and frozen. (T 13.) After servicing approximately 100 houses, Petitioner came to a container that was covered in snow from the homeowner's shoveling. (T 13.) While struggling to retrieve the container from the snowbank, Petitioner felt a sharp pain through his neck, left shoulder, and arm; he instantly dropped the container. (T 13-14.) Following the November 27, 2018 accident, Petitioner began suffering severe pain in his neck, shoulders, and upper arms bilaterally. (T 22.)

Petitioner sought immediate medical attention at the NorthShore University Systems emergency room that same day. (T 14; PX2.) A C-collar was applied. (PX2.) Petitioner reported sided neck pain

radiating down his left arm, with left arm weakness, coldness in his left hand, tingling in the third digit of his left hand, and a burning sensation at the back of his neck. (PX2.) Petitioner related that he had been symptom-free and able to work full-duty following an epidural injection to his neck, and that his symptoms began after lifting a heavy garbage can frozen in the snow that morning. (PX2.) Petitioner was prescribed Tramadol and discharged with instructions to follow up with his doctor in 1-2 days for a recheck, as well as to return if his symptoms worsened. (PX2.)

On December 3, 2018, Petitioner sought follow-up care at Concentra Urgent Care's Occupational Clinic for Waste Management, Respondent's company urgent care provider. (T 14-15; PX3.) Petitioner reported his history of injury: he was attempting to move a heavy garbage can out of the snow when he felt a sharp pain and pull in his neck with associated numbness and weakness in the left arm. (PX3.) Prior to this incident, he'd been working full duty with minimal pain. (PX3.) Petitioner reported that he had been given prescriptions for Tramadol and Medrol; he had been taking Tramadol with some relief, but he was continuing to experience weakness in his left arm, along with joint pain, muscle pain, back pain neck pain and joint stiffness. (PX3.)

On physical examination, Petitioner demonstrated limited cervical range of motion in all directions due to pain, tenderness to palpation along the left paracervicals and first few parathoracics, bilateral deep tendon reflexes at 2/4, left upper extremity strength at 3/5, and decreased sensation to light touch in the left upper extremity. (PX3.) Cervical spine x-rays were taken, which demonstrated moderate to marked degenerative disc space narrowing at C6-7. (PX3.) Petitioner was given 10-pound lifting restrictions and referred to an orthopaedic specialist. (PX3.)

On December 10, 2018, Petitioner sought treatment with orthopaedic surgeon Dr. Avi Bernstein at the Spine Center. (T 15; PX4.) Petitioner complained of left-sided neck pain, scapular pain, weakness of his left upper extremity, and some lingering numbness radiating down into the long finger of his left hand. (PX4.) Petitioner related his history of injury, including prior work accidents. (PX4.) Petitioner reported that his prior symptoms had improved following an epidural injection, but that they worsened following his work accident of a few weeks prior when he was pulling a dumpster in heavy snow. (PX4.)

On physical examination, Dr. Bernstein noted decreased range of motion of Petitioner's cervical spine, with left lateral bending and left lateral rotation reproducing neck pain and pain radiating into the upper extremity. (PX4.) Dr. Bernstein noted a positive Spurling's maneuver with pain into the left scapula, the supratrapezial area and down the upper arm. (PX4.)

Dr. Bernstein reviewed Petitioner's prior MRI from May 8, 2018, which demonstrated degenerative changes in the cervical spine primarily at C5-6 and C6-7 with left-sided foraminal

stenosis at both levels as well as secondary marrow changes. (PX4.) Dr. Bernstein opined that Petitioner was unlikely to improve with conservative care; he put Petitioner on light duty and ordered an updated MRI scan. (PX4.) He stated: "I feel that he is going to require a C5-6, C6-7 anterior cervical decompression and fusion." (PX4.) Dr. Bernstein prescribed Tramadol and Norco, prescriptions which continued to the date of hearing. (T 15-16; PX4.)

On December 14, 2018, Petitioner underwent an updated cervical spine MRI at 3T Imaging. (PX6.) The MRI demonstrated diffuse disc bulging at C5-6 with endplate spurring and early facet arthropathy, causing minimal to mild right and minimal left foraminal and central spinal canal narrowing; and diffuse disc bulging at C6-7 with endplate spurring and early facet arthropathy, causing moderate left foraminal and mild right foraminal narrowing with slight narrowing of the central spinal canal. (PX6.)

After the accident and lasting until January 2019, Respondent accommodated Petitioner with a full-time position at Meals on Wheels requiring him to lift no more than 5 pounds. (T 24-25.) He would just put a small tray into a bag. (T 25.) Petitioner was paid his full salary during this period. (T 24.)

On January 7, 2019, Petitioner returned to Dr. Bernstein. (PX4.) Petitioner reported that he had been working modified duty, and that he was experiencing primarily left, but also right-sided radiating arm symptoms. (PX4.) On examination, Petitioner again demonstrated a positive Spurling's maneuver. (PX4.) Dr. Bernstein reviewed Petitioner's updated MRI, which he opined demonstrated a bilobed disc protrusion at C5-6 as well as bilateral foraminal stenosis at C5-6 and C6-7. (PX4.)

Dr. Bernstein opined that Petitioner was continuing to suffer from cervical radiculopathy and discogenic neck pain due to findings from C5-C7. (PX4.) He wrote: "This is the result of a work injury and work activity. He is an appropriate candidate for two level anterior cervical decompression and fusion." (PX4.)

On January 24, 2019, Petitioner presented to Dr. Alexander Ghanayem for a Section 12 examination at Respondent's request. (RX8.) Dr. Ghanayem's Section 12 report consisted of approximately half a page of text. (RX8.) Dr. Ghanayem opined that Petitioner's cervical range of motion was "normal," that foraminal compression signs were "negative," and that upper extremity weakness on exam revealed "an obvious intent to deceive in every motor group." (RX8.) He wrote, "there is nothing wrong with this guy's upper extremity strength." (RX8.) Dr. Ghanayem opined that Petitioner's December 14, 2018 MRI was "unchanged from his prior." (RX8.) Dr. Ghanayem opined that "Mr. Marshall, should he have been injured in November last year, would have sustained nothing more than a sprain." (RX8.) Dr. Ghanayem diagnosed Petitioner with malingering, opined that he

should be released from all medical care, and opined that he should be returned to work at full duty. (RX8.)

On March 7, 2019, Dr. Bernstein issued a letter commenting on Dr. Ghanayem's Section 12 report. (PX5.) Dr. Bernstein wrote that in his examinations of Petitioner, "he has had consistent complaints of neck pain and radiating arm pain with a positive Spurling's maneuver and a normal neurologic evaluation." (PX5.) Dr. Bernstein disagreed with Dr. Ghanayem's conclusion that Petitioner was malingering and he reiterated his prior opinions. (PX5.)

On April 1, 2019, Petitioner followed up with Dr. Bernstein, continuing to complain of neck pain going down both his left upper extremity and right shoulder in what Dr. Bernstein noted to be a radicular pattern. (PX4.) Dr. Bernstein reviewed Petitioner's December 14, 2018 MRI side by side with Petitioner's pre-accident MRI of May 8, 2018; Dr. Bernstein opined that the new MRI re-demonstrated degenerative changes, disc protrusions, and bulging at C5-6 and C6-7. (PX4.) Dr. Bernstein noted that in the post-accident MRI, "[t]he left C6-7 foraminal stenosis appears to be slightly worse than previously demonstrated" and further observed a left-sided "subtle disc protrusion" at C5-6 that he could not find in the pre-accident MRI. (PX4.) Dr. Bernstein opined:

> "This patient's symptoms persist. They are the result of his work incident as previously described. I do feel there is an objective difference between both his cervical MRI scans. I believe that the radiographic findings show cause for and support his subjective complaints. I continue to recommend a two level anterior cervical decompression and fusion."

(PX4.)

On May 2, 2019, Petitioner visited Dr. Bernstein once more. (PX4.) His symptoms were worse and he had been off work since January. (PX4.) On physical examination, Dr. Bernstein noted increasing stiffness in Petitioner's cervical spine, but opined that he remained neurologically stable. (PX4.) Dr. Bernstein kept Petitioner off work and prescribed Petitioner Norco for his symptoms pending approval of the recommended surgery. (PX4.)

On June 17, 2019, Dr. Bernstein testified at an evidence deposition. (PX8.) Dr. Bernstein is a board-certified spinal surgeon at the University of Chicago Medical School; he has been practicing medicine in Illinois for 28 years. (PX8, 4-5.) Dr. Bernstein has performed thousands of spinal surgeries and continues to perform four to six spinal surgeries per week. (PX8, 5.)

Dr. Bernstein testified that Petitioner's updated cervical spine MRI of December 14, 2018 showed a bi-lobe disc protrusion, "which is basically a bilateral disc herniation," as well as foraminal stenosis on both sides at C5-6 and C6-7. (PX8, 11.) Dr. Bernstein testified that compared to Petitioner's pre-accident MRI, he observed "development of what I described as a bi-lobe disk

protrusion, which is more of a disk herniation, as opposed to simply degenerative change." (PX8, 11-12.) Asked if this was present in Petitioner's pre-accident MRI scan, he testified: "No, previously I thought he had foraminal stenosis, disk space narrowing and disk osteophyte complexes." (PX8, 12.)

Dr. Bernstein opined to a reasonable degree of medical and surgical certainty that Petitioner's most recent work accident aggravated his preexisting degenerative condition, which was relatively stable prior to that point, resulting in a change in his cervical spine pathology and the onset of symptoms that have not abated. (PX8, 17.) Dr. Bernstein based this opinion on his physical examinations of the Petitioner, on Petitioner's consistent complaints of pain, and on his comparison of Petitioner's MRI scans. (PX8, 17.)

Dr. Bernstein further testified that his opinion would not change merely because a prior surgeon had recommended a cervical fusion for Petitioner in May 2018. (PX8, 18-19.) He testified that an earlier recommendation would be made in response to the patient's presentation, symptoms, and findings at that time. (PX8, 19.) He stated that "the recommendation would not hold in perpetuity if the patient's symptoms abated or resolved to the extent that they were acceptable to the patient." (PX8, 19.) Dr. Bernstein opined, "if the patient was functioning well and feeling well, there was no reason for him to pursue surgery." (PX8, 19.)

Dr. Bernstein reiterated his earlier disagreement with Dr. Ghanayem's March 7, 2019 Section 12 report:

> "Yeah, I disagree with Dr. Ghanayem's findings. I thought that the patient had consistent complaints of pain, that his symptoms were consistent in terms of his radiating arm pain. That he continued to demonstrate a positive Spurling's maneuver on exam. And I noted that Dr. Ghanayem felt that the patient was malingering. And I pointed that if I thought the patient were malingering, I would have no problem pointing it out and recommending no further care. And so I just reiterated my opinion that he requires surgery from C5 to C7."

(PX8, 13.)

Dr. Bernstein testified that his bills are fair and reasonable for the geographic community in which he practices. (PX8, 18.)

On July 24, 2019, Dr. Ghanayem testified in his evidence deposition. (RX9.) Dr. Ghanayem testified that Petitioner's pre-accident MRI of February 28, 2018 showed bone spurs on the right side of the cervical spine, as well as arthritic changes at C6-7. (RX9, 6-7.) Dr. Ghanayem testified that at that time, Petitioner had soft tissue neck pain. (RX9, 7.) Dr. Ghanayem testified that Petitioner's MRI of May 8, 2018 showed the same thing as the February 28, 2018 MRI, and that Petitioner's work injury of March 26, 2018 was another cervical strain. (RX9, 8.) At that time, Dr. Ghanayem opined that

Petitioner was malingering. (RX9, 8-9.) At his Section 12 examination in this case, occurring on January 24, 2019, Dr. Ghanayem opined that Petitioner's December 14, 2018 MRI was unchanged from his May 8, 2018 MRI. (RX9, 10.) Dr. Ghanayem opined that Petitioner's December 14, 2018 MRI showed no disc protrusions or herniations. (RX9, 11.) Dr. Ghanayem again opined that any injury Petitioner sustained was a cervical strain, and that he was malingering. (RX9, 10.) Dr. Ghanayem opined that Petitioner's only preexisting conditions were "some spondylosis or arthritis," and that neither was aggravated by his accident. (RX9, 12.) Dr. Ghanayem possessed no independent recollections of the medical records he reviewed in order to reach his conclusions. (RX9, 19.)

As of the date of hearing, Dr. Bernstein continues to recommend a cervical fusion. Petitioner testified that if the procedure were approved, he would undergo the fusion. (T 17.)

Asked the difference between his pain pre-accident and post-accident, Petitioner testified that before November 27, 2018, he felt okay and he was able to go to work full duty. (T 23.) He testified that as of the date of hearing, his pain was terrible. (T 24.) Petitioner testified he was in constant, severe pain every day, with burning, aching, and stabbing sensations on both sides of his neck and shoulders. (T 24.) Petitioner testified that sometimes when he turns his head, he feels a grinding sensation. (T 24.) He testified, "The pain gets so unbearable I have to lay down sometimes." (T 24.)

At the time of his injury, Petitioner was single with four dependent children. (AX1.) In the year preceding his injury, Petitioner earned $44,213.00, for an average weekly wage of $850.25. (AX1.) Petitioner has $994.54 in unpaid, outstanding medical bills. (PX1.)

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S FINDINGS AND CONCLUSIONS RELATED TO:

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

The parties agree Petitioner suffered a work-related injury on November 27, 2019. (T 6.) However, Respondent disputes Petitioner's current condition of ill-being is causally related to his work injury. For the reasons that follow, the Arbitrator finds and concludes that Petitioner has proven by a preponderance of the credible evidence that his current condition of ill-being in his cervical spine is causally related to his stipulated work accident sustained on November 27, 2019.

The law in Illinois is clear that when a work accident aggravates a preexisting condition, causation is established. *See Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 215 (2003). In this case, Petitioner's testimony establishes that prior to November 27, 2018, his preexisting cervical condition

had improved to the point that he was working full duty lifting garbage containers with only a little soreness at 2 or 3 out of 10 on the left side of his neck and no pain at all in his right arm, shoulder, or neck. (T 12, 22.) When the accident occurred, Petitioner felt a sharp pain through his neck, left shoulder, and arm. (T 13-14.) Following the accident, Petitioner began suffering severe pain in his neck, shoulders, and upper arms bilaterally. (T 22.)

Not only is this testimony unrebutted, the medical records support his testimony as well. After his epidural injection in October 2018 and prior to the date of accident, Petitioner sought no medical treatment for his neck. Immediately following the accident, however, Petitioner presented to the emergency room and reported neck pain radiating down his left arm, with left arm weakness, coldness in his left hand, tingling in the third digit of his left hand, and a burning sensation at the back of his neck. (PX2.) Petitioner related that he had been symptom-free and able to work full-duty following an epidural injection to his neck, and that his symptoms began after lifting a heavy garbage can frozen in the snow that morning. (PX2.)

Petitioner's reports to Concentra Urgent Care's Occupational Clinic for Waste Management are also consistent with his testimony. On December 3, 2018, Petitioner reported that he was attempting to move a heavy garbage can out of the snow on November 27th when he felt a sharp pain and pull in his neck with associated numbness and weakness in the left arm. (PX3.) Prior to this incident, he had been working full duty with minimal pain. (PX3.)

Upon presentation to Dr. Avi Bernstein on December 10, 2018, Petitioner again complained of left-sided neck pain, scapular pain, weakness of his left upper extremity, and some lingering numbness radiating down into the long finger of his left hand. (PX4.) Here, too, Petitioner reported that his symptoms had largely abated prior to November 27, but that they worsened following his work accident. (PX4.)

Every documented instance of actual medical treatment post-accident not only corroborates Petitioner's history of injury, it contains actual physical examination findings consistent with the above. On physical examination at Concentra, for instance, Petitioner demonstrated limited cervical range of motion in all directions, tenderness to palpation along the left paracervicals and first few parathoracics, bilateral deep tendon reflexes at 2/4, left upper extremity strength at 3/5, and decreased sensation to light touch in the left upper extremity. (PX3.) On physical examination with Dr. Bernstein, Petitioner had decreased range of motion of the cervical spine, with left lateral bending and left lateral rotation reproducing neck pain and pain radiating into the upper extremity, as well as a positive Spurling's maneuver with pain into the left scapula, the supratrapezial area and down the upper arm. (PX4.) These symptoms remained consistent through the course of Petitioner's treatment,

and in fact, worsened as of May 2, 2019, when Petitioner presented to Dr. Bernstein with increased stiffness in the cervical spine. (PX4.)

The radiographic evidence also demonstrates disc protrusions at C5-6 and C6-7. The radiologist report of the December 14, 2018 MRI noted diffuse disc bulging at C5-6 with endplate spurring and early facet arthropathy, causing minimal to mild right and minimal left foraminal and central spinal canal narrowing; and diffuse disc bulging at C6-7 with endplate spurring and early facet arthropathy, causing moderate left foraminal and mild right foraminal narrowing with slight narrowing of the central spinal canal. (PX6.) Dr. Bernstein testified that this MRI showed a bi-lobe disc protrusion, "which is basically a bilateral disc herniation," as well as foraminal stenosis on both sides at C5-6 and C6-7. (PX8, 11.) Dr. Bernstein testified that compared to Petitioner's pre-accident MRI, he observed "development of what I described as a bi-lobe disk protrusion, which is more of a disk herniation, as opposed to simply degenerative change." (PX8, 11-12.)

Based on the above, Dr. Bernstein credibly opined that Petitioner was continuing to suffer from cervical radiculopathy and discogenic neck pain due to findings from C5-C7. (PX4.) He wrote: "This is the result of a work injury and work activity. He is an appropriate candidate for two level anterior cervical decompression and fusion." (PX4.)

Although Respondent's Section 12 examiner, Dr. Ghanayem, disagreed with this conclusion, Dr. Ghanayem's supporting evidence stands at odds with Petitioner's records of treatment. The Arbitrator emphasizes that significantly, **alone among all physicians in this case**—including Respondent's own company healthcare provider, Concentra - Dr. Ghanayem found "normal" range of motion in Petitioner's cervical spine and no signs of foraminal compression on physical examination. (RX8.) Alone among all physicians in this case, Dr. Ghanayem not only failed to find weakness in Petitioner's upper extremity, he opined that it was "an obvious intent to deceive." (RX8.) The Arbitrator notes that these conclusions are not only inconsistent with all of Petitioner's records of medical treatment, they are in fact directly contradicted by Petitioner's own treating physician. (RX8.) Dr. Bernstein testified that he disagreed with Dr. Ghanayem's diagnosis of malingering, asserting that Petitioner's symptoms were consistent and that he had found no signs of malingering across repeated examinations. (PX8, 13.)

In addition to his anomalous physical examination findings, Dr. Ghanayem's readings of Petitioner's MRI scans going back to February 2018 are also inconsistent with the readings of all other physicians in this case. In his evidence deposition, Dr. Ghanayem testified that Petitioner's MRI of May 8, 2018 showed the same thing as the prior February 28, 2018 MRI, and Petitioner's December 14, 2018 MRI was unchanged from his May 8, 2018 MRI. (RX9, 8-10.) Asked if Petitioner's

December 14, 2018 MRI showed disc protrusions or herniations, Dr. Ghanayem denied that it did. (RX9, 6-7, 11.) However, the radiologist's MRI report from December 14, 2018 repeatedly references diffuse disc bulges at C5-6 and C6-7 in addition to the bony degenerative changes, with "disc disease...most pronounced at C6-7." (PX6.) Dr. Ghanayem opined that Petitioner's only cervical spine condition was "some spondylosis or arthritis" but this is directly contradicted by the radiologist reports, which note bulging of the actual discs at C5-6 and C6-7. (RX9, 12.) For these reasons, the Arbitrator finds Dr. Ghanayem's opinion less persuasive in this matter than that of Dr. Bernstein.

The Arbitrator finds and concludes the opinions and conclusions of treating physician Dr. Bernstein are more credible, weighty and reliable than those of Respondent's examining expert Dr. Ghanayem. The Arbitrator also notes that in this case, Dr. Ghanayem expressed what appears to be an inexplicable antipathy to Petitioner beyond what one would normally expect to encounter in a negative Section 12 report.

The Arbitrator notes 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, 168 Ill. Dec. 756, 590 N.E. 2d 78, 82 (1992).

Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts. Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its

facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion." Gross v. Illinois Workers' Compensation Comm'n, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. "If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative [**18] to be reliable." Id. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." In re Joseph S., 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). Further, an expert's findings and opinions can be undermined, or even disregarded, through reliance on inaccurate or incomplete information. **Lastly, not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician.** *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 31 Ill.Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992). **That is what the Arbitrator has determined to do in this claim.**

Applying the above principles to the facts, the Arbitrator finds and concludes the opinions of Respondent's examining expert Dr. Ghanayem are afforded less weight and credibility than those of treating physician Dr. Bernstein.

Based on the evidence set forth above, and the record as a whole, the Arbitrator finds and concludes that Petitioner's current condition of ill-being is causally related to his work accident of November 27, 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 Arbitrator has reviewed the medical records and finds and concludes that Petitioner's medical services were reasonable and necessary. In so finding, the Arbitrator notes Dr. Bernstein's testimony that his bills are fair and reasonable for the geographic community in which he practices and notes that no rebuttal evidence to the contrary has been adduced. (PX8, 18.)

The Arbitrator finds that Respondent is liable for the $994.54 in related medical bills that remain outstanding.

K. What temporary benefits are in dispute?

Respondent has not paid any temporary total disability benefits, as Respondent disputes its liability to pay TTD after January 24, 2019 based upon Dr. Ghanayem's Section 12 examination. As discussed above, however, Dr. Ghanayem's opinions are afforded less weight than those of Dr. Bernstein, are inconsistent with Petitioner's records of treatment, and reflect conclusions inconsistent with those set forth by every other physician in this case. When Dr. Ghanayem's opinions are properly discounted, there are no opinions to challenge those of Dr. Bernstein. As the parties agree that an accident occurred and as the Arbitrator has found that Petitioner's condition of ill-being is causally connected to that accident, Petitioner is owed TTD for the period he was unable to work.

The parties agree that the correct period of TTD benefits for a compensable claim in this case is from January 27, 2019 until the date of the arbitration hearing, August 20, 2019, totaling $16,600.12 (29-2/7 weeks x 2/3 x $850.25). (T 7.)

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

Respondent has placed nature and extent in dispute in this proceeding. However, as discussed herein and below, the Arbitrator finds and concludes Petitioner still requires additional future medical treatments that may improve his condition; further, the Arbitrator finds and concludes Petitioner has not yet reached MMI, and therefore it would be premature to make any determination and issue an award for permanency at this time.

O. Other issues

This is an 8(a) action. Dr. Bernstein, Petitioner's treating physician, testified that Petitioner requires further medical treatment, stating that Petitioner was unlikely to improve with conservative care. Dr. Bernstein has consistently opined that Petitioner is going to require a C5-6, C6-7 anterior cervical decompression and fusion. (PX4.) Dr. Bernstein stated:

> "This patient's symptoms persist. They are the result of his work incident as previously described. I do feel there is an objective difference between both his cervical MRI scans. I believe that the radiographic findings show cause for and support his subjective

complaints. I continue to recommend a two level anterior cervical decompression and fusion."

(PX4.)

As of the date of hearing, Dr. Bernstein continues to recommend a cervical decompression and fusion, and Petitioner has testified that he would undergo the procedure if approved. (T 17.) Based on the above, the Arbitrator awards Petitioner prospective medical benefits in accordance with the recommendations of Dr. Bernstein, including a decompression and cervical fusion at C5-6 and C6-7.

Robert M. Harris

Robert M. Harris, Arbitrator

Dated: October 10, 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Deborah E. Packard,

Petitioner,

vs. NO: 11 WC 20992

20IWCC0764

Ill. Department of Healthcare & Family Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation, medical expenses and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, said decision being attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 9/13/18 is affirmed and adopted.

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: DEC 29 2020
o:11/24/20
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0764

PACKARD, DEBORAH E
Employee/Petitioner

Case# **11WC020992**

IL DEPT OF HEALTHCARE & FAMILY SERVICES
Employer/Respondent

On 9/13/2018, 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 2.26% 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:

2043 HAUSER LAW LLC
RICHARD J HAUSER
524 W STEPHENSIN ST SUITE 300
FREEPORT, IL 61032

5946 ASSISTANT ATTORNEY GENERAL
HELEN A LOZANO
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 13 2018

RICHARD A. RAMOS, ASSISTANT SECRETARY
ILLINOIS WORKERS' COMPENSATION COMMISSION

20IWCC0764

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DEBORAH E. PACKARD,
Employee/Petitioner

v.

ILLINOIS DEPT OF HEALTHCARE & FAMILY SERVICES
Employer/Respondent

Case # **11** WC **20992**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Rockford**, on **July 18, 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 **March 1, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$65,191**; the average weekly wage was **$1,253.67**.

On the date of accident, Petitioner was **38 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.

ORDER

Permanent Partial Disability: Person as a whole (For injuries before 9/1/11)

Respondent shall pay Petitioner permanent partial disability benefits of $ 664.72/week for 37.95 weeks, because the injuries sustained caused the 15% loss of use of the right arm and 37.95 weeks representing 15% loss of the use of the left arm due to bilateral cubital tunnel syndrome as a result of repetitive trauma.

The parties stipulated that for the 52 weeks prior to the Petitioner's injury the Petitioner made $65,191 for an average weekly wage of $1,253.67. The maximum PPD rate at the time of the Petitioner's injury, March 15, 2010, was $664.72.

Therefore, the Petitioner is entitled to permanency of $25,226.12 as to her right arm and $25,226.12 as to her left arm for a total of $50,452.24.

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.

Jessica C. Kozatz

Signature of Arbitrator

9/11/18
Date

SEP 13 2018

BEFORE THE
ILLINOIS WORKERS COMPENSATION COMMISSION

STATE OF ILLINOIS)
)
COUNTY OF WINNEBAGO)

20IWCC0764

DEBORAH PACKARD,
Petitioner,

v.

ILLINOIS DEPT. OF HEALTHCARE & FAMILY SERVICES,
Respondent.

No. 11 WC 20992

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

Petitioner's Testimony

On March 1, 2010, Petitioner was a 38-year-old, right hand dominant employee of the Illinois Department of Healthcare and Family Services, Child Support Division. She has been employed in this capacity since December of 1997.

Petitioner had a prior right carpal tunnel release performed in March of 2005. No Application for Adjustment of Claim was filed by the Petitioner in connection with this surgery.

In March of 2010, Petitioner was a Field Advisor who worked Monday through Friday, between seven and seven and half hours per day. Her work duties consisted of analyzing data, requesting ad hoc reports, conducting research, ensuring federal compliance, and maximizing federal funds. Occasionally, she simultaneously used her phone and computer. Petitioner's position required her to travel at a minimum, quarterly. On these occasions, she would be away for two days.

At the time of the alleged injury, and for the prior three years, Petitioner's workstation consisted of a CPU, keyboard, monitor, and mouse that were set up on a table, to her left, against a wall. The monitor was set atop the CPU, keyboard on the table with the mouse to her right. She sat on an adjustable chair about the same height as the table. When Petitioner typed, her elbows were bent at a 45-degree angle with her arms resting on the table. Petitioner testified she typed on her keyboard for approximately 7 hours per day while at work.

On the alleged accident date, Petitioner noticed she was experiencing bilateral hand and arm pain, numbness, and tingling with weakened grip strength.

On March 15, 2010 Petitioner completed an Employee's Notice of Injury where she indicated that "all typing causes pain". (PX 1) She did not indicate what body parts were affected. (Id.) On September 20, 2010, she amended her Notice of Injury Report to add affected body parts: wrists, hands, shoulders, and neck. (RX 2.)

On March 16, 2010, Petitioner presented to Dr. Shokry Tawfik of CIOX Health, at which time the doctor noted a history of bilateral hand pain for the last 2 ½ weeks with decreasing grip strength, occasional numbness and tingling in the fingers. (PX 4). Dr. Tawfik further noted the Petitioner's worked required her to type frequently. On exam, positive Phalen's was noted bilaterally. Petitioner was advised to use wrist splints at night and an EMG was scheduled for April 12, 2010 to rule out bilateral carpal tunnel syndrome. (Id.)

On March 23, 2010, Petitioner called Dr. Tawfik's office with complaints of "sharp pain in [her] hands, fingers [and] forearm". (Id.) As Tylenol and Tylenol PM was not alleviating her symptoms, medication was prescribed. (Id.).

Petitioner presented to Dr. Farouk Khan, at FHN, Department of Neurology on April 12, 2010, reporting a history of numbness, tingling and episodic "pain in her finger, and sometimes in the entirety of her upper extremities, for the past two months." Bilateral EMG/NCV testing was consistent with moderately severe bilateral carpal tunnel syndrome. (PX 5)

Petitioner testified she then waited for approval for treatment of her condition as a work injury.

In October of 2010 the Petitioner started to experience severe stomach pain, Petitioner had a hysterectomy in November of 2010 which kept her off work until January of 2011. Thereafter, Petitioner received approval that her condition with her hands and arms would be treated as a work injury, but she did not want to have another surgery after having her recent hysterectomy and therefore contemplated alternative care with a chiropractor.

In May of 2011 the Petitioner suffered a left knee injury while playing kickball with her family. Petitioner had arthroscopic surgery for an ACL reconstruction of her left knee on June 20, 2011.

On September 25, 2011 the Petitioner presented for a rheumatology consult with Dr. David Dansdill at Ortho Illinois with complaints of multiple joint pain and stiffness in her shoulders, elbows, hands, fingers, hips, knees, ankles, and feet. (PX 3)

The Petitioner again sought approval from her employer for treatment of her upper extremity issues as a work injury. The Respondent referred the Petitioner to Dr. Michael Birman for an independent medical exam.

On October 22, 2012, Petitioner presented to Dr. Michael Birman at Hand Surgery Associates reporting a history of bilateral upper extremity numbness, tingling and weakness, greater on the right than left. (RX 4) Petitioner reported a prior right carpal tunnel release, followed by a right rotator cuff repair in June and December of 2005, after which she did well for approximately five years before the return of symptoms in March of 2010. Petitioner was reportedly working with splints but continued to wake up at night with symptoms. Dr. Birman diagnosed the Petitioner with left cubital tunnel syndrome and bilateral upper extremity pain, recommended treatment for the cubital tunnel syndrome and found Petitioner was not at maximum medical improvement.

Dr. Birman noted Petitioner worked for the last 15 years as a statewide field advisor requiring 7½ hours per day of typing and mouse work. (Id.).

Regarding causation, the doctor opined that the Petitioner's activities at work had not caused, aggravated or accelerated her current condition. (Id.)

On December 27, 2012 the Petitioner consulted with Dr. Robin Borchardt at OrthoIllinois, at which time the doctor noted a history of a 41-year-old female who complained of bilateral hand and elbow pain due to repetitive use. Review of the prior EMG was significant for right cubital tunnel syndrome. The doctor recommended further EMG studies to evaluate her nerve entrapment. (PX 3)

The Petitioner again saw Dr. Borchardt on January 10, 2013 for bilateral hand and elbow pain. Dr. Borchardt noted an EMG study on January 8, 2013 revealed mild bilateral ulnar nerve conduction delay across the elbows. (Id.) Dr. Borchardt noted Petitioner's symptoms had existed for three years and that physical therapy, inflammatory medications, and bracing had provided little relief. The doctor noted that the Petitioner's job required her to keep her arms bent while working on the computer. (Id.)

On January 11, 2013 the Petitioner consulted with Dr. Edric Schwartz, a surgeon at OrthoIllinois on referral from Dr. Borchardt. Dr. Schwartz noted a history of a 41-year-old female complaining of bilateral hand and elbow pain due to repetitive use. The doctor reviewed the January 8, 2013 EMG study, noting evidence of bilateral cubital tunnel syndrome. Due to the failure of conservative treatment to relieve Petitioner's symptoms, the doctor recommended surgical intervention.

On February 5, 2013, Petitioner underwent right ulnar nerve decompression at the elbow with subcutaneous anterior nerve transposition performed by Dr. Schwartz. (Id.) She presented for four sessions following her surgery before she was discharged from physical therapy. (Id.)

On May 1, 2013 Dr. Schwartz released the Petitioner from his care as to the right elbow. (PX 3)

On January 26, 2016, Petitioner underwent left elbow cubital tunnel decompression with subcutaneous anterior ulnar nerve transposition. (PX 4)

On October 19, 2016, Petitioner presented to Dr. Schwartz with complaints of left elbow pain starting three months ago. (Id.) An injection was administered and Petitioner was advised to follow up as needed. (Id.) Petitioner followed up on May 8, 2017 requesting a second injection to the left elbow. (Id.) She was advised that surgical intervention might soon be necessary. (Id.) Petitioner's medical records reflect this was her last visit to a physician.

In his written report of February 9, 2017, Dr. Schwartz opined Petitioner's condition could be aggravated by her employment, if during her period of time she frequently rested the medial aspect of her elbow over a hard surface or had her elbow bent for long periods of time." (PX 2)

CONCLUSIONS OF LAW

Credibility of Petitioner

The Arbitrator found Petitioner presented at the arbitration hearing as an exceedingly credible witness. Petitioner appeared to understand the many questions posed to her, answering in a direct, calm, confident and articulate manner. The Arbitrator was impressed with Petitioner, noting she came across as truthful and honest. After the conclusion of the hearing, the Arbitrator reviewed the written materials submitted into evidence, noting Petitioner's testimony was corroborated by such.

ACCIDENT & CAUSAL CONNECTION

Petitioner's uncontradicted testimony is that in March of 2010 she noticed she was dropping things and experiencing pain, numbness, and tingling in both arms and hands.

Petitioner testified for at least three years prior to March of 2010, she performed keyboarding duties for approximately seven hours per day from a seated position with her elbows bent at a 45-degree angle and her arms resting on the desk.

On March 15, 2010 Petitioner completed an Employee's Notice of Injury where she indicated that "all typing causes pain".

Between the time of her prior right carpal tunnel release in 2005 and March of 2010, she had no significant complaints or difficulties with her arms or hands.

On March 16, 2010, Petitioner presented to Dr. Tawfik with a history of bilateral hand pain for the last 2 ½ weeks with decreasing grip strength, occasional numbness and tingling in the fingers. Dr. Tawfik further noted that the Petitioner worked performing desk work and typed frequently. On exam, positive Phalen's was noted bilaterally. On March 23, 2010, Petitioner called Dr. Tawfik's office with complaints of sharp pain in her hands, fingers and forearm[s].

Although bilateral EMG/NCV testing on April 12, 2010 noted moderately severe bilateral carpal tunnel syndrome, the same testing conducted on January 8, 2013 noted "mild bilateral ulnar nerve conduction delay across the elbow (cubital tunnel syndrome) affecting motor components" with no evidence of carpal tunnel syndrome.

Petitioner's treating surgeon, Dr. Edric Schwartz, opined the work activities such as the Petitioner performed would cause or aggravate cubital tunnel syndrome:

> *Cubital tunnel syndrome tends to be caused by both traction and compression of the ulnar nerve across the elbow. This can be either caused by activities which require frequent elbow flexion and extension, activities that require long periods of elbow flexion, or activities which cause pressure over the medial aspect of the elbow on the ulnar nerve. Often times, however, the condition is idiopathic and a definitive cause is not noted. Any job which does require long period of elbow flexion would aggravate the condition. Ms. Packard's job, in which she worked in Child Support Enforcement per my records, involved hours of typing on a keyboard. Depending on the position of the typing, this could indeed cause aggravation of the cubital tunnel if the patient rested her elbows on a desk or typed with her elbows in a relatively bent position. So, to a reasonable degree of medical certainty, I would believe that Ms. Packard's condition could be aggravated by her employment, if during her period of time she frequently rested the medial aspect of her elbow over a hard surface or had her elbow bent for long periods of time.* (PX 2)

Dr. Birman, Respondent's independent medical examining doctor, agreed with the diagnosis of left cubital tunnel syndrome though he opined that the work activities of the Petitioner was not a causative factor:

> *She does not perform the forceful activities that would contribute to cubital syndrome at work. I was unable to identify other specific risk factors in her history that led to the development of cubital tunnel syndrome. The electrodiagnostic studies demonstrated no evidence of carpal tunnel syndrome. Her primary job responsibility of typing and using a mouse would not lead to carpal tunnel syndrome nor would it lead to cubital tunnel syndrome.* (Id.)

The Petitioner testified she currently experiences pain and numbness in her arms following bilateral cubital tunnel. Petitioner has returned to her job for the Respondent and is not restricted in her work activities. Although the Petitioner had other maladies during her course of treatment, there is no evidence to refute the

Petitioner's claim of her ongoing problems of numbness and pain in her arms. There were no other risk factors from which the Petitioner suffered that would explain her ongoing problems with her arms.

Based upon the Petitioner's credible, uncontradicted testimony and the supporting medical records, the Arbitrator finds the Petitioner suffered from bilateral cubital tunnel syndrome that manifested on March 1, 2010 which arose out of and during the course of her employment with the Respondent

Furthermore, based on a preponderance of the evidence presented, the Arbitrator finds Petitioner's current condition of ill-being is causally related to the work-related accident at issue. The Arbitrator relies particularly on Petitioner's credible testimony, the corroborative medical records and the opinions of her treating surgeon, Dr. Schwartz.

The Arbitrator found the conclusions of Dr. Birman less convincing that Dr. Schwartz noting Dr. Birman's failure to explain or substantiate his opinion with explanation, reasoning or facts.

NOTICE

The Petitioner completed an injury report for her employer March 15, 2010. (1st page, PX 1) Also on March 15, 2010, the Petitioner's supervisor, Norris Stevenson, signed a Supervisor's Report of Injury acknowledging that the employee stated she was having pain in her hands and arms beginning approximately two weeks ago. (Id., Page 2) On March 16, 2010, the Petitioner sought treatment for pain and numbness in her hands by her primary care physician Dr. Tawfik. (PX 4) The evidence is irrefutable that the Petitioner provided timely notice of her condition to the Respondent.

NATURE & EXTENT

Petitioner's accident arose prior to September 1, 2011 and is therefore evaluated under the prior Act.

The Petitioner has returned to full duty and has now been employed by the Respondent in excess of twenty years. She is currently 46 years of age. She continues to complain of numbness and pain in her arms following her surgeries.

Based on Petitioner's credible testimony and the treating medical records, the Arbitrator finds Petitioner has suffered 15% loss of the use of the left arm and 15% loss of use of her right arm.

Petitioner is therefore entitled to permanent partial disability of 37.95 weeks for her right arm and 37.95 weeks for her left arm.

The parties stipulated that for the 52 weeks prior to the Petitioner's injury the Petitioner made $65,191 for an average weekly wage of $1,253.67. The maximum PPD rate at the time of the Petitioner's injury, March 15, 2010, was $664.72.

Therefore, the Petitioner is entitled to permanency of $25,226.12 as to her right arm and $25,226.12 as to her left arm for a total of $50,452.24.

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

Candice Williams,

Petitioner,

vs. NO: 18 WC 28343

Advocate Health Care,

Respondent.

20IWCC0765

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 issue of medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 27, 2020, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,300.00. 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: DEC 29 2020
TJT:yl
o 12/15/20
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

WILLIAMS, CANDICE
Employee/Petitioner

Case# **18WC028343**

ADVOCATE HEALTH CARE
Employer/Respondent

20IWCC0765

On 1/27/2020, 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 LLC
SCOTT G GOLDSTEIN
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY
KAREN A HAARSGAARD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

20 IWCC0765

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)

Candice Williams
Employee/Petitioner

v.

Advocate Health Care
Employer/Respondent

Case # **18** WC **028343**

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 **July 8, 2019 and August 13, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **4/14/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$16,630.64**; the average weekly wage was **$319.82**.

On the date of accident, Petitioner was **34** years of age, ***married*** with **1** dependent children.

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

Respondent shall be given a credit of **$4,048.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$4,048.00**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $3,514.28, as provided in Sections 8(a) and 8.2 of the Act and as is set forth below.

Respondent shall pay Petitioner temporary total disability benefits of $286.00/week for 16-5/7 weeks, commencing 4/28/18-7/10/18 and 8/21/18 – 10/1/18, as provided in Section 8(b) of the Act.

Petitioner's claim for prospective medical care 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.

Signature of Arbitrator

January 27, 2020
Date

ICArbDec19(b)

20IWCC0765

FINDINGS OF FACT

Petitioner was employed by Respondent as a CNA/unit secretary at Advocate South Suburban Hospital. She had been so employed for 2 years.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on April 14, 2018. She was moving a bed with a heavy patient when she felt pain in her mid-back and left shoulder. The patient weighed in excess of 300 pounds and the bed was defective.

She was treated in Respondent's emergency department later that day. She had complaints of left shoulder and thoracic back pain. The physical exam revealed tenderness to palpation at T5-6 with radiation to the left paraspinal area. No shoulder pathology was noted. X-rays of the T-spine and left shoulder were unremarkable. She was discharged to go home, prescribed medication and recommended to follow up with Dr. Rosner. (PX 3)

Petitioner was apparently seen at Advocate Occupational Medicine Clinic beginning April 17, 2018 and received physical therapy, per the histories noted by Respondent's §12 examiners. Neither Party submitted medical records from occ med.

On June 1, 2018 Petitioner was seen by P.A. Mark Bordick of Orland Park Orthopedics for consultation regarding left shoulder and back pain, secondary to an injury at work. She complained of pain across the medial border of the left scapula with more focal pain in the anterior lateral aspect of the left shoulder. Her strength with internal rotation was five out of five; supraspinatus isolation was five out of five. She did have positive impingement sign with internal rotation. There was no pain over the acromioclavicular joint. There was no pain with resisted straight arm abduction or cross-arm adduction. There was no evidence of biceps tendonitis or rupture. Strength was 5/5. Exam of the cervical spine was normal. There is no comment regarding T-spine complaints or findings. She was treated with a Kenalog and Lidocaine injection. Petitioner was excused off work. (PX 5)

Petitioner returned to P.A. Bordick on June 11, 2018. She noted some shoulder improvement since the injection but said physical therapy was making her back worse. An MRI of the thoracic spine, completed July 5, 2018, demonstrated mild degenerative changes with no evidence of a disc herniation. On July 9, 2018, P.A. Bordick provided work restrictions of no lifting with the left upper extremity and sedentary work with a weight restriction of ten pounds. (PX 5, PX 3)

On July 11, 2018 Petitioner had an MRI of the left shoulder, which demonstrated uncomplicated subacromial decompression without recurrent osteophytes, mild tendinosis of the supraspinatus and infraspinatus, mild atrophy of the lateral deltoid muscle, red marrow conversion (which was said to be commonly seen with obesity, smoking, anemia, and CHF). (PX 5, PX 3)

On July 16, 2018, Petitioner received a biceps groove injection by Dr. Rhode. Petitioner returned to Dr. Rhode on July 30, 2018, with the exam demonstrating positive impingement signs of the left shoulder with external rotation, positive Speed's test. Dr. Rhode noted that the injection provided relief. Petitioner was to maintain her modified light duty restrictions and continue with physical therapy two times per week for four weeks. Petitioner was seen by Dr. Rhode on August 20, 2018, complaining of returned biceps pain. She stated she wished to undergo surgery for biceps tenodesis. (PX 5)

Petitioner was evaluated by Dr. Julie Wehner on September 13, 2018, pursuant to §12. Exam demonstrated a four foot eleven inch female weighing 256 pounds with moderate pain to light palpation of the thoracic spine,

and mild pain with axial compression of the left shoulder. The MRI findings were benign.. The subjective complaints did not correlate with the objective findings. She had a pain rating of 8/10. The diagnosis was left shoulder pain and thoracic pain Dr. Wehner opined Petitioner sustained a soft tissue injury to the thoracic spine, opined that Petitioner was at MMI and could work full duty with respect to the thoracic spine. No further treatment was necessary. (RX 2A)

Petitioner was evaluated by Dr. Brian Forsythe pursuant to §12 on September 17, 2018. There was a normal cervical exam, active guarding at 125 degrees of left shoulder scaption (elevation?), with later elevation of 145 degrees, 40 degrees external rotation with active guarding and internal rotation to L1. She had complaints of diffuse , non-anatomic tenderness to palpation, 4+/5 supraspinatus and infraspinatus strength with cog-wheel rigidity; non-specific discomfort with Hawkin's, O'Briens and valgus shear. She had give way effort on Speed's test. The MRI was reviewed. Dr. Forsythe diagnosed a resolved shoulder strain related to the work accident and opined she could return to her regular work. He also opined she had severe symptom magnification. (RX 1A)

Petitioner returned to Dr. Rhode on September 21, 2018 and he continued to recommend surgery and she now had lumbar spine complaints although there was no exam for same. P.A. Bordick evaluated her on December 14, 2018 charting that she had worsened due to return to full duty work. Dr. Rhode saw her again on February 27, 2019 charting she was off work as there was no light duty available. Dr. Rhode continued to see Petitioner through May 15, 2019, with the same left shoulder exam results, same recommendations and no examination or care prescribed for the new complaints of lumbar spine. (PX 5)

The deposition of Dr. Rhode was taken on May 2, 2019. He is a board certified orthopedic surgeon. He maintained his position that Petitioner required biceps tenodesis and disagreed with Dr. Forsythe's diagnosis and opinions, although he admitted he did not know how Petitioner presented at the Forsythe exam and also repeatedly said "in fairness to Dr. Forsythe" while addressing these issues. The mechanism of injury was consistent with the injury Petitioner presented with. The proposed surgery was an arthroscopic biceps tenodesis. Petitioner suffered a rotator cuff strain and strain of the biceps attachment as a result of the injury. That condition and the proposed surgery were causally related to the accident. Dr. Rhode said he had no opinion with respect to her back complaints. If the T-spine MRI had pathology, he would refer the patient to a spine surgeon. (PX 1)

The deposition of Dr. Forsythe was taken on May 21, 2019. He is a board certified orthopedic surgeon. Dr. Forsythe advised he took x-rays which were normal. The MRI findings were consistent with Petitioner's prior injury and surgery. There was no objective findings on MRI that would explain Petitioner's pain complaints. Dr. Forsythe testified Petitioner exhibited severe symptom magnification, inconsistent range of motion, active guarding with active and passive range of motion, non physiological tenderness to palpation and give way effort with strength testing. He explained that Petitioner actively resisted increasing her range of motion by contracting her muscles and that her complaints were non-anatomical. The diagnosis was resolved left shoulder strain. Petitioner was at MMI and not in need of further treatment. There was no need for surgery. Petitioner could return to work with no restrictions. Dr. Forsythe also opined that there is no known diagnostic correlation between bicipital groove injection, pain relief and successful biceps tenodesis. Patients with non-localizing tenderness tend to have worse surgical outcomes. Dr. Forsythe testified his job as a physician, whether treater or evaluator, is to develop appropriate treatment and do what is in their best interest. (RX 1B)

The deposition of Dr. Wehner was taken on May 28, 2019. She is a board certified orthopedic surgeon. The MRI of the T-spine revealed mild degenerative changes. The left shoulder MRI was largely unremarkable. Petitioner may have suffered a thoracic sprain, but that should have healed by the time of her examination. There were no objective findings to correlate with Petitioner's pain complaints. Petitioner was at MMI and not

in need of any further treatment. She was capable of full duty work. Dr. Wehner now performs 6 to 10 back surgeries per year and 2 to 10 IME's per week. (RX 2B)

Custom Case Management provided nurse case management on this matter and their reports of July 9, July 16, July 30 and August 21, 2018 were admitted into evidence. On July 9, 2018, it was noted that Dr. Rhode thought that the T-spine MRI was clean. On July 16, 2018, it was noted that Dr. Rhode thought that the shoulder MRI did not show a surgical lesion. The shoulder was not improving since the injury. On July 30, 2018, the shoulder was said to be improving. On August 21, 2018, it was reported that Dr. Rhode was unable to determine the etiology of Petitioner's increased pain complaints and was recommending surgery to prompt the need for an IME. (RX 3)

Petitioner testified she had left shoulder surgery approximately 8 years prior to the subject accident and had no symptoms following same. Petitioner testified her present pain level in her left shoulder was a 6, she needed assistance with household chores, and stated she continued to have mid back pain. Petitioner testified she wanted the surgery proposed by Dr. Rhode.

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d).

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between her employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

WITH RESPECT TO ISSUE WITH RESPECT TO ISSUE (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY AND ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS:

Petitioner's current condition of ill-being is, in part, causally related to the injury. The Arbitrator finds that the said condition of ill-being is thoracic sprain, resolved and left shoulder strain, resolved, per the persuasive opinions of Drs. Forsythe and Wehner.

As to the T-spine sprain, Dr. Wehner's opinions are unrebutted and Dr. Rhode offered no opinions regarding Petitioner's back.

Petitioner failed to prove that her current condition of ill-being regarding her left shoulder (for which Dr. Rhode has offered surgery) is causally related to the injury.

Dr. Rhode's opinions on causal connection and the need for the offered biceps tenodesis surgery are not persuasive. The Arbitrator is troubled by the benign MRI findings and inconsistencies noted by Drs. Forsythe and Wehner. Additionally, the NCM's 8/21/2018 report stating that Dr. Rhode was unable to determine the etiology of Petitioner's complaints and was ordering surgery to prompt an IME was unrebutted. Dr. Rhode disagreed with Dr. Forsythe's opinions, but did not offer a persuasive basis for the disagreement. Dr. Forsythe's testimony is persuasive that Petitioner is at MMI and not in need of surgery. Petitioner's non-localizing complaints of tenderness do not support a finding that the offered surgery will lead to a successful outcome.

Petitioner's injuries have reached MMI and no prospective medical treatment is ordered.

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:

Petitioner's only claimed bill was from Dr. Rhode, said to be in the amount of $4,495.70.

Based upon the Arbitrator's finding above on the issue of Causation, **the Arbitrator awards $3,514.28 for the services rendered by Orland Park Orthopedics for the dates of service of 6/1/2018, 7/9/2018, 7/16/2018 and 8/20/2018.** The same are found to be causally connected to the injury and reasonable and necessary to cure or relieve the effects of the injuries. This award is in accordance with §§8(a) and 8.2 of the Act. Respondent is entitled to a credit for all awarded bills that it has paid or satisfied.

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

The Parties stipulated that Petitioner was entitled to TTD benefits from April 28, 2018 through July 10, 2018. Dr. Rhode excused Petitioner from work effective August 21, 2018. Respondent disputes TTD after October 1, 2018 (Arb.X 2)

Based on the Arbitrator's finding above on the issue of causation, **Petitioner is awarded TTD from 4/28/2018 through 7/10/2018 and 8/21/2018 through 10/1/2018, a period of 16-5/7 weeks.**

Respondent is entitled to a credit in the amount of $4,048.00 for TTD paid.

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mesha Williams,

Petitioner,

vs. No. 13 WC 39671

Capital Healthcare and Rehab Centre,

20IWCC0766

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §19(B) AND §8(A)

Timely Petition for Review 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 care and admissibility of Dr. Rutz's deposition, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

I. FINDINGS OF FACT

On October 15, 2013, Petitioner, a 36-year-old Activities Director, slipped and fell on a wet ramp leading to her office. She landed on her back and buttocks, and also struck her head. Petitioner was treated that same day at Midwest Occupational Health Associates, where she was given restrictions and an order for physical therapy. Petitioner testified that she returned to work a couple of days after that.

Petitioner received follow-up care from her primary care physician, Dr. Lee. In January 2014, she underwent cervical and lumbar MRI's. The cervical MRI was unremarkable. The lumbar MRI showed only mild degenerative changes and a tiny L5-S1 disk protrusion. Petitioner began a second course of physical therapy in February 2014. She underwent a lumbar epidural steroid injection on June 5, 2014.

On July 21, 2014, Petitioner was examined by orthopedic surgeon, Dr. Pineda. Petitioner reported that two courses of therapy didn't really help her pain, and the low back epidural injection she received made her pain worse. On review of her systems, Dr. Pineda found nothing specific that was worrisome. He agreed that both her cervical and lumbar MRI's demonstrated only mild degenerative changes, noting the slight osteophyte disc complex at around C5-6 and tiny bulge at L5-S1. He opined there was no significant abnormality causing any neuro compromise. Dr. Pineda recommended only, "prn medicines," for Petitioner, and specifically advised against undergoing more aggressive measures such as injections, therapies, or "anything of that nature." He believed Petitioner was at MMI as of July 21, 2014, and that she could do anything she was comfortable doing.

On August 7, 2014, Petitioner was examined by Respondent's Section 12 expert, Dr. O'Leary. At his deposition, Dr. O'Leary opined that Petitioner's treatment through the date of his exam was reasonable. However, he believed her complaints were ill-defined, noting that her lumbar MRI showed no nerve compression or pathology which would explain her subjective complaints. Dr. O'Leary opined that: Petitioner was at MMI, she did not need restrictions, and she did not need a discogram or surgery.

Petitioner did receive additional treatment after August 2014. On December 2, 2015, Petitioner sought care for a flare up of pain due to an unknown cause. In 2016, Dr. Salvacion provided her with two steroid injections.

At the request of her attorney, Petitioner saw Dr. Rutz on November 21, 2017 for an exam. She did not receive treatment from him. At his September 7, 2018 deposition, Dr. Rutz testified that Petitioner suffered from mostly discogenic low back pain, secondary to an L5-S1 annulus injury. He believed her treatment through the date of his exam was reasonable, necessary and causally related. He recommended a provocative discogram possibly followed by surgery, though only if the discogram revealed appropriate findings. He did not believe Petitioner would be at MMI until she had a conversation with a spine surgeon. Petitioner testified that she wishes to pursue Dr. Rutz's treatment recommendations.

In November 2018, Petitioner accepted a new job as a CNA at Lewis Memorial Village. Before beginning work in that position, she took a pre-employment physical exam. Her examining doctor told her she would do fine at that job if she was mindful of her body mechanics. Since beginning work in that position, Petitioner has missed only one night of work due to back pain. Petitioner also testified that she hasn't requested or received a prescription for pain medication since at least 2017.

II. CONCLUSIONS OF LAW

The Arbitrator found that Petitioner's condition reached MMI in April 2014. The Arbitrator based that finding upon the testimony of Dr. O'Leary, which the Arbitrator believed was consistent with the records of Petitioner's treating physicians, who also found her to be at MMI for her work injuries. The Arbitrator awarded Petitioner her unpaid medical bills through April 30, 2014, but denied an award for her treatment expenses after that date, and denied prospective medical care.

In his decision, the Arbitrator struck the deposition testimony of Dr. Rutz from the record, finding that his deposition was a discovery deposition, not an evidence deposition. The Arbitrator believed Dr. Rutz's testimony could not be used at trial because it was in contravention of 50 Ill. Admin. Code 9030.60; S. Ct. Rule 202; and S. Ct. Rule 212.

The Commission views the evidence differently than the Arbitrator. While the deposition is not titled, "Evidentiary Deposition," and does not include a stipulation that the deposition was being taken for evidentiary purposes, the circumstances surrounding it clearly show clearly that it was intended to be an evidence deposition. It was taken for the sole purpose of being used at Petitioner's arbitration hearing in lieu of Dr. Rutz's live testimony. The Workers' Compensation Act makes no provisions for discovery. Because no *dedimus potestatem* was filed, Dr. Rutz's deposition was taken by agreement of the parties. Respondent's counsel was present at the deposition and cross examined Dr. Rutz. Moreover, and most significantly, the Respondent had no objection to the admission of the deposition into evidence at the arbitration hearing. The Commission finds Dr. Rutz's deposition was an evidence deposition; that it should not have been stricken from the record by the Arbitrator, and that any claim of error was waived by the Respondent. The Commission vacates that part of the Arbitration decision which struck Dr. Rutz's deposition transcript from evidence.

The Commission has considered Dr. Rutz's testimony and opinions, but does not find them persuasive. Dr. Rutz only first saw Petitioner more than four years after her accident. He admitted that he had not reviewed Dr. Ferguson's March 3, 2014 report stating Petitioner's work injury did not explain her generalized right-sided complaints of intermittent numbness and weakness. Dr. Rutz admitted he had not reviewed Petitioner's January 2014 and January 2015 MRI's, and he could not state whether there was any difference between them. Dr. Rutz admitted that Petitioner's complaints at his exam were much greater than her objective findings, similar to what Dr. Ferguson reported.

Although Dr. Rutz did not believe Petitioner would be at MMI until she consulted with a spine surgeon, that ignores the fact that Petitioner did see a spine surgeon for her injuries: Dr. Pineda. Dr. Pineda noted that two sessions of physical therapy did not really help Petitioner's complaints, and that a low back epidural made her condition worse. Dr. Pineda recommended against further treatment other than as-needed pain medication. Notably, Petitioner currently

20IWCC0766

manages her pain with only over the counter medications, and she has not required pain prescriptions since at least 2017.

The Commission finds the opinion of Dr. Pineda – that Petitioner was at MMI as of July 21, 2014 – more persuasive than Dr. Rutz's opinion that she was not. Dr. Pineda's opinion was confirmed by Dr. O'Leary a few weeks later, on August 7, 2014. Although Dr. O'Leary testified that Petitioner should have attained MMI for her work injuries by April 2014, he had not seen or examined her in April 2014. He also acknowledged that the testing and treatment she received through August 7, 2014 had been reasonable. For those reasons, the Commission modifies the April 30, 2014 MMI date found by the Arbitrator to August 7, 2014, and finds Petitioner entitled to her medical expenses for her work injuries through August 7, 2014.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the order in the Arbitration decision striking the deposition testimony of Dr. Rutz is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of medical expenses is modified. Respondent shall pay to Petitioner the outstanding reasonable and necessary expenses incurred in treating her head and spine injuries between October 15, 2013 and August 7, 2014, as provided by §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 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.

20IWCC0766

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,500.00. 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.

DEC 29 2020

DATED:
o-11/5/20
Marc Parker/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WILLIAMS, MESHA K
Employee/Petitioner

Case# **13WC039671**

CAPITAL HEALTHCARE AND REHABILITATION CENTRE
Employer/Respondent

20IWCC0766

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0834 KANOSKI BRESNEY
CHARLES N EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

1872 SPIEGEL & CAHILL PC
MILES CAHILL
16 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

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

20IWCC0766

☐ 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

Mesha K. Williams
Employee/Petitioner

v.

Capital Healthcare and Rehabilitation Centre
Employer/Respondent

Case # **13** WC **39671**

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 and Maureen Pulia**, Arbitrators of the Commission, in the City of **Springfield**, on **February 27, 2019 and May 24, 2019 respectively**. The parties have agreed to a decision to be rendered by the Honorable Thomas L. Ciecko. After reviewing all of the evidence presented, Arbitrator Ciecko hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 15, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$28,080.00**; the average weekly wage was **$540.00**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **1** dependent children.

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

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

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

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

ORDER

Medical benefits

Respondent shall pay, if not previously paid, pursuant to the fee schedule, reasonable and necessary medical services for Petitioner to her providers, incurred from October 15, 2013 through April 30, 2014.

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

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

Signature of Arbitrator

4-1-2020
Date

ICArbDec p. 2

APR 2 - 2020

Mesha K. Williams v. Capital HealthCare and Rehabilitation Centre, No. 13 WC 39671

Preface

The parties proceeded to hearing February 27, 2019 before Arbitrator Douglas McCarthy and on May 24, 2019 before Arbitrator Maureen Pulia, on a Request for hearing indicating the following issues in dispute: whether Petitioner's current condition of ill-being is connected to the injury; whether Respondent is responsible for unpaid medical bills; and whether Petitioner is entitled to prospective medical care. Mesha K. Williams v. Capital Healthcare & Rehabilitation Center, Transcript of Proceedings on Arbitration at 4. The parties have agreed to have this decision made by me on the record as submitted at the hearing. Petitioner testified, as well as Dr. Patrick O'Leary via evidence deposition. The testimony of Dr. Kevin Rutz was submitted via discovery deposition. That witness's testimony is stricken in contravention of 50 Ill. Admin. Code 9030.60; S. Ct. Rule 202; and S. Ct. Rule 212. It is a discovery deposition and here, cannot be used at trial.

Findings of Fact

The accident was not in dispute in this case. Petitioner testified that on October 15, 2013, she was employed as an activity director at Capitol Care Center. She testified that she slipped and fell while walking down an inclined concrete ramp inside the employee entrance to clock in for her day of work at Capitol Care Center. She testified that it had been raining that day and that a puddle of water had accumulated by the door and rushed down the concrete ramp when she opened the door to enter the building. Petitioner testified that when she fell she fell backwards with her feet flying up, striking her buttocks, back and the back of her head. Petitioner testified that co-workers helped her up and that she was experiencing pain particularly in her tailbone and the back of her head. Petitioner reported the fall to the administrator and was directed to go to Midwest Occupational Health Associates (MOHA) for treatment and evaluation. Williams at 9-13.

Records from MOHA indicate Petitioner was seen that day and related a history of injury. Petitioner complained of hitting her head and back and complained of a mild headache and ear and back pain. On examination, Petitioner was diagnosed with contusions to her head and thoracic spine. Petitioner was directed to go home that day and given restrictions against lifting, pushing or pulling more than 10 pounds, no repetitive waist bending and was provided medications. Petitioner testified that she was able to return to work in a couple of days because able to perform her work as an activity director within her restrictions. Petitioner returned to MOHA on the following day as directed denying a headache on that day but complaining of right thoracolumbar soreness and soreness in her left and right anterior rib cage. Two small areas of bruising were noted along her left anterior lower rib cage that was tender. Petitioner was directed to continue her medications and her light duty restrictions were continued. X-rays of her ribs were performed. Petitioner returned on October 24, 2013 reporting continued pain to the right side of her back down her buttocks and around her chest. It was noted that she had a prior history of lumbar injury several years ago with resolution. Petitioner was directed to continue her medications and start physical therapy. Her light duty restrictions were continued. Petitioner's Exhibit 5 at 106-107, 97-99, 89-90; Williams at 13.

Petitioner began physical therapy at Memorial Industrial Rehabilitation on November 14, 2013 reporting lumbar and thoracic pain following a work injury. Petitioner's Exhibit 5 at 80.

Petitioner returned to MOHA on November 15, 2013. Petitioner reported that she was now getting numbness in her right thigh and weakness and heaviness in her right arm. MRIs of the Petitioner's lumbar and

cervical spine were done on January 29, 2014. The cervical MRI showed an "essentially unremarkable exam" with minimal degenerative disc disease at C4/5, C5/6 and C6/7 levels. The lumbar MRI showed "very mild degenerative disc disease at L5/S1 with a small disc protrusion. Petitioner returned to MOHA on January 31, 2014 reporting no improvement in her back pain. She also reported numbness down her right upper extremity intermittently and that her right upper arm felt heavy. She also reported increased stiffness and pulling in her neck. After reviewing the MRI findings, Petitioner was diagnosed with a neck strain with intermittent radicular symptoms and thoracolumbar strain with intermittent numbness down the right anterior thigh. Her medications were continued and she was advised to re-start physical therapy for two weeks. Petitioner returned to MOHA on February 12, 2014, reporting numbness in both her right arm and leg, tingling all the time and worsening pain in her back. That doctor noted no difficulty with her ambulation and increased her weight restriction to 50 pounds and again directed physical therapy. Petitioner's Exhibit 5 at 23, 25, 17-18, 5.

Petitioner was seen by Dr. Lee, her family doctor, on February 3, 2014, for a second opinion following her MRIs. Petitioner was complaining of mid and low back pain more on the right than the left as well as some pain in her right leg and arm. Dr. Lee recorded a history of her injury. Petitioner reported back stiffness and pain, decreased flexion and extension of her back and neck and difficulty walking and sleeping. Petitioner returned to Dr. Lee on March 19, 2014, reporting no change in her condition. Petitioner reported that she had been doing therapy but it did not help. Petitioner reported low back pain worse in the right and some right leg and arm pain and numbness. Pain was worse with bending and movement. Petitioner was given medication for her back, was directed to continue therapy and a steroid injection was to be set up. Petitioner's Exhibit 2 at 105-106, 34-35.

Petitioner did restart her therapy at the Springfield Clinic on April 4, 2014, on referral from Dr. Lee. Petitioner reported ongoing back pain as well as the development of some numbness her right arm and right leg intermittently. Her therapy there continued until she was discharged on May 6, 2014, when it was noted that her back pain was the same but her leg pain was worse. As she was making no progress in therapy, it was discontinued and she was directed to continue a home exercise program. Petitioner's Exhibit 1 at 36, 29.

Petitioner testified that at this point, she was continuing to experience low back pain and pain down the back of her right leg with numbness on the right side of her leg. Petitioner testified that prior to her fall at work she had not been experiencing these sensations of pain and numbness in her back and right leg. Petitioner acknowledged that she had experienced back pain years before that had resolved. Williams at 15-16.

Petitioner saw Dr. Salvacione at the Memorial Pain Center on April 22, 2014. Petitioner again reported a history of accident. She complained of pain in her low back that sometimes radiated to her right leg. She reported numbness in her right leg that would come and go. She also reported neck and right shoulder pain but her low back pain was worse. Dr. Salvacione reviewed the MRIs that had been taken. He diagnosed lumbar and cervical radiculopathies and degenerative disc disease and recommended a trial of a lumbar epidural steroid injections, that was given that day. Petitioner's Exhibit 2 at 52.

Petitioner returned to Dr. Lee on May 27, 2014. Her medication was continued and she was directed to return in two months. Petitioner returned again to Dr. Lee on July 17, 2014, reporting that she was not doing better. Dr. Lee suggested another steroid shot in the back but noted it needed to be approved by worker's compensation. He prescribed Tramadol for pain. Petitioner's Exhibit 2 at 32-33, 25-27.

Petitioner was seen by Dr. Pineda, an orthopedic surgeon at the Springfield Clinic, on July 21, 2014. Petitioner was reporting pain in her neck, right arm, low back and right leg, with the back and leg pain being the worst. Dr. Pineda recorded a history of onset associated with a fall in October 2013. Petitioner reported that therapy had not helped and a steroid injection in her back had made it worse. On examination, Dr. Pineda noted

that her strength and sensation was normal. He noted only minor findings on the MRIs, seeing nothing that would cause a neuro compromise. Dr. Pineda did not recommend any more aggressive treatment, and recommended medication as needed and approved of home exercise. Petitioner's Exhibit 1.

Petitioner was seen at the emergency room of St. John's Hospital on July 29, 2014, reporting back pain related to her fall at work. She reported that the past injection and current medications were not working. The ER doctor prescribed a muscle relaxer and anti-inflammatory and stated that he suspected she was suffering from muscle spasm and sciatica. Petitioner's Exhibit 4 at 13-15.

On August 7, 2014, Petitioner was seen by Dr. Patrick O'Leary at the Midwest Orthopedic Center in Peoria for a Section 12 examination at the request of Respondent. He reviewed records of her treatment at MOHA and the MRI scan reports. On examination, O'Leary found no muscle spasm in her back. Petitioner reported pain on the right side of her thoracic spine in a large ill-defined area. He found that her sensation and reflexes were normal in her lower extremities. O'Leary opined that Petitioner had suffered a thoracolumbar strain at the time of her injury. He stated that this strain "should largely be resolved by now" and felt that the persistence of pain for this long was "highly unusual". He did not feel that her current diagnosis "was substantially contributed to" by the accident, though acknowledged that initially it would have been. O'Leary said the exact etiology of Petitioner's shoulder problem is unknow. He agreed that the initial doctor visits, the therapy and the MRIs were reasonable and related to her injury, but felt that no further treatment was reasonable, nor studies nor surgery, which he said should be avoided. He opined that she had no physical limitations related to the work accident, and that she had reached MMI by April 2104. Respondent's Exhibit 2.

Petitioner followed up again with Dr. Lee on October 9, 2014 for follow-up of her back pain. She continued to complain of back pain as well as pain in the right arm and leg. Dr. Lee noted that there was good compliance with treatment by Tramadol and good symptom control. She was prescribed Tramadol and Flexeril for pain management. Dr. Lee also indicated that he would set her up with a chiropractor. Petitioner was seen again on November 21, 2014 in follow-up for her back pain. She reported that she had been pushing a lot of patients at a festival the previous day. She was given Tylenol #3, as the Tramadol was not relieving the pain. Dr. Lee indicated that he may refer her to another orthopedic if she did not get relief. Petitioner followed up again with Dr. Lee on December 15, 2014, reporting no change in her condition, reporting that she had had no sensation in her right thigh since the last visit. Dr. Lee refilled her Tylenol #3 and Flexeril and indicated that he would attempt to refer Petitioner to another orthopedic doctor and would consider another steroid injection. Petitioner's Exhibit 2 at 19-20, 17-18, 14-15.

On January 9, 2015, Petitioner was seen by Dr. Smucker at the Orthopedic Center of Illinois, on referral from Dr. Lee. Petitioner complained of constant low back pain as well as intermittent lancinating pain radiating into her right lateral thigh and sometimes to her right foot. Petitioner also complained of chronic numbness and occasional burning in her right anterolateral thigh. Petitioner described little benefit from therapy but moderate relief with the use of Tylenol #3 and Flexeril. Smucker noted a large ovoid area on the anterolateral thigh that lacked sensation. He noted no atrophy or decreased strength. Petitioner's lumbar region was tender to light touch though he described that as "somewhat inconsistent and dramatic in appearance". Smucker noted that lumbar pain was not reproduced with extension, rotation or flexion. Dr. Smucker reviewed the previous MRIs and noted that she had mild degenerative disc disease at L5/S1 with a tiny midline disc protrusion. He viewed the cervical MRI as "essentially unremarkable". Dr Smucker's assessment included L5/S1 mild degenerative disc disease, chronic axial low back pain, right lower extremity pain, possible lumbar radiculopathy component and possible meralgia paresthetica. He recommended a repeat MRI of her lumbar spine and a diagnostic ultrasound evaluation of her right lateral femoral cutaneous nerve and a diagnostic and hopefully therapeutic injection by Dr. Watson. A repeat lumbar MRI was performed on January 20, 2015, which was read by the radiologist to show a small right paracentral L5/S1 disc protrusion with annular tear that did not distort or

impinge the right S1 nerve root sleeve, but was in close proximity. Petitioner was seen by Dr. John Watson at the Orthopedic Center of Illinois for evaluation of her lateral femoral cutaneous nerve in the right hip. An ultrasound examination of the nerve showed no obvious compression. An injection was performed and Petitioner was advised to follow up with Dr. Smucker. Petitioner returned to Dr. Smucker on February 16, 2015, reporting that the injection had resolved some of the numbness causing the burning sensation to be more intense. Petitioner reported an increase in pain in her right leg during the previous week that caused her leg to swell, though these symptoms had resolved on their own. On examination, Smucker noted that neural tension sign was mildly positive on the right. Smucker reviewed the new MRI noting that it showed minimal degenerative disc disease at L5/S1 but that it did not show any nerve impingement. Noting that Petitioner was suffering from "right lower extremity pain/paresthesia of unclear etiology", and noting that a past lumbar injection and the more recent lateral femoral cutaneous nerve injection had failed to provide relief, indicated that he had nothing further to offer. He noted that she may benefit from neurological consultation at the discretion of Dr. Lee. Petitioner's Exhibit 3 at 1-4, 20-21, 9-10.

Petitioner was seen by Dr. Lee on December 2, 2015, to follow-up her chronic back pain, noting its onset when she slipped at work in rain in October 2013. She was also seen for diabetes and right foot pain that had started two months before. As for her back pain, Dr. Lee suggested referral for another injection. Petitioner returned to Dr. Lee on January 11, 2016, reporting no change in her back pain. She reported plans to call for another back injection. Petitioner's Exhibit 2 at 158-161, 153-156.

Petitioner returned to Dr. Salvacione at Memorial Medical Center Spineworks on January 18, 2016. He noted that she continued to suffer from chronic back pain radiating down the right lower extremity. She also reported a new symptom of right heel pain for which she was receiving therapy. However, he noted that the radicular pain had been present since her injury in a fall in 2013 at work. She described her pain as shooting from her low back down her right leg to her heel. She noted that she had experienced some relief from her previous injection in June 2014. She was continuing to work her full time job as an activity director, taking over the counter medications and Naproxen 500 mg for pain. However, she was having difficulty sleeping at night and at times was having difficulty walking on her right heel. Dr. Salvacione reviewed an MRI taken in January 2015 which showed some mild degenerative changes including minimal disc bulging at L4/5 and a small right paracentral disc protrusion with annular tear at L5/S1. His diagnostic impression was mild lumbar degenerative disk disease, lumbar radiculopathy, lumbar myalgia, and small L5/S1 disk protrusion. Dr. Salvacione gave Petitioner a prescription to add aqua therapy to her current therapy treatment and a repeat epidural steroid injection. He added Flexeril to her medications to help her sleep at night. Petitioner's Exhibit 6 at 41-43. Petitioner did pursue aqua therapy from January 29, 2016 to March 10, 2016 when she was discharged with no improvement. Petitioner's Exhibit 2.

Petitioner underwent the repeat epidural steroid injection at L5/S1 on April 26, 2016. Petitioner testified that the epidural steroid injections that she had would help for a month, but then the pain would keep coming back. Petitioner testified that the medications prescribe by Dr. Lee for her pain would cause her to be drowsy. Petitioner's Exhibit 2 at 9-10; Williams at 19, 20.

Petitioner testified that she still has pain and continues to have numbness in her right leg. She testified that the pain will sometimes awaken her at night. She testified that if she sits or stands for too long, she has pain. She testified that the pain that she feels is in her low back and down the right leg. She testified that the pain is not constant and comes and goes, but that she experiences pain on a daily basis that may last an hour or longer. Petitioner testified that she takes over the counter Ibuprofen for the pain. Petitioner testified that due to her pain, she avoids boating, roller skating and long road trips that she used to enjoy taking with her husband. Petitioner testified that she can ride in a car maybe an hour at the longest before she needs to get out. Petitioner testified that she never had any of these problems prior to her fall, and that they have persisted since her fall. Petitioner

testified that she left her job at Capitol Care Center in 2015 and since that time has worked as an activity director at Brother James Court and as an activity assistant at Heritage Health. Petitioner testified that these jobs involved playing games with the residents, like bingo or cards, though at Brother James Court, a facility for developmentally disabled men, she would take the residents out to eat, the library or to dances to get them out in the community. Petitioner testified that there was no lifting associated with these activities, and that none of these jobs involved heavy lifting. She acknowledged that she is able to sit, stand and move around as she needs to. Petitioner testified that she is currently working at Lewis Memorial as a CNA. Petitioner testified that there is no lifting involved in this job because she works at night when the residents are in bed. Petitioner did acknowledge that she has experienced an exacerbation of her back pain while pushing residents in wheelchairs at a holiday lights festival. Petitioner testified that she when she took the developmentally disabled men from Brother James out into the community, there would not be more than one in a wheelchair and she had an assistant to do the more hands on work. Petitioner acknowledged that she had had a pre-employment physical at MOHA when she went to work at Lewis Memorial Christian Village. Petitioner testified that she told the person performing the physical about her back pain and the doctor told her to just remember her body mechanics and she would be fine. Petitioner could not recall if she was given any kind of list of restrictions on her activities. Petitioner testified that in her work as a CNA, if the residents need to go to the restroom, they use bedpans or urinals. Petitioner testified that using the bad pain just involves having the patient roll over, placing the bed pan and then having them roll back. Petitioner testified that even if a bed is soiled, she does not have to lift anything to change the bed. She testified that the bed has a remote that raises it to a comfortable level. Petitioner testified on cross-examination that she last saw a doctor around January 2018, and discussed her back pain though she was there for other issues. Petitioner also testified that she had missed a day of work at her current job at Lewis Memorial due to her persistent back pain. Petitioner said that she rarely had to push residents of Brother James Court in wheel chairs and thought it would have been once a week. She testified that when she did push them it would not be for a long period, other than the one incident when she pushed a resident at the Festival of Trees because it covered a large area. Petitioner acknowledged that she had had a steroid injection in her back in April 2016, and acknowledge that she had a couple of steroid injection, but wasn't sure if she had seen a doctor for her back pain since that time. Petitioner testified that since that time she has managed her pain with over the counter pain medications such as Ibuprofen and limiting her activities. She testified that she takes Ibuprofen on a daily basis, stating that she would take four 200 milligram tablets and also take Tylenol PM. Williams at 21-23, 25-26, 29-31, 38-44, 68-72.

Conclusions of Law

Disputed issue **F** is Petitioner's current condition of ill-being causally connected to the accidental injury of October 15, 2013. To obtain compensation under the Act, an employee must establish, by a preponderance of the evidence, a causal connection between a work related injury and the employee's condition of ill-being. Vogel v. Illinois Workers' Compensation Commission, 354 Ill. App. 3d 780, 786 (2005).

Here, I find as a conclusion of law, Petitioner's current condition of ill-being is not causally connected to the accidental injury. I rely on the testimony of Dr. O'Leary which seems consistent with the records of Petitioner's previous treating physicians who had her at MMI. Petitioner suffered a soft tissue injury, six years before the hearing, that resolved to MMI in April 2014. Petitioner continued to work at various employers throughout the years since the fall.

Disputed issue **J** is, is Respondent liable for unpaid medical bills. 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 the accidental injury. 820 ILCS 350/8a.

I find as a conclusion of law, Respondent is not liable for unpaid medical bills subsequent to April 30, 2014. I rely on the testimony of Dr. O'Leary, as well as the finding that Petitioner's current condition of ill-being is not related to the accidental injury.

Disputed issue **O** is, whether Petitioner is entitled to prospective medical care. Section 8 of the Act obligates an employer to pay for medical and surgical services and necessary medical and surgical services thereafter incurred reasonably required to cure or relieve from the effects of an accidental injury. Specific procedures that have been prescribed by a medical service provider are incurred within the meaning of Section 8, even if they have not been performed or paid for. Petitioner bears the burden of proving by a preponderance of the evidence, her entitlement to the award of medical care. Questions on this issue are factual inquiries. Dye v. Illinois Workers' Compensation Commission, 2012 Ill App (3d) 100907WC.

I find as a conclusion of law, Petitioner is not entitled to prospective medical care. I rely on the finding on current condition, and the testimony of Dr. O'Leary that Petitioner is not a candidate for more studies; no further tests are needed; and surgery on Petitioner is to be avoided. There is also absolutely no evidence specific procedures have been prescribed *by a medical provider* for Petitioner.

Arbitrator

4-1-2020
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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BARBARA DOMINA,

Petitioner,

vs. NO: 18 WC 11046

PALOS IMAGING & DIAGNOSTICS,

Respondent.

20IWCC0767

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, 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 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.

20IWCC0767

Bond for 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: DEC 29 2020
o- 12/15/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DOMINA, BARBARA
Employee/Petitioner

Case# **18WC011046**

PALOS IMAGING & DIAGNOSTICS
Employer/Respondent

20IWCC0767

On 1/15/2019, 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 2.46% 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:

0154 KROL BONGIORNO & GIVEN LTD
RANDALL W SLADEK
20 N CLARK ST SUITE 1820
CHICAGO, IL 60603

0081 LORENZ & BERGIN PC
JOHN BERGIN
120 N LASALLE ST SUITE 1420
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)
X ☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Barbara Domina,
Employee/Petitioner

v.

Palos Imaging & Diagnostics,
Employer/Respondent

Case # **18** WC **11046**

Consolidated cases: _____

20IWCC0767

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 **12/3/18**. 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. x☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ 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 **11/29/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**42,276.00**; the average weekly wage was $**813.00**.

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

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

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

Respondent shall be given a credit of $**5,187.72** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**5,187.72**.

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 $542.00/week for 9-4/7 weeks, commencing 12/29/17 through 3/5/18, as provided in Section 8(b) of the Act. Respondent shall receive credit in the amount of $5,187.72 for all TTD payments made.

Respondent shall pay Petitioner permanent partial disability benefits of $487.80/week for **37.5** weeks, because the injuries sustained caused the **7.5%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

Jan. 15, 2019
Date

JAN 15 2019

Memorandum of Decision of Arbitrator

Findings of Fact

Petitioner has been employed by Respondent as an outpatient ultrasound technician for 13 years. As part of her job duties, she is required to move patients. On the agreed accident date, Petitioner was lifting a larger patient with a broken hip. When doing so, Petitioner felt a "tug" in her neck. Petitioner reported to her supervisor, "I think I must have hurt myself". Petitioner took ibuprofen and continued to work.

As time went on, Petitioner experienced "severe weakness" and was finding it difficult to perform her job. On December 21, 2017, Petitioner sought treatment in her employer's emergency room. Petitioner reported that she had experienced pain radiating down her right arm and that ibuprofen was no longer working.

Petitioner sought orthopedic consult with Dr. Lim on January 12, 2018. Petitioner advised Dr. Lim that she had been having right neck radiation to her right hand since a work accident involving transferring a patient. Petitioner advised Dr. Lim that she continued to have neck pain radiating with numbness and tingling and weakness to the hand. Petitioner expressed issues with firmly pressing the ultrasound wand. Dr. Lim suspected right C5-6 radiculopathy.

Petitioner returned to Dr. Lim on December 19, 2018. Petitioner had more tightness and soreness in the back of her neck with headaches. Petitioner's symptoms were unchanged as of January 30, 2018 and Dr. Lim ordered an MRI.

The MRI of the cervical spine, performed on February 2, 2018, was reviewed by Dr. Lim on February 16, 2018. Dr. Lim diagnosed a right sided C6-7 disc herniation. Dr. Lim recommended therapy.

Following a visit on March 2, 2018, Petitioner was able to return to light duty work with no lifting greater than 15 lbs. Petitioner did so on March 6, 2018.

On March 26, 2018, Petitioner reported ongoing improvement of symptoms while functioning at a light duty level. Dr. Lim recommended full duty work at that time.

Petitioner last saw Dr. Lim on April 10, 2018. At that time, Petitioner's pain was at 2 out of 10 and she reported discomfort with transferring patients. Petitioner continued to have right sided neck pain. Dr. Lim believed that though Petitioner was not pain free, a return to regular work would be beneficial.

At trial, Petitioner testified she continues to use exercise to address her ongoing right sided neck pain. Petitioner's weakness has continued to improve but she has soreness, weakness and numbness on a daily basis. Petitioner is performing her normal work although with difficulty.

Conclusions of Law

Though Respondent placed causation in dispute, this was only in relation to the issue of the nature and extent of the injury.. The Arbitrator finds and concludes that based on his review of the entire record, including Petitioner's trial testimony and the medical records, Petitioner has proven a causal connection exists between her current condition of ill-being and the stipulated accident of November 29, 2017.

In terms of the disputed issue of nature and extent, Section 8.1(b) applies, as indicted below:

Regarding subsection (i) of §8.1b(b), the Arbitrator notes no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

Regarding subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes the record reveals that Petitioner was employed as an ultrasound technician at the time of the accident and that she is able to return to work in her prior capacity. The Arbitrator notes Petitioner's job requires ongoing lifting of patients which is the original mechanism of injury. Because of the physical nature of the job, the Arbitrator therefore gives *greater* weight to this factor.

Regarding subsection (iii) of §8.1b(b), the Arbitrator notes Petitioner was 51 years old at the time of the accident. Because of an anticipated work life of at least another 15 years, the Arbitrator therefore gives *greater weight* to this factor.

Regarding subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no evidence the accident has impaired Petitioner's future earning capacity. Therefore, the Arbitrator gives no weight to this factor.

Regarding subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner has sustained a right-sided C6-7 disc herniation with symptoms radiating into the right hand. Because Petitioner's symptoms and condition is ongoing, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds and concludes Petitioner sustained permanent partial disability to the extent of **7.5%** loss of use of the person pursuant to §8(d)2 of the Act, or **37.5** weeks at her weekly PPD rate of $542.00.

Robert M. Harris

Signature of Arbitrator Robert M. Harris

Dated: January 15, 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 Causal connection,	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICTOR LOPEZ,

Petitioner,

vs. NO: 17 WC 21057

HMS HOST,

Respondent.

20IWCC0768

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely Petition for Review under §19(b) of the Decision of the Arbitrator. Therein, the Arbitrator found Petitioner sustained an accidental injury arising out of and occurring in the course of his employment, but his condition of ill-being is not causally related; the Arbitrator denied all benefits. Notice having been given to all parties, the Commission, after considering the issues of causation, temporary disability, medical expenses, and prospective medical, and being advised of the facts and law, reverses the Decision of the Arbitrator. The Commission finds Petitioner's condition of ill-being remains causally related to his work accident and awards benefits as set forth below. 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 who testified through an interpreter. T. 9. Petitioner works at O'Hare as a packer for Respondent, a position he has held since 2007. T. 10. His job is to pack food and send it to the restaurants around the airport. T. 10-11. This requires that he routinely lift boxes of food weighing 25 to 30 pounds and repeatedly bend. T. 11.

Petitioner alleges an accidental injury on March 19, 2017. ArbX1. He described the event as follows:

> I had to go into the freezer to pick up my box of chicken, and the freezer was leaking at the top part where the fans are. And they were - - and it was leaking on top of the boxes, and then we had to clean that. We had to hit it to unfreeze it... So when I had to pick up the box of chicken to unfreeze it, I had to walk backwards, and then I slipped on some skids. They were filled with ice...So what I felt, I felt a pain, but more than anything in my left leg because that's the one that fell or hit the floor. And up top I twisted. T. 11-12.

Petitioner explained when he slipped, his left knee landed against a skid. T. 23. The skid was approximately five or six inches off the ground. T. 23. Petitioner confirmed his back did not strike the ground: "No, I twisted from my shoulders...When I unstuck the box, I had the box at my shoulder level, and that's when I slipped. My knee hit the floor, and that's when I kind of fell twisted with the box at my shoulder." T. 23, 24.

Petitioner testified he had an acute onset of pain: "It was so big that I just wanted to drop everything." T. 14. The pain was on his left leg "most of all." T. 14. Petitioner notified his boss, Rachi, of the incident. T. 12. Three days later, Petitioner was sent to the company clinic; Petitioner explained the delay was because the boss was on vacation. T. 13.

The records from University of Illinois Chicago (hereinafter "UIC") were admitted as Petitioner's Exhibit A. Contained therein is a March 21, 2017 Discharge Sheet from UIC Medical Center O'Hare Clinic authored by Marlene Angelico, APN. This reflects a diagnosis of low back pain; Petitioner was provided prescriptions for Ibuprofen 800mg and Soma, and authorized off work until re-evaluation. PXA.

The O'Hare Clinic records from April reflect Petitioner was placed on restricted duty while undergoing physical therapy at NovaCare. PXA. Respondent provided an accommodated position, and Petitioner began working modified duty around April 11, 2017. T. 19, 25. He worked "bakery, light boxes." T. 26.

An April 17, 2017 Discharge Sheet authored by Jennifer Jackson, APN, documents "care transferred to UIC Orthopedics"; Petitioner was to continue with physical therapy and remain on restricted duty pending orthopedic evaluation. PXA. Petitioner testified he was evaluated at UIC, and an MRI was ordered. T. 14.

On May 5, 2017, a lumbar spine MRI was performed. The radiologist's impression was central disc protrusion at L5-S1 mildly causing narrowing of the left lateral recess; protrusion is effacing the ventral thecal sac; and some mild bilateral neural foraminal stenosis. PXJ. Petitioner testified that following the MRI, the doctor indicated "It says that I needed surgery." T. 17.

On June 28, 2017, Dr. Michael Szczodry authored a Work Status Report which reflects a diagnosis of lumbar disc herniation (L5-S1). Dr. Szczodry ordered physical therapy and imposed a 10-pound maximum weight work restriction. PXA.

On August 18, 2017, Dr. Babak Lami performed a Section 12 examination and record review at Respondent's request. An interpreter was present for the exam. Petitioner reported he had no history of back problems then, on March 19, 2017, he was "carrying a box that weighed 50 pounds. He slipped on ice; however, he did not fall. He twisted his back and hit his left knee. This resulted in low back pain." RX1, DepX2. Petitioner described his current pain at 10/10, localized to the right side of his low back. Dr. Lami memorialized he reviewed a June 28, 2017 note from Dr. Szczodry:

> It was noted that the patient had 19 days of physical therapy without significant improvement. The patient is interested in surgical treatment. It was noted that the patient had low back pain and right lower extremity radiculopathy secondary to L5-S1 disc herniation. The patient is a good candidate for L5-S1 discectomy. RX1, DepX2.

On physical examination, Dr. Lami noted Petitioner's motor exam was 5/5, sensation intact, straight leg raise test was negative, and range of motion caused discomfort; the doctor reviewed the report from the May 5, 2017 MRI. Dr. Lami diagnosed Petitioner with a back sprain; the doctor acknowledged the MRI showed a disc herniation but opined Petitioner did not have "collaborating clinical symptoms." RX1, DepX2. Dr. Lami opined the treatment to date had been reasonable and necessary, but felt Petitioner was not a surgical candidate:

> He specifically denies any radicular symptoms down his lower extremities. The MRI suggests central disc herniation with mild narrowing of the left lateral recess. There was some bilateral neuroforaminal narrowing. These findings do not suggest a right sided neural element compromise. The microdiscectomy will not help his back pain. Microdiscectomy is performed to help radicular symptoms. RX1, DepX2.

Dr. Lami noted Petitioner's pain was out of proportion to the clinical findings. Dr. Lami further opined Petitioner had reached maximum medical improvement and could return to work without restrictions. RX1, DepX2. Presented with Respondent's Exhibit 2, an intake form from the August 18, 2017 exam, Petitioner agreed he rated his initial pain at 10/10. T. 32. He further agreed his pain on August 18, 2017 was 10/10: "On August 18th, ever since I got hurt, it's been at 10." T. 32. His pain on the date of arbitration, however, was 6/10. T. 32.

On August 29, 2017, at his attorney's recommendation, Petitioner was evaluated by Dr. Neeraj Jain of Chicago Pain and Orthopedic Institute. T. 29. Petitioner reported an onset of lumbar pain after an injury on March 19, 2017; Petitioner advised he was in a walk-in cooler trying to lift a box that was stuck when he slipped on ice twisting his body. He thereafter underwent a course of physical therapy but his pain persisted. He described his pain as a constant sharp, throbbing sensation with tingling; he further noted the pain occasionally radiated to his legs and described it as his legs falling asleep. Dr. Jain's examination findings included palpable tenderness in the midline of the paravertebral muscles of the lumbar spine, decreased range of motion secondary to pain, and straight leg raise positive for hamstring tightness. Upon reviewing the MRI report, Dr. Jain diagnosed lumbar facet syndrome, lumbar discogenic pain, and

lumbosacral radiculopathy. The doctor recommended epidural steroid injections as well as a selective nerve root block; in the meantime, Petitioner was to continue therapy and pain medications while working restricted duty, maximum weight 10 pounds. Dr. Jain documented his opinion was Petitioner's symptoms were directly related to the injury. PXD

On September 12, 2017, Dr. Jain administered bilateral L5-S1 and S1 transforaminal epidural steroid injections and selective nerve root block. The post-procedure diagnoses were lumbar discogenic pain, lumbar facet syndrome, and lumbosacral radiculopathy. PXE, PXF.

Pursuant to Dr. Jain's recommendation for therapy, Petitioner presented to Lee De Las Casas, D.C., on September 13, 2017. Petitioner gave a history of the March 19, 2017 injury: "He states he was injured when he pulled a box, in a freezer, that was frozen against three other boxes. The freezer floor was frozen and his left leg slid back suddenly causing his left knee to impact the ground and his torso to rotate left suddenly." PXJ. Petitioner summarized his subsequent treatment and advised DC De Las Casas he had persistent lumbar spine pain with radiating pain into the bilateral lower extremities, rated at 8/10, as well as bilateral sacroiliac joint region pain, 9/10. Examination revealed decreased and painful range of motion; tenderness to palpation of the mid-lumbar region, lumbar paravertebral musculature, multifidus, SI joint, lower lumbar spinous processes, PSIS, iliolumbar ligament, piriformis, and quadratus lumborum; spasms of the lumbar paraspinal muscles; and positive straight leg raise, Kemp's test, and Yeoman's test bilaterally. Diagnosing intervertebral disc disorders with radiculopathy, lumbar region; spinal enthesopathy; and sprain of SI joint, DC De Las Casas recommended a program including manual therapy, e-stim, and manipulation; DC De Las Casas also provided a TENS unit and low back brace. PXJ. Petitioner thereafter commenced therapy with DC De Las Casas.

On September 26, 2017, Petitioner was re-evaluated by Dr. Jain. Petitioner reported he had up to 100% pain relief following the injection, however it only lasted three to four days and his back pain had since returned to its pre-injection baseline. He further indicated the numbness and tingling had resolved since the injection, though his leg still occasionally felt like it was falling asleep and had the heavy sensation. Noting he believed Petitioner's pain was osteogenic, Dr. Jain recommended facet joint injections, ordered continued therapy and medication management, and maintained Petitioner's restricted duty status. PXD.

On October 4, 2017, Petitioner underwent an EMG of the bilateral lower extremities. The study was abnormal, demonstrating electrodiagnostic evidence of a possible left S1 radiculopathy; there was no evidence of a right sided lumbar spine radiculopathy or right or left lower extremity peripheral neuropathy. PXJ

On October 5, 2017, Dr. Jain performed bilateral L4-5 and L5-S1 facet joint injections. The post-procedure diagnoses were lumbar facet syndrome, lumbar discogenic pain, and lumbosacral radiculopathy. PXE, PXF.

Thereafter, chiropractic therapy with DC De Las Casas continued. On October 17, Petitioner followed up with Dr. Jain. Petitioner again reported significant but short-lived pain relief following the facet injection. Dr. Jain recommended "bilateral L4-S1 medial branch blocks

x 2 to prognosticate the efficacy of a longer lasting radiofrequency ablation"; in the interim, Petitioner was to remain under modified duty restrictions while continuing with therapy. PXD

On October 24, 2017, Dr. Jain performed bilateral L3-4, L4-5 medial branch blocks. PXE, PXF. The procedure was repeated on November 14. PXE, PXF.

On November 21, 2017, DC De Las Casas indicated Petitioner had made gains in flexibility and range of motion, but he still complained of lumbar spine pain into the bilateral lower extremities, then rated at 6/10, as well as bilateral SI joint pain, down to 5/10. Noting Petitioner had experienced increased symptoms while working, DC De Las Casas modified the therapy program to incorporate work conditioning. PXJ.

When Petitioner returned to Dr. Jain on November 28, he reported persistent pain as well as numbness and tingling in the lower extremities. After examination, Dr. Jain concluded radiofrequency ablation was appropriate. PXD.

On December 12, 2017, Petitioner underwent left L3, L4, L5 medial branch nerve block and radiofrequency ablation. On December 19, Dr. Jain performed the same procedure on the right side. PXE, PXF.

On January 16, 2018, Petitioner was re-evaluated by Dr. Jain. Petitioner complained of ongoing low back pain, rated at 5/10, as well as numbness and tingling starting at the knees and going down to his feet. Petitioner further requested his therapy frequency be decreased to accommodate his full-time work schedule. Having advised Petitioner it could take approximately eight weeks for symptom resolution following the radiofrequency ablation, Dr. Jain refilled Petitioner's medications, decreased therapy to twice a week, and released Petitioner to return to unrestricted work on January 17, 2018. PXD.

On January 19, 2018, Petitioner commenced a brief course of work hardening at MTN ProActive Rehab; this was done at DC De La Casas' direction. At the initial evaluation, Petitioner gave a history of being injured when he pulled a box in a freezer that was frozen; as he was pushing his left leg slid causing his left knee to impact the ground and his torso rotated left suddenly. He complained of pain on the lower back and sacrum with radiating pain into the right lower extremity rated at 6/10, sacroiliac pain at 6/10, and numbness and tingling in the lower extremity to the toes on right. PXI.

Petitioner followed up with Dr. Jain on February 13; Petitioner stated his low back was much better since therapy ended, however he continued to have numbness and tingling going down his lower extremities. Dr. Jain placed Petitioner on modified duty while awaiting full benefit from the radiofrequency ablation. PXD.

On March 20, 2018, Petitioner presented to Dr. Jain and reported increased pain, rated at 8-9/10, and ongoing numbness and tingling down both legs. Noting Petitioner obtained 30% improvement with radiofrequency ablation, Dr. Jain ordered a discogram at L2-S1 and maintained Petitioner's work restrictions. PXD. The prescribed discogram and post-discogram CT were performed on March 27, 2018. PXE, PXF, PXB.

Petitioner testified his employment was terminated on April 4, 2018:

> That day I got there, I worked, did what I have to do. When I was done, the boss asked me if I was finished, and I said yes. He told me to accompany him upstairs because they had to speak to me. And that's when the person from human resources told me that they had to let me go because I was a risk for the company and that they would escort me out, and they were going to keep my ID. T. 19-20.

On April 10, 2018, Petitioner returned to Dr. Jain to review the discogram. Dr. Jain noted the post-discogram CT showed, *inter alia*, L5-S1 diffuse posterior disc bulge with superimposed central disc herniation. Dr. Jain authorized Petitioner off work and referred him to a neurosurgeon. PXD.

The next day, April 11, Petitioner was evaluated by Dr. Jain's colleague, Dr. Geoffrey Dixon. Dr. Dixon memorialized Petitioner complained of back pain with bilateral lower extremity numbness which he related to March 19, 2017 when he slipped and fell while trying to lift a box off a frozen floor. Petitioner thereafter underwent physical therapy and multiple epidural injections with limited success, indicating the injections helped approximately 30% but were not durable. Examination revealed normal strength in the lower extremities, sensation intact, and straight leg raising was "suggestive of positive" on the right. Dr. Dixon interpreted the MRI scan as demonstrating degenerative disc disease most significant at L5-S1 associated with broad-based central disc protrusion and increased T2 signal suggestive of an acute disc signal at that level, as well as what appeared to be a grade I spondylolisthesis of L5 on S1. On review of the discogram, the doctor's impression was it was suggestive of a grade V fissure of L5-S1 intervening disc with extravasation of dye. Dr. Dixon diagnosed a herniated lumbar disc at L5-S1 associated with grade I spondylolisthesis which he believed became symptomatic as a direct result of the injury Petitioner sustained on March 19, 2017. Dr. Dixon documented Petitioner had returned to restricted work on February 13, 2018 however, approximately one week ago he had been "discharged to not pursue work until such time as he had improved from his injury." PXD. Petitioner confirmed he discussed being fired with the doctor. T. 30. Treatment options were discussed and the decision was made to proceed with L5-S1 decompression with interbody fusion. Dr. Dixon authorized Petitioner off work pending further treatment. PXD. Petitioner testified the doctor "decided to put me completely on light duty after the company kicked me out." T. 29.

Petitioner next saw Dr. Dixon on May 23, 2018 and advised he had received notification from his attorney that the recommended surgical procedure had been approved. Dr. Dixon noted Petitioner would be sent for pre-operative clearance then placed on the surgical schedule once written authorization was obtained. In the interim, Petitioner was to remain off work. PXD.

On May 25, 2018, Petitioner obtained a second opinion from Dr. Cary Templin of Hinsdale Orthopaedics. Petitioner complained of lower back pain since an injury on March 19, 2017; he was picking up a box which was frozen to the floor when he slipped to the side, twisting his back significantly. Dr. Templin noted Dr. Dixon was recommending L5-S1 fusion, and because of the severity of the surgery, Petitioner sought his opinion regarding treatment. On

examination, the doctor observed limited lumbar range of motion with increasing pain on extension, 5/5 strength, and negative straight leg raise. Dr. Templin noted he reviewed the MRI as well as the CT discogram: "They show that there is severe degenerative change at L5-S1 with Modic endplate change. There is a large central disc herniation which bisects the S1 nerve roots and slightly compresses the thecal sac but does not cause severe stenosis. The remainder of the levels are well preserved." PXD. Dr. Templin's assessment was "continued severe lower back pain with pain extending into the buttocks as a result of the degenerative change at L5-S1 aggravated by his lifting and falling episode." PXD. Dr. Templin agreed surgery was appropriate and his recommendation was L5-S1 fusion done through a transforaminal lumbar interbody fusion approach. The doctor noted Petitioner would decide whether to proceed with Dr. Dixon or Dr. Templin. PXD. Petitioner testified he elected to stay under Dr. Dixon's care. T. 41.

On July 6, 2018, Dr. Lami performed a second Section 12 examination at Respondent's request. Dr. Lami noted he reviewed the mechanism of injury with Petitioner and Petitioner stated he was inside a freezer when he slipped on ice while carrying a 30- to 35-pound box and fell on his left knee. Petitioner's current complaints were pain involving his entire lumbar area from the thoracolumbar junction to the pelvis line and from flank to flank as well as full and complete numbness of the bilateral legs in a stocking distribution when he sits on the toilet. On examination, Dr. Lami noted 5/5 motor exam, sensation was intact, negative straight leg raise, flexion to 45 degrees, full extension to 30 degrees, and lateral bending to 30 degrees. Dr. Lami reviewed the images from the CT and the MRI. He read the CT as showing "L4-5 mild disc degeneration with diffuse posterior bulge, mild left and posterolateral herniation indenting thecal sac at L5-S1 significant disc degeneration. The MRI was interpreted as demonstrating loss of disc signal at L5-S1 with desiccation with degenerative changes, and a central disc protrusion/herniation; Dr. Lami opined the findings were degenerative in nature. Dr. Lami diagnosed Petitioner with degenerative disc at L5-S1. The doctor opined Petitioner's reported pain were more than what his L5-S1 disc herniation could explain. Dr. Lami noted Petitioner's "low back symptoms only from the chronological standpoint follow" the March 19, 2017 incident, but the doctor did not believe that incident "caused any aggravation of a preexisting condition." RX1, DepX3. Dr. Lami disagreed with Dr. Dixon's diagnosis of L5-S1 spondylolisthesis and concluded, based on his examination and the discogram, Petitioner was not a candidate for L5-S1 surgery. Dr. Lami felt Petitioner had reached maximum medical improvement and had an AMA Impairment rating of 1% of the whole person. RX1, DepX3. Asked to compare his pain level from the first and second examinations with Dr. Lami, Petitioner stated, "I'd say that there was a lot of pain. It was just a lot of discomfort." T. 37.

On July 11, 2018, Petitioner returned to see Dr. Dixon. Petitioner reported attending an evaluation with Dr. Lami who "told him that there is no surgical indication and that his treating physicians are simply documenting that he needs to have a surgical procedure." PXD. Dr. Dixon documented he "reassured Mr. Lopez that his diagnosis of grade II spondylolisthesis at L5-S1 is in fact entirely appropriate surgical indication and that I would respond at Dr. Lami's report as soon as it is available"; Petitioner was to remain off work while awaiting surgery. PXD.

Petitioner attended follow-up appointments with Dr. Dixon in August and September. On each occasion, the doctor noted he was awaiting a copy of Dr. Lami's report, which he believed would confirm the need for surgery. PXD.

At the October 3, 2018 re-evaluation, Petitioner provided Dr. Dixon with Dr. Lami's report. Dr. Dixon's examination findings included normal strength and sensation, and positive straight leg raise bilaterally. The doctor documented he reexamined the MRI, which demonstrated L5-S1 desiccation with degenerative changes, disc protrusion and herniation, as well as a grade I spondylolisthesis, and again reviewed the EMG, which was suggestive of L5-S1 radiculopathy. Dr. Dixon confirmed his conclusion that Petitioner's diagnosis was grade I spondylolisthesis at L5-S1 with associated radiculopathy, and Petitioner's symptoms were the direct result of the injury he sustained on March 19, 2017. In addressing Dr. Lami's report, Dr. Dixon "would point to Dr. Lami's own documentation in which the patient was seen and evaluated by myself, as well as Dr. Templin, both of whom recommended the L5-S1 decompression with interbody fusion and pedicle screw instrumentation due to the patient's diagnosis of grade I spondylolisthesis." PXD. Dr. Dixon reiterated his surgical recommendation and directed Petitioner remain off work. PXD.

Petitioner continued to follow up with Dr. Dixon in late 2018 and early 2019. Dr. Dixon has maintained Petitioner off work while awaiting surgery. PXD. Petitioner testified he last saw Dr. Dixon the day before the hearing. T. 40. The record contains an April 24, 2019 narrative report authored by Dr. Dixon; rather than be contained within the subpoenaed records from Chicago Pain & Orthopedic Institute (PXD), this single page was paper-clipped to Petitioner's Exhibit A. Given foundation for the April 24, 2019 note is unclear, the Commission will not rely on it.

Petitioner testified Dr. Szczodry, Dr. Dixon, and Dr. Templin have all recommended lumbar spine surgery. T. 20-21. Petitioner wants to proceed with surgery. T. 18.

Petitioner had no injuries to his lower back prior to March 19, 2017. T. 20. He testified he has daily pain at 8/10. T. 15. He takes Ibuprofen every day. T. 15. He has difficulty sleeping, climbing stairs, and bending. T. 15. His leg falls asleep, the back of his leg hurts, and his lower back "is numb. It gets numb if I sit for too long." T. 39. He has weakness, "when I walk my foot hurts a lot, and not the left, the right…Sometimes my leg will get numb, especially the right one. That's why I use the cane." T. 16. Petitioner explained Dr. Dixon prescribed the cane; this was "Easily [four] months ago because one time going down the stairs, my girlfriend had to hold on to me. And I mentioned that to him, and he said he was going to recommend the cane. He also recommended the stickers that I could park closer to stores." T. 40.

The January 14, 2019 evidence deposition of Dr. Lami was admitted as Respondent's Exhibit 1. Dr. Lami is a spine surgeon, board certified in orthopedic surgery. RX1, p. 5-6. Dr. Lami testified consistent with his §12 reports. His conclusions will be discussed below.

Conclusions of Law

I. Causal Connection

The Arbitrator concluded Petitioner's condition of ill-being is not causally related to the March 19, 2017 work accident. In so doing, the Arbitrator made an adverse credibility determination. 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) (When evaluating whether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence, "resolution of the question can only rest upon the reasons given by the Commission for the variance.") To be clear, the Commission finds Petitioner credible: his testimony was straightforward and forthright and is consistent with the medical records. Our analysis turns next to the medical evidence.

Initially, the Commission observes Dr. Szczodry's dictated office notes are not in the transcript; in fact, there are no dictated office notes in the UIC records. Rather, the exhibit contains "Discharge Sheets" from clinic visits on March 21, 2017; April 10, 2017; and April 17, 2017, and two Work Status Reports signed by Dr. Szczodry. Certainly Dr. Lami's initial §12 examination and record review report indicates that on June 28, 2017, Dr. Szczodry concluded Petitioner had "low back pain and right lower extremity radiculopathy secondary to L5-S1 disc herniation and was a candidate for discectomy" (RX1, DepX2); however, while the Work Status Report from that date reflects a diagnosis of lumbar disc herniation at L5-S1, the prescription is for physical therapy. PXA. As such, the Commission is unable to evaluate Dr. Szczodry's June 28, 2017 surgical recommendation as memorialized by Dr. Lami. Instead, resolution of the issue rests on our consideration the conflicting conclusions of Dr. Dixon, Dr. Templin, and Dr. Lami.

On April 11, 2018, Dr. Dixon evaluated Petitioner for the first time. As part of the consultation, Dr. Dixon reviewed the MRI scan and observed degenerative disc disease most significant at L5-S1 associated with broad-based central disc protrusion and increased T2 signal suggestive of an acute disc signal at that level, as well as what appeared to be a grade I spondylolisthesis of L5 on S1. Dr. Dixon similarly reviewed the discogram and noted a grade V fissure of L5-S1 intervening disc with extravasation of dye. Dr. Dixon diagnosed a herniated lumbar disc at L5-S1 associated with grade I spondylolisthesis which he concluded became symptomatic as a direct result of the injury on March 19, 2017. The doctor recommended surgical intervention in the form of L5-S1 decompression with interbody fusion. PXD.

Dr. Dixon was later provided with Dr. Lami's report. In response, Dr. Dixon re-read both the MRI as well as the discogram and his conclusions were unchanged; Dr. Dixon documented his continued opinion was Petitioner's diagnosis was grade I spondylolisthesis at L5-S1 with associated radiculopathy, and Petitioner's symptoms were the direct result of the injury he sustained on March 19, 2017.

On May 25, 2018, Dr. Templin evaluated Petitioner. Like Dr. Dixon, Dr. Templin was provided with Petitioner's diagnostic tests. Dr. Templin interpreted the MRI and CT discogram as showing "severe degenerative change at L5-S1 with Modic endplate change. There is a large central disc herniation which bisects the S1 nerve roots and slightly compresses the thecal sac

but does not cause severe stenosis." PXD. Dr. Templin concluded Petitioner's ongoing severe lower back pain with pain extending into the buttocks resulted from the March 19, 2017 aggravation of his underlying degenerative condition at L5-S1. PXD. Dr. Templin agreed surgery was appropriate and his recommendation was L5-S1 fusion done through a transforaminal lumbar interbody fusion approach. PXD.

In contrast, Dr. Lami concluded Petitioner sustained a back strain which had resolved by his 2017 examination. While Dr. Lami agreed Petitioner's mechanism of injury is a competent cause for disc herniation (RX1, p. 43), Dr. Lami opined Petitioner's presentation was compromised by exaggerated pain complaints: "So at the time that I saw him, he's reporting 10 out of 10 pain. This is four, five months after his incident. He's not taking any medications. Normal exam. 10 out of 10 is not supported by objective findings, his report of mechanism of injury." RX1, p. 15-16. Beyond that, Dr. Lami stated, Petitioner did not have radiculopathy and therefore would not benefit from surgical intervention:

> For two reasons he's not a surgical candidate. One, he does not have radicular symptoms. The surgery is not for back pain. It's really for sciatic pain. Number two, the disc protrusion which is noted is on the left and he was reporting pain on the right. So there was no indication for microdiscectomy." RX1, p. 14-15.

Dr. Lami later reiterated his opinion Petitioner is "absolutely not" a candidate for L5-S1 fusion:

> I'll give you two reasons. One, when I have examined him on both sides, the type of pain he describes and the amount of pain described does not correspond to L5-S1. I can tell based on clinical examination, his subjective complaints. He has no neurological deficits, no radiculopathy. At the same time, although I disagree with the discography he has, the discography says he has positive discs at two levels. Why would anyone pick one of them to operate? That means you ignore the discography? So there's nothing presented. If you rely on discography, that tells you don't touch this man. This is not a discography that shows he needs to have L5-S1 fusion. RX1, p. 32.

Dr. Lami was clearly troubled by Petitioner's complaints of extreme pain during the initial §12 exam as well as the significant change between the 2017 and 2018 symptom diagrams. The Commission emphasizes, though, Dr. Lami's blanket assertion that Petitioner did not have radiculopathy is contradicted by multiple instances of the treating physicians documenting radicular complaints and diagnosing radiculopathy:

- August 29, 2017, Dr. Jain: describes pain as constant sharp throbbing sensation with tingling; "pain does radiate to his legs at times" and describes it as his legs falling asleep; diagnoses include lumbar facet syndrome, lumbar discogenic pain, and lumbosacral radiculopathy (PXD);

- September 13, 2017, DC De Las Casas: complains of "lumbar spine pain with radiating pain into bilateral lower extremities, 8/10"; straight leg raise positive bilaterally; diagnosis includes intervertebral disc disorders with radiculopathy (PXJ);

- September 25, 2017, DC De Las Casas: complains of "lumbar spine pain into bilateral lower extremities" (PXJ);

- October 4, 2017 EMG: abnormal study; electrodiagnostic evidence of a possible left S1 radiculopathy (PXJ);

- October 23, 2017, DC De Las Casas: complains of lumbar spine pain into bilateral lower extremities, bilateral SI joint region pain 7/10 (PXJ);

- November 21, 2017, DC De Las Casas: complains of lumbar spine pain into bilateral lower extremities, 6/10 (PXJ);

- November 28, 2017, Dr. Jain: still having pain, 7/10, worse with activity; also complains of numbness and tingling in lower extremities starting from knees; diagnoses include lumbosacral radiculopathy (PXD);

- January 8, 2018, DC De Las Casas: patient feels increased low back pain since returning to work yesterday; lifted 380 boxes yesterday and 390 boxes today; complains of lumbar spine pain into bilateral lower extremities (PXJ);

- January 16, 2018, Dr. Jain: continues to have low back pain, 5/10; complains of numbness and tingling starting with the knee bilaterally going down to his feet (PXD);

- January 19, 2018, MTN ProActive Rehab: "complains of lumbar spine pain with radiating pain into the right lower extremity, 6/10"; numbness and tingling lower extremities to the toes on right (PXI);

- February 13, 2018, Dr. Jain: continues to have numbness and tingling going down his lower extremities, which bothers him more than the low back pain; rates pain 4/10 (PXD);

- March 20, 2018, Dr. Jain: having numbness and tingling bilaterally down both legs (PXD); and

- May 25, 2018, Dr. Templin: complains of lower back pain since work injury, notes some pain that extends into the right buttock (PXD).

The Commission has considered Dr. Lami's opinions and we find them to be unpersuasive. The Commission finds Dr. Lami's opinions are inconsistent with the treating records and are therefore entitled to less weight. *See, e.g., Sunny Hill of Will County v. Illinois Workers' Compensation Commission*, 2014 IL App (3d) 130028WC, ¶36, 14 N.E.3d 16 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.)

To summarize, Petitioner had no prior history of lower back problems; on March 19, 2017, he sustained a sudden torso-twisting injury when he slipped while carrying a heavy box at shoulder-height; he commenced treatment at Respondent's company clinic and was shortly

thereafter diagnosed with a disc herniation at L5-S1; according to Dr. Lami, as of June 28, 2017 Dr. Szczodry had made a surgical recommendation to address back pain and right lower extremity radiculopathy secondary to L5-S1 disc herniation; the post-August 2017 records show ongoing treatment with consistent complaints; and Dr. Dixon and Dr. Templin memorialized they reviewed the MRI images and discogram and both physicians concluded Petitioner was a surgical candidate. The Commission finds the credible evidence establishes Petitioner's current condition of ill-being is causally related to the March 19, 2017 work accident.

II. Temporary Disability

An employee is temporarily totally incapacitated from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of injury will permit. To be entitled to Temporary Total Disability benefits, it is the claimant's burden to prove not only that he did not work but also that he was unable to work. *Shafer v. Illinois Workers' Compensation Commission,* 2011 IL App (4th) 100505WC, ¶45, 976 N.E.2d 1. A TTD award is proper when the claimant cannot perform any services except those for which no reasonably stable labor market exists. *Archer Daniels Midland Co. v. Industrial Commission,* 138 Ill. 2d 107, 118, 561 N.E.2d 623 (1990). "Therefore, when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force." *Holocker v. Illinois Workers' Compensation Commission*, 2017 IL App (3d) 160363WC, ¶34, quoting *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 236 Ill. 2d 132, 923 N.E.2d 266 (2010).

On the Request for Hearing, Petitioner alleged he was temporarily and totally disabled from April 18, 2018 through April 25, 2019, the date of hearing. ArbX1. The Commission observes the commencement of the disputed period of temporary total disability corresponds to Petitioner's termination while on restricted duty. Dr. Jain's March 20, 2018 office note reflects Petitioner had persistent severe pain despite radiofrequency ablation; Dr. Jain ordered a discogram and imposed work restrictions of maximum weight 10 pounds, no bending or squatting, no prolonged standing or sitting, and minimal walking. PXD. Petitioner testified he worked accommodated duty until April 4, 2018, when he was terminated:

> That day I got there, I worked, did what I have to do. When I was done, the boss asked me if I was finished, and I said yes. He told me to accompany him upstairs because they had to speak to me. And that's when the person from human resources told me that they had to let me go because I was a risk for the company and that they would escort me out, and they were going to keep my ID. T. 19-20.

The Commission finds Petitioner's testimony of being fired while on restricted duty is corroborated by Dr. Dixon's April 11, 2018 evaluation note wherein the doctor documented Petitioner was working an accommodated position until "approximately one week ago, he was discharged to not pursue work until such time as he had improved from his injury." PXD.

At the time of his termination, Petitioner had not reached maximum medical improvement and his treating physician had imposed significant work restrictions which

precluded him from performing his regular job with Respondent. We further find those same restrictions severely limited his ability to return to the workforce. The Commission finds Petitioner proved entitlement to Temporary Total Disability benefits from April 18, 2018 through April 25, 2019.

The parties stipulated Petitioner's average weekly wage is $440.00. ArbX1. This yields a TTD benefit rate of $293.33, however the Commission notes this rate falls below the minimum as calculated pursuant to Section 8(b)1. *820 ILCS 305/8(b)1.* The statutory minimum benefit rate for a single claimant with three dependents on Petitioner's date of accident is $319.00. Therefore, the Commission finds Petitioner entitled to TTD benefits of $319.00 per week for a period of 53 2/7 weeks.

III. Medical Expenses

Petitioner alleged entitlement to expenses for medical services provided at Accredited Ambulatory Care, Chicago Pain and Orthopedic Institute, Advocate, NovaCare, Windy City Anesthesia, Rx Development, Edgebrook MRI, and Archer Open MRI. ArbX1. Associated bills are contained within Petitioner's Exhibits A through J. The Commission finds these charges were incurred for reasonable and necessary treatment related to the March 19, 2017 accident.

IV. Prospective Medical Treatment

Section 8(a) of the Act requires Respondent to pay for medical expenses which are "reasonably required to cure or relieve from the effects of the accidental injury..." *820 ILCS 305/8(a)* (West 2013). See *F & B Manufacturing Co. v. Industrial Commission of Illinois*, 325 Ill. App. 527, 534, 758 N.E.2d 18 (2001) ("Under Section 8(a) of the Act, the claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of claimant's injury"). The Commission observes the surgical procedure at issue was recommended by both Dr. Dixon and Dr. Templin. The Commission finds the preponderance of the credible evidence establishes the recommended surgery is reasonably required to relieve the effects of the March 19, 2017 accidental injury. The Commission orders Respondent to provide and pay for surgical intervention as recommended by Dr. Dixon.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's current condition of ill-being remains causally related to the March 19, 2017 work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $319.00 per week for a period of 53 2/7 weeks, representing April 18, 2018 through April 25, 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. Respondent shall have a credit of $721.65 for TTD benefits already paid.

20IWCC0768

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses incurred for treatment of Petitioner's lumbar spine condition of ill-being as set forth in Petitioner's Exhibits A through J, as provided in §8(a) and subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for the lumbar spine surgery recommended by Dr. Dixon as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of 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 $16,400.00. 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: DEC 29 2020

Stephen Mathis

D. Douglas McCarthy

DISSENT

I respectfully dissent. I would affirm and adopt the Decision of the Arbitrator which is attached hereto and made a part hereof with the following analysis provided below.

As the Majority correctly points out, the Arbitrator, who had the benefit of seeing Petitioner testify in court, found Petitioner not credible and to be exaggerating his pain complaints specifically noting Petitioner's behavior at trial. *Arbitration Decision*, p. 5. The Majority, though, through its reading of a written record finds Petitioner's testimony "straightforward and forthright." *Supra*, p. 9, ¶ 1. I disagree and defer to the Arbitrator's

finding. The fact that Petitioner's exaggerated testimony at trial is consistent with the medical records makes him no more believable.

Moreover, as the Arbitrator, I afford greater weight to the opinions of Dr. Lami than those of Drs. Dixon and Templin. "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. Lami found Petitioner's pain complaints to be exaggerated and not supported by the objective diagnostic studies. As the Majority correctly notes Dr. Lami found the discography invalid and as such, not supportive for surgical intervention.

The Majority takes great pains to highlight the documented instances of Petitioner's complaints of alleged radiculopathy. A close review of these records though, in fact, support Dr. Lami's opinions. Petitioner consistently complained of bilateral leg pain and *numbness* despite the degenerative disc protrusion found to be left-sided. As Dr. Lami explained "the distribution of numbness he's describing is not explained by the MRI." RX1, p. 28. Dr. Lami went on to testify as follows: "So, in my opinion, someone who's taking ibuprofen, has no neurological deficit, and a fairly benign MRI finding with mild degenerative changes and protrusion at L5-S1 would benefit from spinal surgery for pain reported in the lumbar spine, the answer is no, he will not. It will not improve his function, his subjective complaints or need for taking less ibuprofen." RX1, p. 33-34.

I find Petitioner suffered from a back strain which resolved on or about September 5, 2017 and his current condition of ill-being and need for treatment is not causally related to the accident of March 19, 2017.

For the above stated reasons, I respectfully dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

LEC/mck

O: 11/18/2020

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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

ADRIAN HIGUEROS,

Petitioner,

vs. NO: 17 WC 9838

LA VILLA BANQUETS,

Respondent.

20IWCC0769

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, causation, medical, temporary disability, and permanent disability, and being advised of the facts and law, finds Petitioner failed to prove he sustained an accidental injury arising out of his employment on March 5, 2017.

Findings of Fact

Petitioner worked as a busboy/server at Respondent La Villa Banquets, a restaurant and banquet hall located at Addison Street and Pulaski Road. T. 13, 18. His job duties included cleaning and serving during events, then each night re-setting the tables and stages for the next day's events. T. 14-15.

Petitioner alleges an accidental injury on March 5, 2017. ArbX1. There was an event at the banquet hall on March 4, 2017, and Petitioner worked the party as a busboy. T. 22-23. Petitioner's injury occurred after the event ended, in the early hours of March 5, 2017. T. 46. When an event concludes, the staff leaves at the same time and two managers remain in the restaurant and lock the door. T. 66. Petitioner explained he and a co-worker, Andy, were taking trash to the dumpster, and when they exited the building, they heard a commotion; the argument was mild at first but quickly became intense. T. 26-28. Petitioner looked to the source and saw

there was an argument in Respondent's parking lot. T. 29. Petitioner further saw several employees who had left for the night and they were looking toward the parking lot: "Definitely almost every cook was outside. And everybody that works in the restaurant side, they were all outside, and they were all paying attention to the commotion going on." T. 67, 29-30. As Petitioner moved away from the dumpster, Petitioner saw a man he did not know "hitting a woman that was on the floor...And the woman inside the car was actually the one that was screaming for help, asking for assistance...[The woman inside the car] was screaming for help." T. 42, 31. Petitioner testified he was never advised of any policies regarding what to do if fights occur on Respondent's property. T. 34. Petitioner stated he and several co-workers approached the situation but stopped "at least [seven] to 10 feet away from him. We kept our distance. We were not close at all." T. 33, 35. Petitioner spoke to the man: "I said, I said you can't do this on the property. You have to leave the property. You cannot hit the woman. The police are coming, okay." T. 36. The man responded by becoming aggressive toward the group and demonstrating his gang affiliation. T. 38. Petitioner testified some of his co-workers were making fun of the man and "kind of getting him a little more edged on." T. 38. Petitioner spoke to the man for three to five minutes. T. 70. When the man became occupied with the group from La Villa, the women got in their car, locked the doors, and eventually drove off. T. 40. Petitioner testified the situation escalated: "Then the man goes to his vehicle, okay? And from what we see, it looks like he's reaching for something, he's looking for something. So in that moment, me and all the co-workers that approached the vehicle, we all walk away. We all start walking away." T. 38-39. He explained the group was walking, but walking quickly. T. 71. Petitioner testified as follows:

> In that moment by the time we're walking away, we're getting towards the entrance of the parking lot...At that time this man is chasing us, specifically me...I tried to avoid him by all means possible. And he must have took at least one, [two] swings beforehand, before he hit me, because he was trying very hard to; okay? And I was trying very hard to get away from him, and I believe the second or the third actual strike, I actually - - he actually hit me...I thought he had actually punched me, okay? But I realized that wasn't the case because I had a lot of blood coming out obviously, and I felt this gash in-between my face. And I realized that he actually did strike me with a sharp object. T. 38-42.

Petitioner stated his manager, Raoul, witnessed the incident, and Randy, another manager, was also present. T. 48. Randy is the one who called the police. T. 74. Asked why he approached the assault even though he knew the police were being contacted, Petitioner explained, "It was more for the actual asking for help or screaming for help that made us persevere and go without the police even being there." T. 75. Petitioner believed that without intervention, the man would have continued beating the woman: "Oh, yes, I think he would have killed her." T. 79.

Emergency services were called and an ambulance and police arrived. T. 44. The records from Advocate Illinois Masonic Medical Center reflect Petitioner was brought "via EMS as code yellow for facial laceration"; the wound was described as a 20-centimeter deep laceration extending from the medial aspect of superior lip to right tragus, with exposed deep musculature and fat pad. Petitioner was diagnosed with a complex laceration of the right face involving the lip, cheek and inferior aspect of the right ear requiring reapproximation of the deep structures. Petitioner was anesthetized and Dr. Samuel Kingsley performed a laceration repair, after which

Petitioner was admitted for pain control. Petitioner testified numerous people from Respondent came to see him while he was in the hospital: Chris, the owner; Luis; Andy; Reynelson; and Raquel. T. 49. Petitioner was discharged on March 6, 2017, with instructions to follow up with the Trauma Outpatient Center. PX4.

On March 13, 2017, Petitioner presented to the Trauma Outpatient Center where he was evaluated by Dr. Juan Santiago Gonzalez. The doctor noted Petitioner was status post complex reconstruction of right complex facial laceration. On examination, Petitioner's right cheek swelling was and the edges healing very well. The sutures were removed and Dr. Gonzalez directed Petitioner to return in three weeks. PX4.

On April 6, 2017, Petitioner returned to the Trauma Outpatient Center for re-evaluation; on that occasion, he was seen by Dr. Richard Fantus. Petitioner reported mild facial pain, rated at 4/10, well controlled with topical cream; fullness in his right cheek when eating; and decreased movement of the right side of his mouth with difficulty smiling. Petitioner also stated he was very concerned about his facial disfigurement especially considering he works with customers in a restaurant. Dr. Fantus documented Petitioner's facial laceration was healing well, but there was concern for nerve injury and parotid duct injury. Dr. Fantus referred Petitioner for a behavioral health consult, post-traumatic stress disorder; authorized him off work for one month; and directed he limit sun exposure for six months. PX4. Petitioner testified he sought the recommended PTSD therapy but the providers were unable to work with his insurance. T. 50-51.

In May 2017, Petitioner attempted to return to work but he was not put on the schedule:

> I would come to the actual worksite. I would come in, and I would talk with Chris. And I would talk with them, see how everything is, see how the hours is going. And they would tell me they would have hours, but they wouldn't offer me. So they told me that they weren't willing to have me work. T. 54-55.

Petitioner explained he was not told he was fired, he was just not given any hours. T. 55. Petitioner was not reprimanded by Respondent for his actions during the incident. T. 62.

At the August 3, 2017 follow-up appointment at the Trauma Outpatient Center, Petitioner was seen by Dr. Michael O'Connor. The record reflects Petitioner was experiencing tingling at the incision site as well as some droop on the right side. Petitioner explained as follows: "So every time I was eating or every time I was smiling or talking, the right side of me was not contributing as much as my left side." T. 53. Dr. O'Connor concluded Petitioner's residual droop was likely secondary to facial nerve injury sustained from the laceration. The doctor noted the incision, CDI was healing well, and reinforced the importance of using sun protection. PX4.

Petitioner was last seen at the Trauma Outpatient Center on September 21, 2017; on that date, he was re-evaluated by Dr. Kingsley, the physician who treated him in the emergency room. Petitioner advised he was doing well but had numbness and tingling of the right side of his face. Examination findings included sensory deficit on the right and asymmetric smile (right side drop). Dr. Kingsley's assessment was approximately 22-centimeter laceration well healed with persistent, permanent motor and sensory deficits. The doctor advised Petitioner to apply

sunscreen to the scar and discharged him from care. PX4.

Petitioner testified he continues to have the deficits documented by Dr. Kingsley: "Certain areas, of course. During some other areas, the nerves are just not recovered. They are dead at this point. Certain areas I don't feel it whatsoever, but a little more, a little more towards the actual cut, there is some spots that are still healing, and I still have that sensation." T. 57. Petitioner hopes to have plastic surgery on his scar. T. 58. Petitioner testified he tried to join the military after the accident but was told he no longer qualified because of his injury. T. 60. Petitioner thinks about the incident "all the time...I really start thinking of the whole aspect of everything. I start - - you know, I have flashes, I get like little flashbacks in my head, and I'll envision everything again. And it's difficult. I don't know. It's difficult. The only way I cannot think about it is by simply not trying to think about it, by running away from it." T. 61-62. Petitioner did not testify against man during the criminal trial. T. 72. Petitioner explained his parents "simply didn't allow it, didn't support it, and didn't know exactly how I was going to react inside the courtroom being next to the same person that was involved with this incident"; Petitioner too was uncomfortable with it: "I never really wanted to see this man, you know. I didn't know how my reaction is. It's been a long time. It's something that's very difficult for me...." T. 80.

Raquel Tomlinson (hereinafter "Tomlinson") testified on Petitioner's behalf. Tomlinson worked two stints as a server for Respondent: 1999 to 2002 and then 2005 through the month of the trial, November 2018. T. 86. As of November 2018, she was taken off the schedule. T. 86. Tomlinson worked exclusively in the restaurant. T. 87. She knows Petitioner as one of the "banquet boys." T. 96.

Tomlinson was working on the night of March 4, 2017. T. 88. She and a co-worker, Kathy, were the closers, responsible for greeting customers. T. 89-90. At one point, three individuals entered, two women and one man, and Tomlinson greeted them:

> They were all happy, giggly. I knew they were happy...I know they were drinking. You could tell that they had a couple drinks, but they said that they wanted to come and get something to eat. They wanted some food. So, okay, that's what I'm watching to see if they were going to sit at the booth or at the table. They decided to sit at the bar. T. 90-91.

Tomlinson testified the trio drank and ate at the bar; they remained there until closing. T. 91. Petitioner did not interact with the group. T. 96. Tomlinson clocked out at 1:00 a.m.; she and Kathy walked out together and heard loud voices:

> So we were just like wondering if something is going to happen or not, I don't know. So we just kept on walking because we were going to go out somewhere else...then once we got to the corner [of Patterson and Pulaski], that's when the voices, instead of being loud, they started yelling and vulgar language.... T. 93.

She observed the assault:

> It was [two] women, the skinny one and one on the little heavier side. The heavier side was yelling and screaming because the gentleman and the girl, he was beating up on her, and they were yelling...At that point I looked up, and my co-worker was on the phone calling the police to get help and all that stuff. I looked up, and I seen Adrian and Andy come out with some bags...I witnessed them coming out, going where they always throw away and put away the linens in the garbage, the disposal area, the garbage bins...What I saw next, the lady was screaming on the top of her lungs. And like I said, they were - - they stopped and heard that. And then we heard all the other [employees] started all coming out because she was screaming at the top of her lungs. So all of them, all approached where the screaming was coming from...There was about 20 of them. T. 97-99.

Tomlinson saw a manager, Randy, in the group: "I heard him on the phone because he was saying we need help, we need officers because everybody was on their phones. And Randy has got this loud voice, deep voice, so I could hear him." T. 100. Randy was walking toward the assault while calling the police. T. 100. She did not hear anyone tell Petitioner to get back or stay away. T. 101, 110. Tomlinson did not hear specifically what Petitioner said to the assailant; rather, she heard "all the guys because that's mostly what was all there, the guys, they were all yelling telling the guy the police are coming, 5-0 is coming, leave her alone, get off of her. That's what everyone, all of them were yelling and screaming at, and that's all the words." T. 103. She clarified none of the employees physically intervened: "No, they all just yelled out get off of her, leave her alone, 5-0 is coming, the police is coming. Nobody did nothing. They just yelled and screamed, police, get off of her." T. 111. Tomlinson testified she believed that if the group had not approached the assailant, he would have continued beating the woman. T. 103-104. She stated it seemed a long time before the police arrived: "It was like 12, 15 minutes. They took forever...it just felt like a long time." T. 110. She saw the assailant strike Petitioner. T. 100.

Tomlinson testified, the following day, the owner, Chris Petrancosta, announced a policy for disputes on the property: "She called a meeting, told us from now on, for what had occurred, for what had happened, if anything ever occurs, anything happens, please don't get involved, don't do anything, stay away from it because you don't know, they could have a gun. Yes, that is true. So she just told us stay away, just call the police. Go inside and call the police, that's it. T. 104-105. Tomlinson testified there was no similar discussion prior to that incident. T. 105.

On cross-examination, Tomlinson was asked the circumstances of her departure from La Villa, specifically whether she got into a disagreement with Chris over ignoring a customer and failing to give them the check; Tomlinson responded, "She set a private meeting for us. We discussed when we solved the problem, and that was it." T. 107. Tomlinson did not return to work after the discussion, "because she told me I'm off the schedule." T. 107. Tomlinson stated there was no argument. T. 107.

Reynelson Rosario (hereinafter "Rosario") testified on Respondent's behalf. Rosario has worked for Respondent for 13 years; eight years ago he became banquet manager. T. 113. Rosario was Petitioner's direct supervisor. T. 116. Rosario confirmed Petitioner worked an event

on March 4, 2017; his duties were to serve food and drinks and clean up after the party. T. 118. He further confirmed that as part of their job duties, busboys take the trash out with them when they leave for the night. T. 134.

Rosario testified as follows:

> When I was the last to leave from the banquet, there was about 8 to 10 guys working that night from the banquet. After I left, I went outside, there was the guys were standing around, and there was an incident going on at the parking lot. I went over to see what was really going on. That's when I ran back, and I knocked on the door and Randy let me in. And I let him know there's a situation in the parking lot, can you please come check it out. That's when he went out, and I went behind him. He went to see what was going on. When he realized what was going on, he told the guys, go home, I'm calling the police, it's domestic violence, and that's when he proceeded to call 911. As he was calling the police, as the guys were leaving - - I'm sorry. I don't know his name. The guy that cut Adrian came from behind him as we were leaving, but Adrian was like the last one. Everybody left and he was like still there, and that's when he proceeded to cut him. T. 122-123.

Rosario explained when he and Randy went back to the parking lot, "I stayed like just a little bit past the apron. He went into the parking lot to see what was going on, and that's when he came back. And once he seen the situation, he told the guys it's a domestic, you know, I'm calling the police." T. 125. Rosario testified the employees began leaving the parking lot: "Everybody stepped back quicker than Adrian. Adrian for some reason was still there. He was like leaving, but it was like a slow walk." T. 126. Rosario saw the man go into his car; at that point, "[Petitioner] was told to run, you know, come over here, like run away. He had something in his hand." T. 128. As to who told Petitioner to run when the assailant went to his car, Rosario stated, "Basically everybody. I mean everybody was out there. They saw what was about to happen. Everybody said, you know, run. He has something in this hand, run." T. 138. The time between when Randy told everyone to get back and Petitioner being cut was "really fast...Within seconds to a maybe a minute." T. 139.

Rosario testified nothing like that had happened before during his 13 years at Respondent. T. 129. He further testified Respondent does not condone getting involved in disputes because "we usually call the police and let the police take care of it." T. 130. Rosario stated Respondent does not have any policies regarding disputes on the premises, "but we know to stay out of it, call the police, and let them take care of it." T. 130. He stated as part of the training, employees are told to talk to the manager if there is any problem. T. 131.

Andy Fuentes (hereinafter "Fuentes") testified on Respondent's behalf. Fuentes is a banquet manager for Respondent; in March 2018, he was a busboy. T. 144. He and Petitioner worked together as busboys. T. 145.

Fuentes worked the event on March 4, 2017. T. 146. Fuentes testified he and Petitioner left at the same time, though he denied that Petitioner had to throw out trash. T. 149, 160.

Fuentes started walking towards his car and heard the altercation:

> All I heard was a lady screaming. All I heard was a man yelling at her. And that's when I started seeing that he was trying to break the windshield, trying to get her out pretty much...All I see is he opened the door and he drags her out, and from right there I saw Adrian walk towards him. So I decided to just like follow him, not all the way, just to see what was going to happen. And all I see was the man on top of the lady beating her, punching her in the face. T. 150-151.

Fuentes denied going into the parking lot with Petitioner or speaking directly to the assailant. T. 150. Fuentes stated he approached to within 10 feet of the parking lot. T. 151. Fuentes saw Petitioner and two other employees in the parking lot, and one of the employees was talking back to the assailant. T. 152. Fuentes did not know the names of the two employees he saw talking to the assailant; they were both busboys. T. 161. "Next thing you know, I see the guy look towards them. So he got up. I'm guessing he was ready to put his hands on them for self-defense. Unfortunately, he put his hands on Adrian, and Adrian put his hands on him back." T. 152. Fuentes testified, at that point Rosario came out of the door, immediately saw what was going on, and runs back and as soon as Randy opened the door, Rosario told him there is an issue in the parking lot and he needed to call the police. T. 153. Fuentes denied that Rosario and Randy walked towards the parking lot. T. 153. Fuentes testified Randy told everybody to get out and go home. T. 153. Asked if "everyone got out at that time," Fuentes stated, "Yes, because somebody screamed out - - someone screamed out saying that the man that cut Adrian had a gun. So everybody took off except for Adrian." T. 153-154. Next:

> We saw Adrian wasn't moving. He was just looking at the man that hurt him, and we - - all of us that yelled at him, even Randy yelled at him get out of the way, get out of there, run. He didn't pay attention. He turns around. Seconds later the man grabs his right arm, pulls him towards him. And he tried to go for his neck, but Adrian, he dodged his head down, and that's when he got cut on the face...The man just got in his car. He had a flat time, but he took off. He got out of the parking lot while Adrian was on the ground bleeding to death. I say that because he lost a lot of blood. All that blood occurred in the street, right in the middle. And I just ran to go get some towels, napkins, so we could cover his wound. T. 154-155.

Fuentes reiterated the blood was on the street as Petitioner had reached Patterson when he was stabbed. T. 164. Fuentes agreed the altercation began in the parking lot, but Petitioner was not cut until he was all the way on Patterson. T. 164.

Fuentes confirmed he saw Rosario come out of the building and state he was 15 feet away from Rosario. T. 161-162. Fuentes again denied that Rosario went toward the parking lot, he only stayed right outside the entrance. T. 162. Fuentes heard Rosario talk to Randy, and Randy was in the doorway when he called the police. T. 162-163. That was where Randy was standing when he told everyone to get out of there. T. 163. Fuentes testified that when Randy told people to leave, half of the employees were in the parking lot and the other half were going home. T. 163-164.

Fuentes stated he was never given paperwork regarding policies for disputes between patrons. T. 165. He testified he received a training handbook as a manager; this contains procedures for disputes between patrons. T. 165.

Randall Robinette (hereinafter "Robinette") testified on Respondent's behalf. Robinette is Respondent's head manager of the kitchen and back of the kitchen. T. 168. He has worked at Respondent for 30 years, working his way up from pizza driver. T. 168. Robinette supervised Petitioner's supervisor. T. 169.

Robinette worked the evening of March 4 into March 5, 2017. T. 171. Robinette saw Petitioner leave the building that night; Petitioner left with eight other employees. T. 172. Thereafter, Rosario came to tell him there was a problem:

> He came to the door. The door is locked. I am there. He said, Randy, you need to come outside. There's a problem outside. I says I have to get Joey to stay because someone has to be there. I can't leave the door open...And Rey said come outside. I walked outside with him. We crossed the street by the parking lot. All of the banquet boys were there. I seen there was a domestic situation going on. Adrian was speaking to the man. I saw it was upscaling. So I told all of my employees, I said, guys, this is not your business. Everybody get out of here. I'll handle it. I'll call the police. They'll come quick. They all started to walk back to go to their cars to leave. And the man and the woman were still there, and I was calling the police. T. 173-174.

Robinette stated there were about seven employees standing with Petitioner. T. 175. They were approximately eight to ten feet from the assailant. T. 183. When Robinette saw them, "Adrian was speaking at the man. He was getting hostile. I spoke up, says, guys, this isn't our business. This is domestic. You guys get going home. I'll handle it. I'll call the police. It's their job." T. 175-176. Robinette was near the employees in the parking lot when he told them to not get involved and to leave. T. 187, 178. He told the employees to avoid it because "I saw that it was domestic situation, and it was upscaling." T. 178. The employees listened, though Petitioner was at the back of the group:

> They all went in a group away to go leave, and he walked slowly on his phone into the middle of the street towards coming back - - going back north. And then I saw what happened, and I warned him because I saw the man coming after him...He was running up behind Adrian, and Adrian's back was to him. And I yelled to Adrian, look out, he's coming after you. And it was over...The man grabbed him in the middle of the street from behind and (indicating) as fast as can be. T. 176.

Robinette explained Petitioner had moved away and was distracted: "He stood around on his phone. Then he moped his way on down to the alley by the street"; Robinette confirmed Petitioner was walking back to the restaurant when he was attacked. T. 185. He did not see Petitioner put his hands on the assailant. T. 185.

Robinette is not sure if Respondent has any policies regarding disputes on the premises. T. 179. He is not aware of any written policies regarding disputes between patrons. T. 186.

Christina Petrancosta (hereinafter "Petrancosta") testified on Respondent's behalf. Petrancosta owns La Villa. T. 190. Petitioner worked as a server/busboy for Respondent. T. 191. Petrancosta testified Respondent has never had a bouncer or security guard. T. 192.

Petrancosta worked on March 4, 2017 but had gone home before the incident occurred. T. 194. She got a phone call and drove back to the restaurant: "And sure enough, at that time when I got there, the police were there putting the yellow ribbon on, but Adrian wasn't there. The boys were all there kind of waiting for me. And at that point then we - - after the boys were there and I spoke with the policeman a little bit, I took my car and a couple of the boys, and we went to the hospital." T. 195. Petrancosta was in shock when she got the phone call because nothing like that had happened in the 48 years her family has owned the restaurant. T. 196. Petrancosta testified the incident was described to her as follows:

> I learned that there was a domestic - - there was a couple that was having an argument in the parking lot. At that time they were fighting. The guy had the girl on the floor, that's what the boys were saying, had the girl on the floor punching her, and the boys went up and said, hey, why don't you just leave her because you had too much to drink, supposedly they said. You know, go home and talk about it the next day.
> Well, in the meantime, they said that what happened was it was a white van and a black car. And this happened in-between. When the guys were walking away, because Randy said, guys, go, get - - go home. It's domestic, go home, or get out of there, get out. They kind of left, and Adrian was the only one that was left walking with his phone. Reynelson usually gives some of the kids a ride home. So they were, I guess, supposedly going to Reynelson's car because everybody kind of left. But then all of a sudden Randy saw somebody, the guy, not somebody, that guy get something from his car from the other side, the passenger side, and ran after Adrian. And that's when Randy kept screaming, run, Adrian. And he was on his phone walking the other way while the other boys were already like walking, I mean almost like down the alley or something. That's what they told me. T. 197-198.

Petrancosta stated Petitioner did not try to return to work after the incident, "but I did mention to him that if he ever wants to come back, he is more than welcome to come back." T. 201.

Petrancosta confirmed the parking lot is owned by Respondent. T. 203. She testified Respondent does not have written policies or procedures regarding disputes on the premises. T. 202. They have meetings and "we tell them all the time that if anything happens, they need to get me immediately." T. 202. Petrancosta instructs her employees to not get involved in disputes:

> All the time because I feel that if the woman goes up to a man and he's agitated, I could calm him down where a man will get a rise in him and will start - - want to fight. So I always try to do whatever I have to do, which, you know, a couple times

> we've had people that had a little bit too much to drink, and just - - I do it. I don't even want my managers to do it. They can tell you that. I go and approach them and say, hey, guys, what's going on, you know, and I try to pass them. And 99.9 percent of the time I do good in that. If not, then I have the boys get my husband, which he's in the kitchen. T. 199.

Conclusions of Law

The Commission has analyzed the witness testimony, and we conclude events unfolded as follows:

- upon exiting the building at the end of the shift, the employees heard a disturbance in the parking lot and screams for help;

- the employees walked to the parking lot and observed a man assaulting a woman;

- Petitioner and others verbally attempted to get the man to stop the assault;

- around this time, Rosario exited the building: "After I left, I went outside, there was the guys were standing around, and there was an incident going on at the parking lot. I went over to see what was really going on. That's when I ran back, and I knocked on the door and Randy let me in. And I let him know there's a situation in the parking lot, can you please come check it out" (T. 122);

- Robinette came outside, crossed the street to the parking lot, and saw approximately seven banquet boys eight to ten feet from the assailant: "I seen there was a domestic situation going on. Adrian was speaking to the man. I saw it was upscaling. So I told all of my employees, I said, guys, this is not your business. Everybody get out of here. I'll handle it. I'll call the police. They'll come quick. They all started to walk back to go to their cars to leave. And the man and the woman were still there, and I was calling the police." T. 173-174;

- the employees began to leave, including Petitioner who was walking back to the restaurant: "he walked slowly on his phone into the middle of the street towards coming back - - going back north." T. 176;

- as Petitioner was walking away, the assailant chased after him and attacked him from behind: "He was running up behind Adrian, and Adrian's back was to him. And I yelled to Adrian, look out, he's coming after you. And it was over…The man grabbed him in the middle of the street from behind and (indicating) as fast as can be." T. 176.

In the course of

The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred; accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of the employment. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 57, 541 N.E.2D 665 (1989).

Here, Petitioner's injury occurred immediately after the end of his shift and was instigated by an assault on Respondent's premises. Moreover, it has been held that rendering aid "is natural and expected and [does] not remove him from the course of his employment." *Metropolitan Water Reclamation District v. Industrial Commission*, 272 Ill. App. 3d 732, 736, 650 N.E.2d 671 (1995), citing *Puttkammer v Industrial Commission*, 371 Ill. 497, 503. As such, the Commission finds Petitioner was in the course of his employment.

Arising out of

The requirement that the injury arise out of the employment concerns the origin or cause of the claimant's injury. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). The occurrence of an accident at the claimant's workplace does not automatically establish the injury "arose out of" the claimant's employment. *Parro v. Industrial Commission*, 167 Ill. 2d 385, 393, 657 N.E.2d 882 (1995). Rather, "[t]he '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.*, 207 Ill. 2d at 203.

The Commission's first task in determining whether the injury arose out the claimant's employment is to categorize the risk to which the claimant was exposed in light of the Commission's factual findings regarding the mechanism of the injury. *First Cash Financial Services*, 367 Ill. App. 3d at 105; see also *Baldwin v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 472, 478, 949 N.E.2d 1151 (2011) (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."). There are three categories of risk an employee may be exposed to: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics.

> Employment risks include the obvious kinds of industrial injuries and occupational diseases and are universally compensated. Personal risks include nonoccupational diseases, injuries caused by personal infirmities such as a trick knee, and injuries caused by personal enemies and are generally noncompensable. Neutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes, bombing, and hurricanes. Compensation for neutral risks depends upon whether claimant was exposed to a risk of injury to an extent greater than to which the general public is exposed. *Illinois Institute of Technology Research Institute v. Industrial Commission*, 314 Ill. App. 3d 149, 162 (2000).

Relying on *Metropolitan Water Reclamation District*, Petitioner argues he performed a Good Samaritan act and when such acts are reasonable and foreseeable, the resultant injury arises out of the employment. In *Metropolitan Water*, the claimant was an electrical operator for the Chicago River Locks at the mouth of the Chicago River to Lake Michigan; he worked in a station house on a pier surrounded by water. Employees customarily parked in a designated lot which the employer had secured by the use of a locking chain at the entrance, as well as an intercom system connecting the parking lot with the station house. On the date of accident, while

awaiting his relief man in the station house, the claimant heard a commotion over the intercom. Concerned for the safety of his relief person, the claimant walked down the pier to the parking lot. Upon his arrival at the lot, the claimant heard a scream for help and observed a woman in an outstretched position leaning over a seawall into Lake Michigan. The claimant left the parking lot, entering upon a third party's adjacent premises, and went to the woman and noticed she was attempting to pull from the lake a person who had apparently fallen into the lake. The claimant helped pull the man from the water, and the exertion caused him to have a heart attack. In holding the claimant's injury was compensable, the Court employed a neutral risk analysis and determined the physical location of the claimant's work site "exposed him to the risk of responding to an emergency to save a person in the water to a greater degree than to which the general public would be exposed." *Metropolitan Water*, 272 Ill. App. 3d at 736.

Petitioner argues he worked as bus boy at La Villa until midnight or one in the morning, and was exposed to the risk of responding to an emergency altercation between intoxicated patrons to a greater degree than the general public. However, the Commission emphasizes the mere fact Petitioner works in a bar does not equate to an increased risk. To be clear, no evidence was presented as to the area's incidence of assault or crime rate. While testimony was elicited as to a neighboring bar, Brudder's, having a history of trouble, the Commission finds this is of limited relevance given the lack of evidence there was any connection between Brudder's and the incident herein. Moreover, the witnesses consistently testified there had never been a similar incident of a violent assault in Respondent's parking lot. The Commission observes *Metropolitan Water* makes it clear that more is required than to simply be on Respondent's premises: "the claimant was on the employer's premises when he responded to the call for help and the location of the employer's premises increased the risk of being needed in such a rescue." *Metropolitan Water*, 272 Ill. App. 3d at 736 (Emphasis added). As the *Metropolitan Water* Court stated,

> Given the location of the place of employment, it was foreseeable that claimant would help rescue someone who was in the lake..."The rule here stated *** does not go so far as to say that every rescue of a stranger by an employee is covered; it refers to a rescue the necessity for making which is thrown in claimant's path by the conditions of his employment. When claimant is a flagman at a dangerous crossing, or a worker in an area where construction and excavation are in progress, or a truck driver who is certain to encounter collisions along the highway, it is easy to see the connection between the work and the contact with the emergency." (lA A. Larson, Workmen's Compensation § 28.22, at 5-458 (1994).)
>
> It was claimant's employment which brought him where he was and, in a general sense, caused him to be confronted with the emergency situation he sought to meet. *Metropolitan Water*, 272 Ill. App. 3d at 737 (Emphasis added).

What is fatally absent from Petitioner's claim is evidence establishing his attempt at rescue was necessitated by the conditions of his employment.

Alternatively, given Petitioner was walking away from the altercation and the rescue was arguably over, the Commission observes the claim could also be analyzed as an assault by a stranger, though the outcome remains the same. A claimant is entitled to compensation where he

20IWCC0769

proves either that the working environment increased the risk of attack or that the attack was motivated by something related to claimant's employment. *Rush-Presbyterian-St. Luke's Medical Center v. Industrial Commission*, 258 Ill. App. 3d 768, 773 (1994), citing *Holthaus v. Industrial Commission*, 127 Ill. App. 3d 732 (1984). The Commission notes the same lack of evidence that dooms the sudden emergency theory is similarly fatal to an assault theory: there is no evidence the working environment increased the risk of attack, nor that the assault was occasioned by something related to Petitioner's employment.

The Commission finds Petitioner did not sustain a compensable injury on March 5, 2017. While Petitioner remained in the course of his employment, the accident did not arise out of his employment. As such, his claim for benefits is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner failed to prove he sustained a compensable accidental injury on March 5, 2017.

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: DEC 29 2020

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

LEC/mck

O: 12/9/2020

Stephen Mathis

43

DISSENT

I respectfully dissent from the Majority and would find that Petitioner's injuries are compensable pursuant to *Metropolitan Water Reclamation District of Greater Chicago v. The Industrial Commission (Gerald Marshall)*, 272 Ill. App. 3rd 732 (Ill. App. Ct. 1st Dist. 1995).

Petitioner worked as a busboy and was taking out the trash as part of his job duties. While taking out the trash, he was confronted with a male physically assaulting a female in the Respondent's parking lot. The assailant and victim had been drinking inside the Respondent's establishment prior to the altercation. The Petitioner heard the female victim yell for help. Petitioner, along with other employees, approached and told the assailant to stop and the police were called. Petitioner testified that the assailant was agitated and that he believed the assailant would have killed the woman. The assailant then assaulted the Petitioner.

Metropolitan Water states that the rule "does not go so far as to say that every rescue of a stranger by an employee is covered; it refers to a rescue the necessity for making which is

thrown in claimant's path by the conditions of his employment." In sudden emergency situations, "the rationale is employed that it is foreseeable by the employer that the employee, when faced with an emergency situation, would assist."

I would find that the nature of Respondent's business increased the risk of being confronted with such a situation. The Petitioner came to the aid of a female being assaulted by a male. Both of the individuals had been drinking inside the Respondent's establishment and the assault was occurring on the Respondent's premises. The Petitioner was performing his job duties when confronted with the ongoing assault. I find Petitioner's testimony that he thought the assailant would have killed the victim reasonable under the circumstances. Given the nature of the incident, I find it foreseeable by the Respondent that its employees would come to the aid of a patron of its establishment. I find that Petitioner's injuries arose out of and in the course of his employment and, therefore, compensable.

Based upon the injuries sustained, I would award Petitioner 15% person-as-a-whole for his facial injuries and claimed PTSD in addition to TTD benefits from March 5, 2017 to May 6, 2017, representing 9 weeks of disability, and outstanding medical expenses.

D. Douglas McCarthy

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

TODD HARDEN,

Petitioner,

vs. NO: 18 WC 30597

MUELLER,

20IWCC0770

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical, prospective medical, 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 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 March 2, 2020 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 29 2020

D. Douglas McCarthy

DDM/tdm
O: 12/22/20
052

L. Elizabeth Coppoletti

Stephen Mathis

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

HARDEN, TODD
Employee/Petitioner

Case# **18WC030597**

MUELLER
Employer/Respondent

20IWCC0770

On 3/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.44% 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:

1580 BECKER SCHROADER & CHAPMAN
NATHAN A BECKER
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

0771 FEATHERSTUN GAUMER ET AL
EDWARD F FLYNN
101 S STATE ST SUITE 240
DECATUR, IL 62523

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Todd Harden
Employee/Petitioner
v.
Mueller
Employer/Respondent

Case # **18** WC **030597**

20IWCC0770

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 **Springfield**, on **December 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. ☒ 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 _____

20IWCC0770

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned **$54,770.79**; the average weekly wage was **$1,053.28**.

On the date of accident, Petitioner was **35** years of age, **married** with **3** children under 18.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $1,101.43, as provided in Sections 8(a) and 8.2 of the Act, and as is set forth below.

Respondent shall authorize and pay for the right shoulder arthroscopic surgery as recommended by Dr. Dennis Dusek, along with all related services, as is set forth below.

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

March 2, 2020
Date

MAR 2 - 2020

FINDINGS OF FACT

Petitioner, Todd Harden, is employed by Respondent, Mueller as a three-spindle drill press operator. He has worked in this position for 1-1/2 to 2 years, having worked for Respondent for more than 14 years. On September 13, 2018, Petitioner was 35 years old. Petitioner is right handed.

Petitioner described the daily job tasks of a three-spindle drill operator. Basically, Petitioner uses the three-spindle drill to make metal pipe fixtures, which are component parts. First, he is given a specific job order to process. When he receives his order, he retrieves the necessary materials and sets his drill for the assigned task. Typically, an order will consist of approximately 5 to 10 pieces to build, however, the number of pieces to build can vary. Petitioner testified the handle for the three-spindle drill was approximately level with his forehead. Petitioner is approximately 6 foot tall. Therefore, Petitioner was required to bring his hand/arm approximately to his forehead in order to reach out and engage the drill handle. Petitioner demonstrated for the Arbitrator how he physically reached for the drill handle and pulled it down and towards himself to engage the drill. Petitioner also testified and demonstrated for the Arbitrator how he hand tapped metal pipes. The pipe remains in the fixture it is put in for drilling and is placed on a work bench (at counter height). Petitioner then applies the tap forcefully, turning it counterclockwise with his arm extended out and bent at the elbow. He leans his body into the effort to apply force in order to thread the pipe.

Petitioner testified that on September 13, 2018, he started work at 7:00 am. At the start of his shift, he had no pain or functional issues with his right shoulder/arm. He was first assigned an order that consisted of between 5 and 10 pieces to build. Petitioner completed this task at approximately 8:00 am without issue, and without experiencing any pain or disfunction in his right shoulder/arm.

Petitioner's second job order consisted of approximately 32 pieces to build, which he testified was a larger than normal order. He started this job between 8:30 am and 9:00 am. The job order required Petitioner to take hardened metal pipes, which were approximately 6 to 8 inches long, and drill one small hole into the hardened pipe. To make this hole Petitioner utilized a small drill bit. Petitioner would then change to a larger drill bit and drill two holes into the pipe. Petitioner then would switch to a counter sink drill bit and counter sink the 2 larger holes. After the drilling was completed, Petitioner would take the metal piece to a workbench where he would hand tap both large holes.

Petitioner was asked a series of questions which required him to estimate the amount of force necessary to complete the several tasks. Petitioner was asked to use a scale from 1 to 10, with 1 being almost no effort and 10 been the hardest force he could apply. Petitioner testified the pressure needed to use the small drill was approximately a 3/10. He did note that he had to use constant pressure and finesse in order to prevent breaking the small drill bit. Petitioner testified that the pressure needed to drill the two large holes was between 7-8/10. The pressure needed to counter sink the two large holes was approximate 3/10. Petitioner testified the pressure needed to hand tap the two holes was approximately 7-8/10, making a ¼ turn at a time.

When asked to describe how the injury occurred Petitioner stated: "well, I came to work, I was fine. I ran the first job out; set up the second job; was running it, no problems. Went to the first break, was good. Went to lunch, had a good lunch, came back and I was fine. Right before the last break I was about 30 pieces into the job and I was drilling and tapping the part, and as I was tapping I was pushing on the table and I got done with the part and I went to reach up for the spindle on the drill and I lost - I lost all power and my arm, like I couldn't get my right arm to reach up to grab the spindle, and it hurt, something in my shoulder hurt, was hurting real bad like a pinching burning sensation in my shoulder. And I was like I never had anything like that happen to me before, and I was like what the, you know what is going on here." (Trial transcript at 25-26)

Petitioner reported this injury to Kenny Grandon, who was the safety liaison for the union. Grandon told Petitioner to advise his supervisor. Petitioner attempted to contact his supervisor over the intercom system, however, his supervisor did not respond. As it was almost break time, Petitioner went on break. Upon returning from break, Petitioner once again used intercom system to attempt to contact his supervisor. Again, his supervisor did not respond. Next, Petitioner went to the office and informed Paul Narker about the injury. Narker told Petitioner to go back to work. Petitioner did attempt to return to the three-spindle drill, however, he could not perform this job task because of the pain he was having in his right shoulder. Therefore, he returned to the office and this time spoke to Daniel Bradford. Bradford called Mallory and reported the injury. Because it was almost the end of his shift, Mallory instructed Petitioner to go home and put ice on his shoulder and to take Aleve. He was to return to work the next day and, if he continued to have issues, Mallory would send him for medical treatment.

Petitioner did return to work on September 14, 2018 and informed Mallory that he continued to have right shoulder pain. Therefore, on September 14, 2018, Petitioner was sent for medical treatment at Occupational Health & Wellness in Decatur, Illinois. Under "Patient's description of problem", the Occupational Health & Wellness records state: "Running 3 spindle drill after hand tapping patient reached up to grab the handle of the drill and that is when the pain started 9/13/2018." (PX1 at 1) The physical examination showed: "Pain on motion is present over the A-C joint. Pain to palpation is present over the A-C joint. Range of motion is normal with increased pain during abduction. Strength is limits against resistance. The crossover test is negative. Neer's test is negative. Liftoff test is negative." (PX1at5) Petitioner was diagnosed with a right shoulder strain and allowed to return to work full duty. (PX1at5) He was instructed to alternate Aleve and Tylenol for pain, use ice for comfort, and undergo physical therapy pending approval. (PX1at2) Petitioner treated with Occupational Health & Wellness from September 14, 2018 through October 15, 2018 for ongoing right shoulder pain. (PX1at1-11) During this time, Petitioner was instructed to work with restricted use of his right shoulder. Respondent accommodated those restrictions. Petitioner attended six therapy sessions. Therapy notes start September 27, 2018, with Petitioner reporting 7/10 pain before the first session. He reported 5/10 pain after treatment. At the last visit on October 15, 2018, reported 2/10 pain when therapy began and 2/10 pain at the end of the session. (PX1)

On October 18, 2018, Petitioner saw Dr. Dennis Dusek, for an orthopedic evaluation. This was on a referral by his lawyer. The history of injury states: "[Petitioner] operates a three spindled drill which is an industrial drill press. He frequently has to, in the course of his work, do hand taps into parts that are hardened steel. He might usually do five or six of these in a day. On September 13th he was asked to do 32 parts. Each part has hyaluronic acid injections tap from each side so this would have been 64 hand taps. In this process, he manually creates a pipe thread into this hardened steel which requires tremendous force apparently. He states that on that date when he was done, he went to reach up and he lost the strength in his right arm and started having pain in his right shoulder. He did not have any pain in his shoulder prior to that date." (PX2at1) It was noted that Petitioner has undergone six sessions of physical therapy with only little improvement. Petitioner continued to have pain in the right shoulder and marked pain with forward flexion. (PX2at1)

The physical examination performed by Dr. Dusek, on October 18, 2018 revealed: [Petitioner's] flexion is painful when he goes past 90 degrees and will stop at about 120 degrees on the right and the left. The left shows full overheard elevation without pain. He shows good strength of internal and external rotation to both shoulders and his bear huggers sign is negative to both shoulders. The biceps is well formed on both sides and the biceps is so massive in his case that even in spite of his overweight status it is quite readily palpable, and I do not feel any sign of a long head biceps rupture. The O'Brien sign is quite positive on the right but negative on the left. Quadriceps adduction and the pull-apart signs do not seem to aggravate either AC joint. He has no deformity and no instability to either shoulder." (PX1at3) Dr. Dusek ordered an MR arthrogram to assess the superior labrum and the rotator cuff. Petitioner was instructed to return to work with a 20-pound lifting

restriction, as well as, no overhead work. (Id) Petitioner testified that Respondent did not accommodate these restrictions, therefore, Petitioner had to work full duty or not get paid.

On November 28, 2018, Petitioner underwent an MR arthrogram of the right shoulder. The study showed: 1) Rotator cuff tendinopathy without a discrete tendon tear identified; 2) Small labral tears; and 3) Hypertrophic and degenerative change at the acromioclavicular joint. (PX3at1)

On November 30, 2018, Dr. Dusek's reviewed the MR arthrogram and noted it revealed a superior labral tear, which was most likely causing Petitioner's issues. However, the rotator cuff could be causing some issues. Dr. Dusek recommended an arthroscopic surgery to address Petitioner's right shoulder. (PX2at6)

Petitioner last saw Dr. Dusek on April 18, 2019. Prior to that visit, Dr. Dusek had received Dr. M. Bryan Neal's IME report, which diagnosed Petitioner with adhesive capsulitis. Dr. Dusek wanted to re-examine Petitioner to see if he, in fact, had a frozen shoulder. The repeat physical examination showed that Petitioner could elevate his right arm to 170 degrees, with help. His external rotation went to 60 degrees bilaterally and internal rotation brings his hand to the upper spine bilaterally. O'Brien's sign remained positive on the right, as well as, a moderately positive impingement sign on the right. (PX2at 7)

After conducting this second examination, Dr. Dusek stated that Petitioner "clearly has normal range of motion of the [right] shoulder and therefore he does not have adhesive capsulitis." (PX2at8) In Dr. Dusek's opinion, Petitioner had a SLAP tear as evidenced by his history, two physical examinations, and the MR arthrogram. (PX2 at 8) Dr. Dusek's office notes of April 18, 2019 states that a person cannot have adhesive capsulitis when they have full range of motion. (PX2at8)

While waiting for the 19(b) hearing, Petitioner sought treatment with Dr. Brett Wolters, in Springfield, Illinois. Petitioner only saw Dr. Wolters on April 12, 2019. Dr. Wolter recorded that Petitioner's right shoulder issue dated back to a work injury involving a three-spindle drill. Dr. Wolters noted Dr. Dusek recommended surgery to address the superior labrum, however, the surgery was being denied because the IME doctor had diagnosed Petitioner with a frozen shoulder and recommended a cortisone injection. Further, Dr. Dusek was out of network, so Petitioner could not use his regular insurance. (PX5at6)

At the April 12, 2019 Dr. Wolters visit, Petitioner reported his pain being between 4 and 8/10. He had increased pain with laying on the shoulder at night, lifting his arm out in front of his body, or twisting it. The pain was sharp and consistent. (PX5at6)

The physical examination recorded by Dr. Wolters revealed: 1) 5/5 strength in the bilateral supraspinatus, infraspinatus and deltoid; 2) Mild pain with lift-off testing, but without significant weakness; 3) no pain over the right acromioclavicular joint, but mild pain with crossover abduction; 4) pain with impingement testing of the right shoulder; 5) no significant pain with Speed's testing; and 6) 5/5 strength of his biceps. Dr. Wolters reviewed the November 28, 2018 MR arthrogram, which showed a possible superior labrum tear and mild rotator cuff tendinopathy. (PX5at7)

Dr. Wolters' diagnosis was: 1) Right shoulder rotator cuff tendinopathy; 2) Possible right shoulder superior labral tear; and 3) Right shoulder acromioclavicular joint osteoarthritis, possibly most symptomatic currently. (PX5at7) Dr. Wolters noted Petitioner had 70 degrees of external rotation which excluded the diagnosis of adhesive capsulitis. Also, Dr. Wolters stated Petitioner had no pain with Speed's testing nor with the O'Brien's testing, excluding a SLAP tear. The examination was most consistent with impingement and AC joint arthritis. An ultrasound guided injection of the acromioclavicular joint was ordered, as well as, physical therapy. (PX5at7)

Petitioner received an ultrasound guided Kenalog injection into the AC joint, by Dr. Marc DeJong, on April 12, 2019. (PX6)

Petitioner testified that the injection provided approximately 50% pain relief. The effects of the shot lasted for approximately 2 weeks. He stated that the shot did not make him pain free. Dr. Wolters' records show that he recommended PT for Petitioner, which Petitioner said he did not recall. Petitioner also denied receiving a follow-up letter from Dr. Wolters inquiring about the therapy results. The therapy recommendation and the follow-up letter are contained in Dr. Wolters' records. Petitioner agreed that Respondent did not deny him any recommended PT. Dr. Wolters' records are silent on the issue of causation. (RX 4)

Petitioner testified that following the injection he continues to wish to have the surgery recommended by Dr. Dusek. Petitioner did attempt to undergo the surgery using his wife's group insurance. However, his wife's group insurance is not accepted by Dr. Dusek's office, therefore, he could not undergo the surgery.

Petitioner testified he has worked full duty from October 2018 until the time of trial. Petitioner testified that he must modify how he does his job tasks because of right shoulder pain. Primarily, when he can, Petitioner utilizes his left hand and arm. Petitioner has even had to tap left-handed. Also, Petitioner has started to utilize automated functions of the three-spindle drill, which he did not utilize prior to his injury. Even with these modifications, Petitioner testified that he experiences pain in his right shoulder while at work. However, he must work through the pain to support his family.

Respondent called Justin Handy to testify at trial. Mr. Handy is Petitioner's supervisor. He has been Petitioner's supervisor for approximately 7 months prior to trial. He was not Petitioner's supervisor on the date of accident. Mr. Handy testified that he has worked for Respondent for more than 5 years. The first three years he was a machine operator on 3rd shift. The last two years he had been a non-production supervisor.

Mr. Handy testified it took approximately 10 pounds of pressure to pull down the three-spindle drill handle. On cross-examination, Handy admitted that he has never performed the job tasks of a three-spindle drill operator. There was no testimony presented that Mr. Handy had ever personally touched the three-spindle drill. Mr. Handy testified he believed it took 10 pounds of pressure to pull down the handle of the three-spindle drill because the EHS team had performed an ergonomic analysis of the job. This ergonomic analysis was done after Petitioner's injury. Handy was not personally present during the testing; therefore, he was unaware if the devices used to measure the pounds of pressure were properly calibrated. He did not know what drill bit was used during the testing, nor did he know what type of material was being drilled into. Respondent did not produce any documents showing the EHS team's test results, nor did they call any witness who had firsthand knowledge of the testing to testify.

Respondent produced no documents nor elicited testimony regarding how much pressure it took to hand tap metal pipes, such as Petitioner was working with on September 13, 2018..

Respondent submitted, as Respondent's Exhibit 5, a "job set"sheet, which purported to show the job performed by petitioner on the date of accident. Petitioner testified the document did not accurately reflect the number of pieces that he processed on September 13, 2018. His belief was that it was either dated incorrectly or was simply inaccurate. Respondent's Exhibit 5 did not alter Petitioner's testimony.

Dr. Dusek's Evidence Deposition was taken on April 30, 2019. He is a board certified orthopedic surgeon, who has been in practice for 39 years. Regarding causation, Dr. Dusek testified that, as a result of the September 13, 2018 work incident: "at this point, my impression is that he has sustained a superior labrum tear,

until proven otherwise. Would have to be proven by arthroscopic surgery. In that the superior labral tear, as I talked about just a few minutes ago, would have been caused by repetitive pulling, vigorous pulling, and use of the biceps and the biceps point in the superior labrum into a SLAP tear. He normally would have been doing 5 or 6 hand taps on that date. However, he was asked to do 32 parts, which was 64 hand taps. And, yes, it is my opinion, to a reasonable degree of medical certainty, that that overuse, heavy use, was the cause of the injury that I'm still currently treating him for." (PX4 at 24) Dr. Dusek testified, within a reasonable degree of medical certainty, that petitioner was suffering from a symptomatic SLAP tear and possibly rotator cuff tendinopathy. Dr. Dusek believes that it is reasonable and necessary to proceed with orthoscopic right shoulder surgery. (PX4at24-25) Petitioner does not have a frozen shoulder. Dr. Dusek did not know the exact amount of force that drilling or tapping required. Dr. Dusek did not review the MR film. He relies upon the radiologist's interpretation.

Respondent's Section 12 doctor, Dr. M. Bryan Neal testified via Evidence Deposition on July 15, 2019. He is a board certified orthopedic surgeon (fellowship trained in hand and upper extremity surgery) and he has been in practice for more than 20 years. He diagnosed Petitioner with a frozen shoulder. He did not believe that the frozen shoulder was related to Petitioner's September 13, 2018 work activities. He did not endorse a diagnosis of symptomatic SLAP tear. The MRI report was consistent with his diagnosis. Petitioner does not need surgery. Dr. Neal did not agree that Petitioner exhibited normal range of motion. Dr. Neal would agree that if the adhesive capsulitis has resolved, the diagnostics revealed a torn labrum and provocative labral signs are positive, then it would be reasonable to proceed with surgery.

At trial, Petitioner demonstrated for the Arbitrator that he could raise his hand/arm directly overhead and, thus, he did not have a frozen shoulder.

CONCLUSIONS OF LAW

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

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

Petitioner's testimony is found to be credible.

Issue C - Accident and Issue F - Causation:

Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on September 13, 2018. Petitioner's current condition of ill-being regarding his right shoulder (to

wit: SLAP tear with possible rotator cuff pathology and possible subacromial bursitis or other associated intra-articular pathology or subacromial pathology as described by Dr. Dusek in his 4/19/2019 chart) is causally related to the injury.

Obviously, Petitioner was in the course of his employment when he experienced the right shoulder pain and weakness that he described in his testimony and is consistently described in the medical records. He was on the clock, on Respondent's premises and performing his 3 spindle drill press operator job.

The injury arose out of Petitioner's employment as it was the result of repeated forceful use of his right arm/shoulder during both the drilling and the hand tapping process that he was engaged in on September 13, 2018. The injury occurred in a fashion that was unique to his employment. The risk of sustaining a shoulder injury such as Petitioner has is certainly a risk incident to Petitioner's job as a 3 spindle drill press operator for Respondent. Thus, the injury arose out of Petitioner's employment. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 203 (2003)

Justin Handy's testimony does not dissuade the Arbitrator on the issues of accident and causation. He had no firsthand knowledge of the forces necessary to operate the three-spindle drill press. In fact, Mr. Handy did not testify that he had ever even touched the three-spindle drill press in question. His testimony does not support the relevance and materiality of the results of the EHS team's ergonomic analysis. He does not know if the force gauges were properly calibrated. He did not know what drill bit was being used during the testing. He does not know what type of material was being drilled into during the testing. For these reasons, the Arbitrator must disregard Mr. Handy's testimony regarding the physical forces necessary to operate the three-spindle drill as Petitioner did on September 13, 2018. Further, negative inference can be made against Respondent because they did not produce the EHS ergonomic study, nor did they call anyone to testify who had firsthand knowledge of this testing. Also, Petitioner's testimony regarding the stance and force required for the tapping operation was unrebutted.

Petitioner's credible testimony and the consistent histories set forth in the medical records support the finding that he sustained accidental injuries which arose out of and in the course of his employment by Respondent on September 13, 2018.

As to the issue of causation, the Arbitrator is persuaded by the testimony and records/opinions of Dr. Dusek. This is an unusual situation in that 3 orthopedic surgeons have 3 different diagnoses as to what is wrong with Petitioner's right shoulder.

Dr. Neal's testimony is not persuasive. Petitioner did not exhibit a frozen shoulder when he was seen by Occupational Health and Wellness or had therapy with Douglas Zobriest, D.C. "Tightness" in the shoulder does not persuade the Arbitrator that Petitioner had adhesive capsulitis when he had treatment with these providers. Neither Dr. Dusek, nor Dr. Wolters noted any finding consistent with adhesive capsulitis. Petitioner's demonstration of his ability to raise his right arm at trial belies any finding that he has a frozen shoulder as of the date of trial.

Petitioner denied any problems with his right shoulder before the accident. He also denied having any prior treatment for a right shoulder condition. Petitioner credibly testified about sustaining a right shoulder injury immediately after hand tapping the 30th piece of hardened steel and then reaching to his forehead level to engage the three-spindle drill handle. Petitioner credibly testified that his right shoulder condition has remained symptomatic since the time of the accident. There was no evidence of any intervening event. Causation is supported by persuasive expert testimony. It will not be held against Petitioner that he continued to work full duty while awaiting his day in court.

Issue J Medical Bills:

The Arbitrator finds the medical treatment provided was reasonable and necessary to treat Petitioner's work injuries. This finding is based on the testimony of Petitioner and Dr. Dusek. Therefore, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule and in accordance with §§ 8(a) and 8.2 of the Act, as follows:

Dr. Dennis Dusek	**$ 104.00**
Clinical Radiologists	**$ 677.00**
Occupational Health & Wellness	**$ 320.43**
Total:	**$1,101.43**

Issue K Prospective Medical Treatment:

The Arbitrator finds the proposed medical treatment offered by Dr. Dusek, arthroscopic surgery to address the symptomatic SLAP tear and possibly rotator cuff tendinopathy, to be reasonable, necessary and causally related to Petitioner's September 13, 2018 work accident. Accordingly, Respondent shall authorize and pay for same, along with all related services.

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

MIESHA THOMAS,

Petitioner,

vs. NO: 17 WC 12665

ST OF IL DEPT OF HUMAN SERVICES,

20IWCC0771

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, 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 Arbitrator considered the five factors under Section 8.1b of the Act, assigned weight to each factor, and awarded Petitioner four-percent (4%) loss of the person as a whole in PPD for her back injury. The Commission notes that as a result of the December 21, 2016 work accident, Petitioner had been diagnosed with back pain affecting pregnancy in third trimester. Petitioner was put on bed rest for approximately one week and had no other significant treatment for the work-related back injury. Petitioner gave birth on February 24, 2017.

Petitioner testified at arbitration that she continued to have back pain and had difficulty with tying her shoes, sweeping, picking up her son, sitting, and sleeping. The medical records, however, demonstrated that by April 15, 2017, Petitioner had recovered from her work injury but was unable to return to work due to being postpartum.

While the Commission does not take issue with the weight assigned to each factor under Section 8.1b of the Act, the Commission finds that the Arbitrator's PPD award does not correspond with the evidence in the record nor the injuries sustained by Petitioner as a result of the December 21, 2016 work accident. Petitioner's injury was primarily back pain treated with one week of bed rest. By April 15, 2017, Petitioner had recovered from this injury. Therefore, the Commission modifies and reduces the Arbitrator's award to two-and-a-half-percent (2.5%) loss of use of the person as a whole under Section 8(d)2 of the Act.

The Commission further modifies the Arbitrator's award of medical bills. The Arbitrator awarded medical bills totaling $9,414.00. The medical records indicated that Petitioner's condition after April 15, 2017 was related to postpartum issues. The Commission notes that the Access at Sinai OB/GYN/Access Community Health Network bill indicated one charge after April 15, 2017 in the amount of $180.00 and with a date of service of May 9, 2017. The Commission finds that the $180.00 charge is unrelated to the December 21, 2016 work accident and therefore deducts this amount from the awarded medical bills.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed May 14, 2020, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $9,234.00, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that pursuant to Section 8(j) of the Act, Respondent is entitled to a credit for those amounts paid under its group plan that are related to the treatment of injuries found compensable by this Decision.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $518.61 per week for 2 4/7 weeks, commencing February 7, 2017 through February 24, 2017, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner permanent partial disability benefits of $466.75 per week for 12.5 weeks, because the injuries sustained caused the two-and-a-half-percent (2.5%) loss of use of the person as a whole under Section 8(d)2 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: DEC 29 2020

D. Douglas McCarthy

Stephen J. Mathis

L. Elizabeth Coppoletti

DDM/pm
D: 12/22/2020
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

THOMAS, MIESHA
Employee/Petitioner

Case# **17WC012665**

ST OF IL DEPT OF HUMAN SERVICES
Employer/Respondent

20IWCC0771

On 5/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% 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:

0139 CORNFIELD & FELDMAN LLP
JIM VAINIKOS
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CHICAGO, IL 60602

5002 ASSISTANT ATTY GENERAL
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1745 DEPT OF HUMAN SERVICES
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SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
SPRINGFIELD, IL 62704

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

MAY 14 2020

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

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

MIESHA THOMAS
Employee/Petitioner

v.

STATE OF ILLINOIS
DEPARTMENT OF HUMAN SERVICES
Employer/Respondent

Case # 17 WC 12665

Consolidated cases: N/A

20 IWCC0771

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 **June 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 **December 21, 2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$40,452.00**; the average weekly wage was **$777.92**.

On the date of accident, Petitioner was **30** years of age, ***single*** with **2** dependent children.

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

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

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

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$518.61**/week for **2 4/7** weeks, commencing **February 7, 2017** through **February 24, 2017**, as provided in Section 8(b) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of **$9,414.00**, 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.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of **$466.75**/week for **20** weeks, because the injuries sustained caused the **4% 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

03/30/2020
Date

ICArbDec p. 2

MAY 14 2020

PROCEDURAL HISTORY

This matter was heard before Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") on June 17, 2019 in Chicago, Illinois.

The parties went to hearing with the following issues in dispute: whether Miesha Thomas's (hereinafter "Petitioner") condition of ill-being is casually related to her injury, whether the Illinois Department of Human Services (hereinafter "Respondent") is liable for unpaid medical bills (P.X3. P.X4, P.X5), whether Petitioner is entitled to temporary total disability for the period of February 7, 2017 through February 24, 2017, and the nature and extent of Petitioner's injury. (Arb.X1)

The parties stipulated that on December 21, 2016, Petitioner and Respondent were operating under the Illinois Workers' Compensation Act (hereinafter "Act"), that their relationship was one of employee and employer, that the accident arose out of and in the course of Petitioner's employment with Respondent, that Petitioner gave Respondent notice of the accident with the time limits stated in the Act. The parties also stipulated that Petitioner's average weekly wage was $777.92 pursuant to Section 10 of the Act, was 30 years of age, single, with 2 dependent children during the time of the accident. (Arb.X1)

The submitted records have been examined and the decision rendered by Arbitrator Kay.

STATEMENT OF FACTS

Petitioner testified that on December 21, 2016, Petitioner was employed by the Respondent as a Social Service Career Trainee. She was hired on March 16, 2016. Her work shift was from 8:30am to 5:00pm. Her job duties included managing medical cases for Medicaid. Her work office was situated on the second floor of an office building in Homewood, IL.

Petitioner testified that on December 21, 2016 she had arrived in the parking lot of the building with a co-worker a few minutes before 8:30am. There was a snowstorm occurring at the time of her arrival. This made the ground surfaces wet with snow and mud. She testified to the fact that there was no snow plowing or salting of the parking lot. There were no floor mats at the inside entrance of the building.

Petitioner testified that the entrance of the building had a lobby area with a staircase that led to the second floor. The staircase started on the ground floor with 6 steps, then there was a landing, then another 10 steps. She had to walk about 20 feet to reach the staircase. Petitioner testified that she was carrying her purse on her shoulder and was 6 months pregnant at the time. As she reached the staircase, she walked up onto the third step at which time she fell forward onto the steps and landing because of the wet and slippery stairs. She hit her abdomen, right knee, her right hand and back. She was immediately concerned about her pregnancy. A co-worker helped Petitioner to stand up and guided her to a chair. Petitioner was taken by ambulance to the emergency room.

The Homewood Fire Department transported Petitioner to Advocate South Suburban Hospital. The narrative history of the accident was documented by the ambulance records and was consistent with Petitioner's testimony. At South Suburban, Petitioner was taken to OB/GYN triage. She underwent a obstetrical ultrasound, which was normal. (PX1) She was advised bed rest and was given a return to work slip for December 27, 2016.

Petitioner went to her primary care physician at Access Community Health Network for a "Routine Prenatal Visit" the next day. (PX2) The treater recorded "cut on right pinky finger" and "muscle aches." Id.

On December 26, 2017, Peittioner returned to Access with complaints of back aches, difficulty sleeping, walking, sitting or standing. Id. She was counseled on third trimester discomforts and proper nutrition. Id. She returned on January 30, 2017 still complaining of back pain. Id. She was given discharge instructions on "Back Pain During Pregnancy: Positioning Yourself" which included descriptions and illustrations of posture and stretching. Id. On February 6, 2017, APRN Barbara Doran completed a physician's statement that said her back symptoms worsened after falling at work. Id. She wrote that Petitioner is "continuously disabled from doing regular work from 2/6/2017 through x12 weeks after delivery." Id. Respondent could not accommodate those restrictions and Petitioner stayed off work until the birth of her baby. While off work from February 6, 2017 to February 24, 2017, Petitioner testified that she never received any Temporary Total Disability benefits for this time period. Petitioner used her group health insurance for payment of the medical bills related to her injury.

Petitioner delivered a boy on February 24, 2017. (P.X2)

Petitioner testified that she did not have any back pain prior to her work-related injury. She experienced back pain only after the injury of December 21, 2016. At trial, Petitioner testified that she notices that she has pain in her back sitting too long in one position, lifting her baby, and has difficulty tying her shoes.

CONCLUSIONS OF LAW

With respect to issue (F) whether the Petitioner's condition of ill-being is causally related to the accident of December 21, 2016, 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 her condition of ill-being is causally connected to her work-related injury. The Arbitrator found Petitioner's testimony credible and supported by the medical records. Respondent did not refute the mechanism of injury. The Petitioner did not have any prior medical care to her back prior to this injury. Notwithstanding the pregnancy, Petitioner was treated by Dr. Lampley for the back injury diagnosed as sciatica. His medical records and the chain of events provide the causation between Petitioner's fall at work and the need for medical care to her back. Respondent did not provide any contrary medical opinion to dispute the causation.

With respect to issue (J) whether the medical services that were provided to Petitioner were reasonable and necessary? and Has Respondent paid 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. Having found in favor of Petitioner for causation, Arbitrator finds that the medical bills incurred by Petitioner for treatment to her back are reasonable and necessary. Regarding the OB/GYN bills, there was substantial concern by the medical providers as to the effect of the injury to the pregnancy. As such, the medical bills for the OB/GYN treatment are reasonable and related to this date of accident.

With respect to issue (K) whether Petitioner is entitled to temporary benefits for the period of February 7, 2017 until February 24, 2017, 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 found in favor of Petitioner for causation and bills, the Arbitrator also finds that Respondent is liable to pay TTD benefits to Petitioner covering the time period of February 7, 2017 and February 24, 2017. The medical records of Dr. Lampley specifically discuss the back injury as a separate medical condition from her pregnancy. She was diagnosed with bilateral sciatica.

With respect to issue (L) the nature and extent of Petitioner's injury, the Arbitrator find as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Petitioner was diagnosed with bilateral sciatica. For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section §8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on February 26, 2015 making section §8.1b applicable.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a social service career trainee at the time of the accident and that she was able to return to work in her prior capacity as a result of said injury. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 30 years old at the time of the accident. Petitioner has a longer period of time to deal with her resulting injury in contrast to an older employee near the end of their career. 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 no change in her salary. 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 Petitioner notices that she has pain in her back sitting too long in one position, lifting her baby, issues sleeping, and has difficulty tying her shoes. 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 4% loss of use of person as a whole pursuant to §8d2 of the Act.

Signature of Arbitrator

03/30/2020
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 up	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES SZYMCZAK,

Petitioner,

vs. NO: 08 WC 40737

EDMAR HEATING & COOLING CO.,

Respondent.

20IWCC0772

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of casual connection, medical, temporary total disability (TTD), permanent partial disability (PPD), 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 Commission modifies the Decision of the Arbitrator and finds that Petitioner is permanently and totally disabled as of December 17, 2015, the date Dr. Avi Bernstein found Petitioner was permanently and totally disabled and discharged him from his care. The Commission further modifies the Decision and finds that the medical bills are to be paid to the Petitioner directly. All else is affirmed and adopted.

An employee is permanently and totally disabled if he or she is obviously unemployable, *i.e.*, unable to make some contribution to industry sufficient to justify the payment of wages or there is medical evidence to establish a claim of permanent and total disability. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 53, 390 Ill. Dec. 293, 28 N.E.3d 946; *Lanter Courier v. Industrial Comm'n*, 282 Ill. App. 3d 1, 10, 668 N.E.2d 28, 217 Ill. Dec. 843 (1996). However, an employee need not be reduced to complete physical incapacity to be entitled to PTD benefits. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87, 447 N.E.2d 842, 69 Ill. Dec. 407 (1983). If an employee's disability is limited

and it is not obvious that the employee is unemployable, the employee may nevertheless demonstrate an entitlement to PTD by proving he or she fits within the "odd lot" category. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 310 Ill. Dec. 18 (2007). The odd-lot category consists of employees who, "though not altogether incapacitated for work, [are] so handicapped that [they] will not be employed regularly in any well-known branch of the labor market." *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 547, 419 N.E.2d 1159, 50 Ill. Dec. 710 (1981) (citing 2 Arthur Larson *et al.*, Workmen's Compensation § 57.51, at 10-164.24 (1980)). An employee generally fulfills the burden of establishing that he or she falls into the odd-lot category in one of two ways: (1) by showing a diligent but unsuccessful search for employment or (2) by demonstrating that because of age, training, education, experience, and condition, there are no available jobs for a person in his or her circumstance. *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 100783WC, ¶ 34, 966 N.E.2d 40, 358 Ill. Dec. 855; *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534-35, 668 N.E.2d 21, 217 Ill. Dec. 836 (1996). If an employee makes this showing, the burden shifts to the employer to show that some kind of suitable work is available to the employee. *Westin Hotel*, 372 Ill. App. 3d at 544.

The Commission finds that Petitioner is permanently and totally disabled due to his ongoing medical condition. The Commission finds the opinions of Dr. Bernstein and Dr. Henry Kurzydlowski more persuasive than the opinion of Dr. Ryon Hennessy. The Petitioner testified to ongoing pain that limits his ability to sit, stand, walk and sleep. In addition to his spinal cord stimulator, he takes medication daily to control the pain. His complaints are corroborated by Dr. Kurzydlowski and Dr. Bernstein, both of whom have a lengthy history treating the Petitioner. Their medical records support that Petitioner has ongoing pain that is exacerbated by activity. Because of this, neither Dr. Kurzydlowski nor Dr. Bernstein released Petitioner to work. In fact, Dr. Kurzydlowski consistently had Petitioner off work indefinitely and Dr. Bernstein noted that Petitioner was completely disabled as of October 22, 2015 and discharged him from his care on December 17, 2015.

The Commission finds the opinion of Dr. Hennessy not persuasive. Dr. Hennessy found Petitioner demonstrated signs of symptom magnification and was capable of working with restrictions of no lifting over 20 pounds with no overhead work for both the left shoulder and the lumbar spine. He also noted that Petitioner would need maintenance of the spinal cord stimulator and would remain on Flexeril and pain medication permanently. Dr. Hennessy's symptom magnification findings are in direct contradiction to the overwhelming evidence, the opinions of the treating physicians and Petitioner's credible complaints. Therefore, the Commission finds Petitioner is permanently and totally disabled due to his medical condition as of December 17, 2015.

The evidence further supports that Petitioner is permanently and totally disabled under the "odd-lot" theory. The evidence supports that Petitioner is not employable because of his age, training, education, experience, and condition. Mr. Blumenthal and Mr. Belmonte testified that there was no labor market available to Petitioner. Because of Petitioner's restrictions coupled with his lack of education and transferrable skills, they opined that Petitioner would be precluded from any work. While the Petitioner established that he is permanently and totally disabled due to his medical condition, the evidence also establishes that he is permanently and totally disabled under

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the "odd-lot" theory.

The Commission further modifies the Decision and finds that the medical bills are to be paid to the Petitioner directly pursuant to Section 8(a) of the Act.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed February 25, 2020, 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 $1,096.27 per week for a period of 199-1/7 weeks, (February 22, 2012 through December 16, 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 the Respondent is entitled to a credit of $113,715.71.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary medical services, pursuant to the medical fee schedule, for medical services to treat Petitioner's back and left shoulder, and services directly related thereto, to the Petitioner directly.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,096.27 per week for life, commencing December 17, 2015, as provided in Section 8(f) of the Act, because the injury caused the permanent and total disability of the Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, the 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 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: DEC 30 2020

D. Douglas McCarthy

20IWCC0772

DDM/tdm
O: 12/9/20
052

Stephen Mathis

SPECIAL CONCURRENCE/DISSENT

I concur with all aspects of the Majority's Decision save its award of medical bills to Petitioner. As to this finding, I respectfully dissent.

As the Court noted in *Perez v. Illinois Workers' Compensation Commission*, "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).

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

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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. I would allow the credit of $112, 095.13 for bills previously paid.

For the above-stated reasons, I respectfully dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED NOTICE OF ARBITRATOR DECISION

SZYMCZAK, CHARLES
Employee/Petitioner

Case# **08WC040737**

EDMAR HEATING & COOLING CO
Employer/Respondent

20IWCC0772

On 02/25/2020 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 1.44% 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:

0247 HANNIGAN & BOTHA LTD,
RICHARD D. HANNIGAN
505 E. HAWLEY ST SUITE 240
MUNDELEIN, IL 60060

1408 HEYL ROYSTER
BRAD ANTONACCI
33 N. DEARBORN ST 7TH FL
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
CORRECTED ARBITRATION DECISION

Charles Szymczak
Employee/Petitioner

v.

Edmar Heating & Cooling
Employer/Respondent

Case # **08** WC **40737**

Consolidated cases: _____

20IWCC0772

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 **August 29, 2019; October 2, 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 **June 20,2006**, 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 **$85,604.48**; the average weekly wage was **$1646.24**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of **$113,715.71, per Respondent's Exhibit 2a,** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$113,715.71**.

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

ORDER

Medical Benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for medical services to treat Petitioner's back and left shoulder, and services directly related thereto, to those providers.

Permanent partial disability

Respondent shall pay Petitioner permanent partial disability benefits of $591.77 per week for 225 weeks because the injuries sustained caused 45% loss of a man 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

2/25/2020
Date

FEB 25 2020

Charles Szymczak v. Edmar Heating & Cooling, No. 08 WC 40737

Preface

The parties proceeded to hearing August 29, 2019, recessed and resumed October 2, 2019, on a Request for Hearing indicating the following issues in dispute: whether Petitioner's current condition of ill-being as to the left shoulder is causally connected to the injury sustained June 6, 2006; whether Respondent is liable for unpaid medical bills as listed in Petitioner's Exhibit 11; what is the nature and extent of the injury; and whether Respondent is allowed credit of $102,995.44 under section 8(j) of the Act. A transcript of the hearing of August 29, 2019, was ordered. Petitioner and his wife testified. Steven Blumenthal testified by means of an evidence deposition, as well as Dr. Ryon Hennessy, and Joseph Belmonte. Petitioner offered no medical testimony. Charles Szymczak v. Edmar Heating & Cooling, No. 08 WC 40737 Transcript of Evidence on Arbitration at 4-6; Arbitrator's Exhibit 1.

Petitioner objected to the deposition testimony of Dr. Hennessy and moved to strike the testimony. In answer to my question, was an objection to the deposition offered at the beginning of the deposition, Petitioner's counsel misrepresented the sequence of an objection and said yes. An objection was raised to certain testimony, but not anywhere near the beginning of the testimony. On that alone, the objection and motion are untimely. Petitioner makes two objections to Hennessy's testimony. First, that he relied on opinions offered in reliance on reports prepared in anticipation of trial. Szymczak at 45, 47; Respondent's Exhibit 1. An expert witness cannot rely on a non-treating physician report done solely for the purpose of trial, as it is not the type reasonably relied on by experts in forming opinions in the course of medical practice. Dugan v. Weber, 175 Ill. App. 3d 1088 (1998) (focus on whether report was normally relied upon by experts in their own practice).

Here there is testimony Hennessy reviewed previous IME's but no testimony he relied on them. Respondent's Exhibit 1 at 18, 22, 26, 30, 32. The objection is over ruled and the motion to strike denied.

Secondly, Petitioner objects to the testimony of Dr. Hennessy as violative of the law of the case doctrine, as causal connection has been found as to the work injury and low back condition. When, at a 19(b) stage of the proceedings, a determination of the existence of causal connection exists between an accident and alleged injuries to specific parts of the body, that determination ends the issue and if not reversed, settles the question for all subsequent stages of the suit and sits within the "law of the case" doctrine. Irizarry v. Industrial Commission, 337 Ill. App. 3d 598, 606 (2003). However, Hennessy did not opine on causal connection, he offered an opinion on Petitioner's ability to return to work, based on his review of extensive medical records, his interview of Petitioner, and a review of the imaging studies. Respondent's Exhibit 1 at 46-49. The objection is over ruled and the motion to strike is denied.

I have read and reviewed the entire record of this case, well in excess of 4000 pages.

FINDINGS OF FACT

The facts, prior to this hearing, are taken and condensed from the decisions of the Illinois Appellate Court, the Commission, and the prior two arbitrators who have heard portions of this eleven year old claim.

The initial hearing on this claim was a 19(b) Petition, heard June 15, 2009, on accident, causation, medical services, and penalties and fees. The Arbitrator found Petitioner had been treating for years for a chronic back pain from the 1990's into the 2000's. On June 20, 2006, Petitioner claimed to have injured his back while catching an air conditioner in an unwitnessed accident. Petitioner treated conservatively, continued to work without restrictions, experiencing the same back pain he had experienced for years. Evaluated in an IME, he was found able to work full duty and not a surgical candidate. A lumbar strain had resolved completely. Petitioner had been working, going on vacation, and playing multiple rounds of golf at a time. Petitioner hired a Dr. Bernstein to perform an IME, and the Arbitrator found Petitioner provided false history to Bernstein denying prior back pain history. Bernstein based his opinions on a negative past medical history. The Arbitrator found an accident occurred, no one had contradicted Petitioner's story, and found Petitioner had a substantial history of low back pain and treatment, which Petitioner attempted to deny. He noted Petitioner's symptoms had resolved until traveling to Texas to play 36 holes of golf, resulting in back pain. The Arbitrator noted Petitioner was advised at least twice before, to be careful when golfing. The Arbitrator relied on Respondent's IME over the false assumptions in the IME of Petitioner. The Petitioner's testimony was of limited credibility and not persuasive. The Arbitrator concluded the June 20, 2006, event was a temporary aggravation of Petitioner's chronic preexisting low back condition. He denied compensation and found treatment after August 21, 2007, unrelated. No penalties or fees were awarded. Petitioner's Exhibit 12. That decision was well reasoned, supported by the evidence and testimony, and bolstered by Petitioner's lack of credibility.

On review in a split decision, the Commission found Dr. Bernstein's testimony to be more credible than that of the Respondent's IME doctor, reversing the Arbitrator on causal connection, and awarding medical bills after August 21, 2007, and ordering Respondent to pay for a discography and fusion surgery and subsequent treatment and therapy. The Commissioner who dissented found no reason to reverse the Arbitrator who found Petitioner not credible, as the record was replete with Petitioner not telling the truth. That Commissioner also found the decision of the Arbitrator well reasoned. Petitioner's Exhibit 12.

Review by the Circuit Court of Lake County and Illinois Appellate Court upheld the Commission's split decision. Petitioner's Exhibit 13.

Another 19(b) Petition was heard by a different Arbitrator five years later, July 22, 2014, on issues of casual connection, medical bills, prospective medical care, temporary total disability, and penalties and fees. Here, the Arbitrator found causal connection between a left shoulder injury and the accident, awarded benefits and services, but denied penalties and fees. On review, the Commission adopted the decision of the Arbitrator. Petitioner's Exhibit 14.

Here, the evidence and testimony reveal since the last 19(b) trial, Petitioner has continued with pain management treatment with Dr. Kurzydlowski. Kurzydlowski performed radio frequency lesioning on July 28, 2014, at L5-S1. He has continued to provide medical care to Petitioner on an almost monthly basis since that time. He continues to prescribe Petitioner medications and restrict Petitioner from work. He has also periodically performed epidural steroid injections. Kurzydlowski has diagnosed Petitioner with post laminectomy syndrome of the lumbar spine, lumbar spinal stenosis and left sided sciatica. His 2019 records note Petitioner complained of low back and left leg pain. Petitioner's Exhibit 1; Petitioner's Exhibit 16.

Dr. Bernstein provided care to Petitioner up through February 28, 2017. On January 23, 2015, he reviewed a recent CT Myelogram which demonstrated a completely healed fusion and was otherwise unremarkable. Dr. Bernstein recommended a spinal cord stimulator. Petitioner's Exhibit 5.

Dr. Kurzydlowski implanted a trial spinal cord stimulator on August 10, 2015. Petitioner reported 75% improvement in his symptoms on August 17, 2015. He also advised Dr. Bernstein he experienced substantial improvement on August 24, 2015. Dr. Bernstein then implanted a permanent spinal cord stimulator on September 16, 2015. Petitioner reported he was doing well afterwards with mild discomfort on the right side and good coverage. Dr. Bernstein noted on October 22, 2015, Petitioner was considered completely disabled and would remain off work. Bernstein noted Petitioner was essentially discharged from his care on December 17, 2015. The stimulator was noted to be in a stable position. Petitioner returned to Bernstein on August 8, 2016, with complaints of electrical jolting with changes in position. X-rays showed the stimulator to be in the exact position as on prior x-rays. Bernstein then also replaced the battery in the stimulator in early 2017. Petitioner has not treated with Bernstein since February 2017. Dr. Kurzydlowski has periodically reprogrammed the stimulator. Petitioner testified the spinal cord stimulator has helped "tremendously" Petitioner's Exhibit 1; Petitioner's Exhibit 5; Petitioner's Exhibit 8; Petitioner's Exhibit 9; Petitioner's Exhibit 2; Petitioner's Exhibit 3; Szymczak at 44.

Why Petitioner placed into evidence records from Athletico, when no physical therapy treatment has occurred since the last 19(b) hearing, is unexplained.

Petitioner testified he utilizes a cane. He has made accommodations to his home. He notices fatigue when going up stairs. He testified his wife performs most of the household chores. He testified he engages in very little physical activities. Petitioner testified to experiencing pain in his lower back and down the left leg to the left knee. He does take care of his activities of daily living. Petitioner's wife testified as to Petitioner's current activities and that she performs the majority of the household chores. Szymczak at 21, 22, 23, 25-26, 36, 41, 73, 99-110.

Petitioner testified he continues to drive and has a valid driver's license. He advised Joseph Belmonte that he has a 60-90-minute sitting tolerance in a vehicle. Szymczak at 67, 68.

As to his left shoulder, Petitioner said he has no current pain. He has no range of motion issues. He does not lift more than ten pounds because he does not want to hurt his back. He confirmed he is right-hand dominant and has no limitation on the use of his right arm. Petitioner has never looked for employment since last working for Respondent. Szymczak at 52-53, 64, 72.

Dr. Ryon Hennessy, a board-certified orthopedic surgeon, examined Petitioner, and prepared a report regarding his examination and testified. Dr. Hennessy appears to have testified consistent with his April 7, 2016, report. He testified that with respect to the Petitioner's lumbar spine, the Petitioner's subjective complaints of pain did not match the objective findings. For example, he noted the Petitioner had "giving way" in all myotomes of the right and left leg in the seated position, reportedly due to pain. He had a negative straight leg raising test, and even though the Petitioner had this giving way, Dr. Hennessy noted this was contradicted by the fact that Petitioner was able to heel and toe walk. He had a normal neurologic examination of the lumbar spine, inconsistent with the Petitioner's subjective complaints. The Petitioner made no subjective complaints with respect to his left shoulder and noted he was essentially pain free with full use of the left shoulder. Dr. Hennessy's left shoulder examination was essentially normal. Dr. Hennessy testified that the Petitioner does not require to be completely off work. He found that, despite the giving way on examination, the Petitioner was able to toe walk and heel walk bilaterally which demonstrates 5/5 strength and again demonstrated symptom magnification. He also demonstrated 5/5 strength in both upper extremities. Dr. Hennessy found Petitioner to be a healthy male who is moderately overweight. Based on this, he felt that the Petitioner is capable of 20 pounds lifting with no overhead work for both the left shoulder and the lumbar spine. He further noted that an FCE could be performed to further assess Petitioner's current work abilities. Dr. Hennessy testified that the Petitioner was at MMI at the time of his examination. He also noted that the Petitioner required maintenance of the spinal cord stimulator in the future as well as ongoing medications. He testified that there is nothing additional surgically that can be done for Petitioner. He said that pain can be disabling and is subjective. Respondent's Exhibit 1; Respondent's Exhibit 6.

Respondent authorized vocational rehabilitation to take place with Joseph Belmonte. Respondent's Exhibit 5. It never did.

Joseph Belmonte, a rehabilitation counselor, testified he prepared a vocational evaluation report dated June 27, 2016. He obtained a medical status on Petitioner based both on his review of the medical records and Petitioner's self-perceived functional capacities. He noted Petitioner's use of a cane, his medication use, and his activities of daily living. He further noted Petitioner's ability to operate a motor vehicle. He noted Petitioner's educational history of dropping out of high school and not obtaining a GED. He also noted Petitioner's vocational status which essentially involved working for Respondent, eventually becoming the owner and operating the business between 1998 and 2012. Petitioner confirmed with his testimony that he supervised others who worked for him with the Respondent. Based on his analysis of Petitioner's employment history, according to the Dictionary of Occupational Titles (DOT), Petitioner had two DOT descriptors for his prior employment. The first was as a contractor, which falls in the light physical demand level. The other DOT descriptor was a heating & air conditioning installer–servicer. This descriptor involves the medium physical demand level and was the primary descriptor for Petitioner's prior employment. Belmonte noted Petitioner's complete work restrictions by Dr. Kurzydlowski and Dr. Bernstein, but also referenced Dr. Hennessy's opinions regarding Petitioner's ability to lift up to 20 pounds with no overhead work for both the left shoulder and lumbar spine. Belmonte offered the opinion that Petitioner has lost access to his usual and customary employment as a HVAC installer–servicer and lost access to his pre-injury job duties

associated with the work of a contractor. Assuming that Petitioner has not been released to work in any capacity based on restrictions of Dr. Bernstein and Kurzydlowski, Belmonte opined that Petitioner is not employable. Assuming the physical restrictions as identified by Dr. Hennessy, Belmonte opined that Petitioner has a guarded prognosis for return to work. Belmonte admitted he did not utilize all of the vocational tools he could have to determine Petitioner's current employability and for searching for employment opportunities for Petitioner. His only contact with Petitioner was a two hour interview in June of 2016. He further confirmed that he saw no medical records or opinion from any physician regarding restrictions on Petitioner's sitting, standing, or walking tolerances. Belmonte admitted that Petitioner is a U.S. citizen, has a valid driver's license, functional automobile, and no difficulties utilizing his lower extremities or upper extremities for driving. He did not research any driving positions such as light delivery/courier work. He did note that these positions had wages in the range of $10.00 to $13.00 per hour the last time he researched them. However, there was some concern because of the fact Petitioner was on medications and whether he will be able to drive on those medications. Belmonte admitted he performed no testing on Petitioner to evaluate his reading, writing, or math skills. Belmonte was asked whether Petitioner could perform estimating work for an HVAC company. Petitioner admitted to Joseph Belmonte that he prepared letters, prepared billing information, and prepared estimates for time and material for his customers. Petitioner also confirmed these statements with his trial testimony. Belmonte admitted that earnings for an estimator could be in a wide range from $13.00 to $15.00 per hour and up to $75,000.00 per year. These positions would be considered to fall in the light physical demand level. Joseph Belmonte also testified that Petitioner would most likely qualify for essentially unskilled or semi-skilled work as a cashier, ticket taker, bench assembler, machine operator in various industrial production environments, and similar occupations. However, this would assume full and complete light duty functional capacity, which does not limit tolerance for standing or sitting. If Petitioner demonstrated limited standing or walking tolerance, Belmonte did not feel he would be able to find Petitioner employable within a reasonable or stable labor market. The most optimistic projection of Petitioner's earnings was minimum wage to approximately $12.00 per hour in the positions Joseph Belmonte identified above, with most probable potential earning of $10.00 hourly. Assuming functional capacity congruent with an ability to return to work, Belmonte felt Petitioner would require vocational rehabilitation interventions. Vocational interventions would need to include vocational testing, supervision for acquisition of a GED, development of keyboard proficiency and computer literacy, comprehensive job seeking skills instruction, possible internships to develop alternative skill sets, as well as implementation of job development and supervised job search to facilitate return to work. He noted that a vocational rehabilitation plan could be submitted upon request. Belmonte admitted that Petitioner has made no effort at a self-directed job search and has never looked for work, as far as he knows. Respondent's Exhibit 7.

Steven Blumenthal, a rehabilitation counselor, testified that he was hired as a treating vocational rehabilitation counselor. He said he must follow the Code of Professional Ethics for Rehabilitation Counselors, drafted by the Commission on Rehabilitation Counselor Certification. In so doing, he said that he is to do no harm to others. He said, based on the ethical guidelines, he would be unable to perform vocational rehabilitation for Petitioner for concern of causing harm to him, based on the doctors' complete work restrictions. Blumenthal testified that Petitioner has lost

access to his usual and customary employment. Based on the doctors' restrictions, he has no residual physical capacity to return to work. There is no job in a stable labor market for him. Blumenthal discussed the multiple medications the Petitioner is currently taking. When asked whether the medications affected his ability to work, Steven Blumenthal continuously noted that he would defer to the opinions of the physicians. He also noted that this depends on the individual and noted that some individuals are able to function at high levels even while taking narcotics. He indicated that the narcotics do not appear to have any cognitive effects on these individuals. Blumenthal admitted he did not note any issues with Petitioner's cognition during his two and a half hour interview. Blumenthal said he performed no vocational services other than the initial evaluation for Petitioner. He performed no transferable skills analysis and performed no vocational testing. He did not note any doctors' restrictions specifically referencing restrictions on Petitioner's sitting, walking, standing, or driving. Petitioner advised him that he continues to drive, has a valid driver's license and a functional automobile despite the fact that he is allegedly taking high doses of narcotic pain medications. Blumenthal offered vague answers when asked whether there are employment positions which involve driving, such as a courier, which would only require the light physical-demand level. He said that Petitioner stated he had no restrictions with the use of his hands or fingers. Blumenthal noted Petitioner appears to have transferable skills, he was the owner of Respondent from 1995 until the time the company went out of business. He had other employees working for him of whom he was in charge. Blumenthal testified that Petitioner completed his own estimating and bidding work. He assumed that Petitioner was able to read blueprints and examine layouts for the purposes of estimating the HVAC work required to complete these jobs. Petitioner testified he was able to read blueprints and plans to prepare estimates. He also said that the estimating position was possibly within the light physical-demand level to sedentary physical-demand level. Blumenthal said that his opinions are based in part on the accuracy of Petitioner's subjective reports of his physical capabilities. He said that his opinions are not based on the return-to-work opinions of Dr. Hennessy. He testified that Petitioner never indicated to him that he attempted to look for employment on his own or perform a self-directed job search. He testified, assuming the Petitioner could return to work at the sedentary physical-demand level or light-duty physical-demand level, the Petitioner might or could be an appropriate candidate for vocational rehabilitation. Petitioner's Exhibit 10; Szymczak at 71.

CONCLUSIONS OF LAW

Disputed issue **F** is whether Petitioner's current condition of ill-being, as to the left shoulder is causally related to the injury of June 20, 2006. Szymczak at 4.

Early on I noted that a prior determination of the existence of a causal connection between an accident and injuries to a specific part of the body ends the issue for all subsequent stages of the suit and is "law of the case." Here an Arbitrator, albeit in a somewhat elliptical fashion, found Petitioner's left shoulder condition causally related to the accident, in a Decision dated November 5, 2014. On that issue the Commission affirmed and adopted the Decision.

Petitioner's Exhibit 14. That is "law of the case" and Petitioner's left shoulder injury is causally related to the injury.

Disputed issue **J** is, is Respondent liable for unpaid medical bills from an aggregate of providers in Petitioner's Exhibit 11. Petitioner stated Respondent has paid medical bills from prior awards. Szymczak at 121-122.

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 the accidental injury. 820 ILCS 350/8a. Respondent is, by prior decisions of the Commission, already required to pay such services for Petitioner, and according to Petitioner, has done so.

The contents of Exhibit 11 are a dog's breakfast containing: a self-compiled purported chart of balances; irreconcilable purported invoices; aged and dated synopsis spread sheets from Athletico; patient accounts with zero balances; vendors without any reference in any testimony; insurance claim forms (which are not bills); spread sheets and prescription profiles. There was no testimony offered to support any part of the Exhibit. A claimant bears the burden of proving entitlement to an award, and no arbitrator should or is required to comb the record, especially one of this magnitude, to provide a basis to support such liability. That is Petitioner's responsibility. He did not attempt to do so either at the hearing or in his proposed findings of fact and conclusions of law. An award for what has been submitted here would be improper. Jewel Cos. v. Industrial Commission, 125 Ill. App. 3d 92, 94 (1984). Respondent's Exhibits, 2a and 2b, are of no help either. Exhibit 2a is almost exclusively a recitation of TTD payments, which are not at issue. Exhibit 2b appears to be payments of older invoices which the parties agree have been paid. Given prior decisions of the Commission and two arbitrators, payment for medical services should not be an issue.

At most, Respondent is responsible for what Section 8a provides, and it would be inconsistent not to allow medical expenses incurred to treat Petitioner's back and shoulder, as they have been found causally connected to the injury. Therefore Exhibit 11 is given no weight on this issue, but to be clear, and since Respondent has not challenged the providers used by Petitioner in treating the effects of his back and shoulder injury, which have long been found causally connected to the accident, Respondent shall pay, if not already paid or written off, according to the fee schedule, for medical services to treat Petitioner's back and left shoulder, and services directly related thereto, to those providers.

Disputed issue **L** is what is the nature and extent of the injury. Petitioner suggests he is permanently and totally disabled. Respondent suggests Petitioner should receive a wage differential. Permanent partial disability is awarded if a job related injury results in some permanent physical loss. There are four types of permanent partial disability: a wage differential where an employee obtains a job paying less than the pre-injury employment; a value on certain body parts, where amputation represents a 100% loss; a value of a nonlisted body part based on the loss of a person as a whole; and disfigurement. 820 ILCS 305/8(d)1; 8(c); 8(d)2. Permanent total disability is, in part, a complete disability that renders an employee permanently unable to do

any kind of work for which there is a reasonably stable employment market. 820 ILCS 305/8(f). There are three ways a claimant can demonstrate he is permanently totally disabled: by a preponderance of medical evidence; by showing a diligent but unsuccessful job search; by demonstrating because of his age, training, education, experience, and condition, no jobs are available to a person in his circumstances. Cancel, Ill. Workers' Comp. Comm'in, No. 19-WC-0212.

There is no medical testimony offered by Petitioner to support a claim he is permanently unable to work. His medical records, even if certified or received in response to subpoena, are not conclusive proof of the contents. 820 ILCS 305/16. Petitioner did not look for work at all. He successfully ran a small business and all that that requires.

As a conclusion of law, I find Petitioner is not permanently and totally disabled. I rely on the testimony of Dr. Hennessy, the only medical testimony offered at hearing, who testified Petitioner did not require a complete restriction from work, was at MMI, and other than routine upkeep of his spinal cord stimulator and pain medications, believed Petitioner required no additional medical treatment. Respondent's Exhibit 1 at 46-49, 66-67. I further rely on the testimony of Joseph Belmonte, who testified that with the restrictions identified by Dr. Hennessy, Petitioner has a guarded prognosis for return to work, and would qualify for unskilled or low semi-skilled work. Respondent's Exhibit 7 at 59-60.

To qualify for a wage differential under Section 8(d)1 of the Act, a claimant must prove partial incapacity which prevents him from pursuing his usual and customary line of employment; and impaired earnings. To prove an impairment of earnings, a claimant must prove his actual earnings for a substantial period before the accident and after he returns to work, or in the event he has not returned to work, what he is able to earn in some suitable employment. Crittenden v. Illinois Worker's Compensation Commission, 2017 Ill App (1st) 160002 WC P20.

A wage differential is not an appropriate measure of benefits in this case. There is no credible evidence of what Petitioner is able to earn in some suitable employment. Belmonte, on the subject of earning capacity, never did any vocational testing, taught job search skills, performed vocational schooling, or conducted job search placement for Petitioner. He could only give a wide range of potential wages for Petitioner in one scenario, and optimistic projection for wage earning potential. Such testimony is pure speculation and earning capacity must be based on facts. No precise post injury earning capacity has been determined by anyone. Respondent's Exhibit 7 at 59, 60, 40, 55, 63.

Section 8(d)2 provides for a man as a whole award where a claimant sustains serious and permanent injuries not covered by Sections 8(c) and 8(e). Village of Deerfield v. Illinois Worker's Compensation Commission, 2014 Ill. App. (2d) 131202 WC P51. Petitioner's injuries are not covered by either.

This accident occurred June 20, 2006, and predates the establishment of the criteria in 820 ILCS 305/8.1b and so disability need not be established using those criteria. Petitioner is not restricted from working, but does not work, performs activities of daily living, and drives. He has a spinal

cord stimulator and takes prescription medications. In observing his testimony and interactions in the hearing room, this Arbitrator believes he can work productively in a number of environments.

Based on the evidence and the testimony given, as well as careful consideration of the record as a whole, I find Petitioner sustained permanent partial disability to the extent of 45% (225 weeks) man as a whole.

Disputed issue N is whether Respondent paid $102,995.44 in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act. Szymczak at 5; Arbitrator's Exhibit 1.

Respondent claims it paid $102,995.44 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 the 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 upon 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, there was no such proof. Respondent's Exhibit 2a is simply entitled "Payment Summary." Exhibit 2b is not entitled at all. Neither have any 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 paid all of the premiums for medical coverage through his union. That cuts against Respondent.

In the face if Petitioner's dispute of the credit and Respondent's lack of evidence necessary to satisfy the statutory requirements of 8(j), I find as a matter of law Respondent is not entitled to such credit.

Arbitrator

2/28/22
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

REGINALD WILLIAMS,

Petitioner,

20IWCC0773

vs.

NO: 17 WC 36242

DIAMOND ENVELOPE CORP.,

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, permanent partial disability (PPD) benefits, and evidentiary motions, 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 2, 2020 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: DEC 31 2020
DDM/pm
O: 12/9/2020
052

D. Douglas McCarthy

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WILLIAMS, REGINALD Case# **17WC036242**

Employee/Petitioner

DIAMOND ENVELOPE CORP

Employer/Respondent

20IWCC0773

On 1/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.56% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1315 DWORKIN AND MACIARIELLO
PATRICK SHIFLEY
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

1109 GAROFALO SCHREIBER STORM
STEVE SCARLATI
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)SS.

COUNTY OF KANE)

20 IWCC0773

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Reginald Williams
Employee/Petitioner

v.

Diamond Envelope Corp.
Employer/Respondent

Case # 17 WC 36242

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 **Geneva**, on **June 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. 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. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **November 10, 2017,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's average weekly wage was **$425.58**

On the date of accident, Petitioner was **47** years of age, ***single*** with **1** dependent children.

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

Respondent ***does not owe for*** 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, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of $.

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

ORDER

Petitioner failed to prove he sustained an accident on November 10, 2017, or at any time, that arose out of and in the course of his employment with respondent.

Petitioner's claim is hereby denied and case is dismissed.

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 MOy

Signature of Arbitrator

December 8, 2019

Date

JAN 2 - 2020

20 IWCC0773

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Reginald Williams	)
Petitioner,	)
vs.	) **No. 17 WC 36242**
Diamond Envelope Corp.	)
Respondent.	)
	)

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in Geneva on June 27, 2019. The parties agree that on November 10, 2017, 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. The parties agree petitioner's average weekly wage, calculated pursuant to §10, was $425.58.

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injuries that arose out of and in the course of her employment with respondent.
2. Whether petitioner gave timely notice of the accident.
3. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
4. Whether respondent is liable for medical bills.
5. Whether petitioner is entitled to temporary total disability.
6. The nature and extent of petitioner's injury.

STATEMENT OF FACTS

Petitioner, Reginald Williams, Testimony

Petitioner testified he began his employment with respondent in September, 2016. He was training to be an adjuster, which meant he would adjust the machines to keep them running. He loaded paper into folding machine that folded the paper into envelopes. He would change knives to different sizes. He cleared jams with his hands or other objects.

On November 10, 2017, he worked the entire day. At the end of his shift, the paper jammed. He climbed into the machined to pull the jammed paper and fell back. "Freddy" pulled out the jammed paper. Freddy saw petitioner fall and asked if he was okay. Petitioner answered "hell no". Freddy allowed petitioner to punch out. Petitioner experienced neck and shoulder pain. He had to hold his hand overhead for relief; he also took Ibuprofen and Aleve. The next day was Saturday.

Petitioner went to work on Monday. He attended a meeting about his attendance. He was not sure how many days off he already had.

He had gone to the emergency room twice during the month of November, 2017. He went to Presence Mercy Medical Center on November 23, 2017. He reported shoulder pain and was possibly prescribed Valium.

He next went for treatment at Diversey Clinic where he saw Dr. Senno. He was prescribed pain meds and physical therapy. He had a nerve test and MRIs of shoulder and neck. He continued receiving treatment through April 14, 2018 at New Life Medical. Due to insurance problems, petitioner changed his treatment to UIC. He was last at UIC was in September, 2018.

Petitioner testified he had no pain in his shoulder and neck; just numbness and tingling in fingers. The condition resolved in January or February, 2019.

He testified that he had two heart attacks and had two stints put in. He testified, for this reason, he is unable to do anything physical.

Petitioner alleged he felt great when he started his employment with respondent. He does not participate in any sports activities, or perform any exercising or weight-lifting. Petitioner testified he has not lifted weights since high school. He denied any exiting problems with his neck or shoulder or suffering any new injuries to his neck or shoulder since November 10, 2017.

On cross-examination, petitioner denied he reported to Dr. Qadir in October, 2017 that he was having shoulder pain for a month. He also claimed he was examined by a nurse practitioner of Dr. Qadir on November 27, 2017, who wrote the note which petitioner took to his employer (RX.4). Petitioner could not recall if he told Kim Dolder whether the condition was work related.

Petitioner adamantly denied he lifted weights or that he tries to stay fit by exercising; and further denied that he provided such a history to the medical providers at Mercy Hospital. He testified he had been on hydrocodone for the last year and half. He testified that Dr. Qadir was aware petitioner was having shoulder pain, but didn't know how he injured it.

Dr. Qadir prescribed marijuana in February, 2019 as alternative medicine.

On redirect he insisted he does exercises; he smokes two cigars a day. He gets winded only walking. He does not try to keep himself fit.

On further cross he did not recall seeing Dr. Qadir in October, 2017. He feels winded merely by taking out trash.

Kimberly Dolder Testimony

Kimberly Dolder, respondent's human resource manager and safety, testified in behalf of respondent. She was the human resource manager in 2017. She first became aware of petitioner's shoulder condition on November 27, 2017. On that date, at 1:45 p.m., petitioner came to the front and asked to see her. Petitioner requested to be put on light duty as he was taking valium and could not work around machinery. Dolder testified petitioner advised her that he did not know what happened, but he had a pinched nerve. He was given a sit-down job working with envelopes. He worked one day and left.

Dolder first became aware petitioner was claiming his condition was work-related in December, 2017 when the Application for Adjustment of Claim was received. An investigation was performed, which included taking statements and photographs.

Dolder testify that safety is huge with respondent. She spoke with all the adjusters working around petitioner and no one recalled seeing petitioner's accident. She viewed videos and saw no evidence of the accident. She spoke with Freddy, who did not know of the accident. Respondent now has documentation as to machines breaking down. Since petitioner's claimed accident, they do a better job of documenting machine breakdowns.

Petitioner contacted respondent in February or March, 2018 requesting to return to work. Dolder advised petitioner he needed a doctor's release. Respondent could have accommodated light duty. Petitioner was no longer employed as he had abandon his job.

On cross examination, Dolder confirmed petitioner called for his job the week before the hearing. Dolder confirmed the Application for Adjustment of Claim on December 18, 2017. Petitioner had no other injury claims. Petitioner originally had been employed by a temporary agency and left his employment with the temporary agency to be directly employed by respondent after the respondent quit using the temporary agency.

Dolder confirmed the videos were no longer available. Eddie Coloner and Dolder reviewed the films. There was another employee present when Dolder asked petitioner if he had a work injury and the petitioner replied no.

Alfredo "Freddy" Rubio

Alfredo Rubio, respondent's supervisor of machine adjusters, testified in behalf of respondent. He would be made aware pretty quickly if there is a problem with a machine. He was present during petitioner's testimony and did not recall the incident as petitioner described. If there had been an incident as petitioner described, it would have been recorded.

Rubio records every accident, or perceived accidents. Perceived accidents, or "near misses" are also recorded. If Rudio had seen it, he would have recorded it. He still works for respondent in a supervisory role. If people get hurt, he follows the rules regarding reporting.

Rudio classified near misses as trips, but not a fall; or if a ladder falls. Rudio classified petitioner's occurrence as described as a near miss that would have been recorded. He remembers petitioner returning to work light duty. He did not remember petitioner clearing a jam. He never saw the video. Rudio did not have problems with petitioner.

Rudio reiterated if petitioner 's incident had happened; he would have reported it.

Mercy Medical Center Records (PX.1 & RX.1)

Petitioner was seen in the emergency room on November 23, 2017 with history of numbness, tingling and pain in right shoulder and back; onset one week earlier and getting worse. According to the history of present illness, it is noted: [petitioner] presents with right shoulder, and elbow discomfort/intermittent paresthesia for one to two weeks. [Petitioner] has seen his PCP by suction (sic) was placed on methocarbamol as well as ibuprofen with some improvement but not resolution. [Petitioner] also with significant gym activity and weightlifting and denies known trauma or specifics strain-sprain but does admit that he does exert himself at times trying to stay fit." The diagnosis was radicular pain in right arm. Petitioner was discharged to his PCP, Dr. Abdul Qadir.

Petitioner returned to the emergency room on November 29, 2017 with right arm and back pain. The history this time was that the right arm pain gradually worsened over the past couple of weeks. He stated he lifts at work so he may have injured it somehow. The records also list, under "History of Present Illness", the fact that petitioner denied any injury or trauma. He stated he did a lot of heavy lifting at work and also lifts weights often. He underwent a CT scan of the cervical spine, which was negative for acute fracture and mild to moderate diffuse prominence of the thyroid. He was prescribed Norco.

Diversey Medical Center/Center for Advanced Medicine and Surgery Records (PX2 & RX2)

Petitioner was first seen by Dr. Senno on December 9, 2017 for a claimed work accident of November 10, 2017. The petitioner described an injury involving his right arm when he reached down into the envelope machine, holding on with his left hand; after throwing the jammed envelopes away from the machine, he felt a sudden pop and pulling sensation of his right side of

neck and shoulder area. He reported the pain was so severe it caused him to lose his grip with his left hand and fell to the ground striking the right side of his body.

Petitioner advised that he made mention of the incident to his floor supervisor, but no incident report was officially made until two weeks later when symptoms had not resolved. He was seen by his PCP, Dr. Qadir, who ordered a CT scan. He was returned to light duty work.

The diagnosis was sprain of cervical spine and right shoulder.

He followed up with Dr. Senno on December 16, 2017, January 2, 2018, January 20, 2018, February 3, 2018, February 17, 2018, March 3, 2018, March 15, 2018, April 14, 2018. The final diagnosis was cervical radiculopathy and right shoulder tear.

Petitioner underwent an EMG on February 12, 2018, which reportedly showed a predominantly right C6 and right C7 radiculopathy.

The December 23, 2017 right shoulder MRI, without contrast, failed to show any tears. The December 23, 2017 cervical MRI showed spondylosis at C4-5, C5-6 and C6-7, a C6-7 protrusions with impingement at C6-7 level.

The February 27, 2018 CR right shoulder arthrogram showed a moderate grade partial supraspinatus insertional tear, low-grade partial infraspinatus insertional tear, suspect SLAP tear, tearing of the anterior superior quadrant of the labrum and acromioclavicular joint arthropathy with mild inferior spurring.

M & R Rudra New Life Medical Bills (PX.3)

The physical therapy bills from December 21, 2017 to February 22, 2018 totals $4,835.00.

University of Illinois Hospital Records (PX.4)

Petitioner was seen by Dr. Benjamin Goldberg, of the orthopedic department, on September 24, 2018. Petitioner provided a history that he was hurt in October, 2017, while working for respondent and reaching into the machine to unjam envelopes and heard a pop in his neck and shoulder and had immediate pain and weakness. Dr. Goldberg determined petitioner had a possible shoulder tears and AC joint arthropathy. However, Dr. Goldberg also believed petitioner had a large C6-C7 herniated disc that needed to be addressed first and referred petitioner to Dr. Siemionow to address the cervical problem.

Dr. Abdul Qadir Records (RX.3)

Petitioner was seen on October 20, 2017, with complaints of right shoulder been that had been going on for a month. He reported he worked as a supervisor that lifted heavy items. He was prescribed meloxicam, continue with Flexeril; X-rays were ordered.

Petitioner was seen on March 22, 2018 due to right shoulder pain which her reportedly was the result of a work injury around November 2017. He was a given a referral to orthopaedic surgeons in Chicago.

He was seen on December 17, 2018 for clearance to have an epidural cervical injection.

Dr. Abdul Qadir Note (RX.4)

Dr. Qadir wrote a note on November 27, 2017 placing petitioner on light duty due to right shoulder pain. The note states weight-lifting less than 10 pounds. The note also indicated no repeated right arm movement. No pulling/pushing or carrying more than 10 pounds.

20IWCC0773

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

To say petitioner had a credibility problem is an understatement. After being confronted with discussions of his weight-lifting activities in at least three medical records; Presence Mercy Medical Center of November 23, 2017 and November 29, 2017, and Dr. Qadir's note of November 27, 2019, petitioner adamantly denied he lifts weights. He further denied seeing Dr. Qadir on October 20, 2017 with right arm complaints of one month's duration.

C. With respect to the issue of whether an accident occurred that arose out of and in the course of Petitioner's employment by respondent, the Arbitrator makes the following conclusions of law:

Petitioner failed to provide a shred of credible evidence that he sustained an injury to his right arm, shoulder or neck, that arose out of and in the course of his employment with respondent on November 10, 2017, or at any time. The Arbitrator relied heavily on the medical records in reaching this conclusion.

The first mention in any medical records of the claimed work accident of November 10, 2017 was on December 9, 2017. However, prior to that, he was seen by Dr. Qadir on October 20, 2017 with right shoulder complaints for a month. There was no mention of any specific accident.

He was seen at the emergency room at Presence Mercy Medical Center on November 23, 2017 and reported significant gym activity and weightlifting and denied knowing any trauma of specific strain-sprain but admitted he exerts himself trying to keep fit. He was seen again on November 29, 2017, with a history of again denying any injury or trauma; but said he did a lot of heavy lifting and also lifts weights.

Dr. Qadir authored a note on November 27, 2017 restricting petitioner's work and weight-lifting, but makes no mention of a work injury. Furthermore, there are no records contained in Dr. Qadir's records of the visit of November 27, 2017 at the time this note was authored.

In addition, the purported witness, Alfredo (Freddy) Rubio, had no knowledge of petitioner's claimed accident. Petitioner had the opportunity to report the injury/accident to Kim Dolder when he brought the note from Dr. Qadir on November 27, 2017 and admitted he did not recall if he advised Dolder that it was work related. Dolder testified petitioner denied his right shoulder problem was work related.

Based upon the lack of any credible evidence, the Arbitrator finds petitioner failed to prove he sustained accidental injuries to his right shoulder or neck on November 10, 2017, or at any time, that arose out of and in the course of his employment with respondent.

The Arbitrator makes this finding despite the fact that respondent destroyed the tape from November 10, 2017; as the evidentiary presumption made by such action does not outweigh the medical evidence and the testimony of Freddy Rubio. The Arbitrator finds petitioner failed to make a compensable case out of whole cloth by using the missing video tape.

As the Arbitrator determined petitioner did not sustain accidental injuries to his right arm or neck from a work related accident, his case is dismissed and all other issues are moot.

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

20IWCC0774

KATHY DUNN,

Petitioner,

vs. NO: 12 WC 43254

COOK COUNTY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) of the Act having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical, and prospective medical treatment, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Petitioner, Kathy Dunn, sustained an accident that arose out of and in the course of her employment with Respondent on January 7, 2011.

The Commission further finds that Petitioner's left shoulder, left hip and low back injury are causally related to the January 7, 2011 injury. As a result, the Commission finds that Petitioner is entitled to all reasonable and necessary medical expenses related to the January 7, 2011 accident and prospective medical treatment. The issue of temporary total disability (TTD) was reserved by the parties for a later date.

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).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. Kathy Dunn was employed as a Public Health Nurse III, supervisor. She is a registered nurse and was assigned to the Bridgeview Courthouse. T.11. Her duties required her to visit various clinics and supervise nurses, clinic assistants and lab personnel. She also monitored the functions of the clinic and saw patients. T.12. She described her job as a desk job. *Id.*

2. Petitioner testified that she went to the Markham Courthouse (clinic) on January 7, 2011 to supervise her staff. T.11. She stated that the Markham clinic had been closed for remodeling for about a year prior to January 7, 2011. The clinic had just reopened and the floors were new and shiny. T.12. As she went to sit on the exam stool, she slipped off the stool and fell onto the floor. *Id.* She stated that the stool slid out from under her and she fell onto her left hip. She stated that two of the nurses had to pick her up off the floor. T.13. She had pain in her left hip and felt dizzy and shaken up. *Id.*

3. Petitioner testified that this was the first time she had been to the clinic since it reopened. T.15. She stated that the exam stool was at the workstation. *Id.* She described the stool as round with 4-5 legs with rollers and there were no arms or back. T.15-16. The stool flipped as she started to sit down. T.16. She stated that the floor was linoleum and very slippery. She thought the floor had a heavy coat of wax. She described the floor as being similar to an ice skating rink. T.17. The accident occurred in an area that was not open to the public. T.51. She was attempting to answer the phone when the accident occurred. T.52.

4. Petitioner completed an accident report on January 10, 2011. She indicated that she fell on the floor as she was attempting to sit in the chair. The clerk was transferring calls as she was attempting to sit down. She landed on the left side of her body and Tya Robinson and Gwendolyn Pinkney assisted her up. PX.8.

5. A witness report was completed by both Tya Robinson and Gwendolyn Pinkney on January 10, 2011. Both confirmed that the chair rolled out from under Petitioner as she was attempting to sit down. PX.8

6. After the accident, she was sore and her left hip, left leg and middle back hurt but she was able to work. T.20. She continued to work over the next couple months but her pain was increasing in her back, hip and leg. *Id.* Petitioner eventually returned to the Markham clinic and noted that they put mats under every station. T.18.

7. Petitioner first sought medical treatment at Loyola on April 4, 2011 for left hip and left lateral leg pain following her fall off of a chair at work several weeks ago. She did not seek treatment and has had an aggravating type of discomfort since that has worsened recently. It hurt to walk. Her pain radiated from her hip down the lateral aspect of her leg into her

ankle. She denied a prior history of back or hip pain. She had a slight limp to her lower left extremity. She had no tenderness to the lumbar spine and was able to flex, extend and side bend without restriction or recurrence of pain. She had slight pain to palpation over the left piriformis and no pain over the bilateral SI joints. She had pain over the iliac crest. She had a negative straight leg raise. The x-ray of the lumbar spine revealed mild narrowing of the L4-L5 intervertebral disk height. The x-ray of the hip was normal. The assessment was left hip pain and possible hip bursitis. Further, the record noted that the Petitioner reported that at the end of January 2011 she fell off the stool and has been having bone pain to the left hip that radiated down the left leg to her ankle. PX.2.

8. Petitioner was seen by Dr. Heidi Renner of Loyola on April 11, 2011 for continued hip pain following her fall on January 7, 2011. She complained of worse pain with pressure on the left side of her body worse with walking. She completed the Medrol pack with limited improvement. Therapy was recommended. PX.2.

9. Petitioner was seen by Dr. Neeru Jayanthi of Loyola on May 6, 2011. The diagnosis was left sacroiliac joint dysfunction and gluteus medius/trochanteric bursitis and piriformis pain. It was noted that she continued to have pain and trouble walking and going upstairs since her fall in January 2011. She had tenderness in the left SI joint, piriformis, greater trochanter/gluteus medius tenderness. She had nearly full range of motion in all planes and in the hip. She had a negative straight leg raise. Dr. Jayanthi stated there was causation between her current SI joint and pelvic dysfunction and the accident. PX2.

10. Petitioner testified that epidural injections were discussed but she declined as they were not effective based upon her experience. T.26. She continued to work full-duty. T.29.

11. Petitioner continued to follow-up with Dr. Jayanthi. On December 6, 2011, she reported moderate pain particularly in the left SI hip as well as leg pain and low back pain. She was still working full-duty. She had mild tenderness in the left SI joint and mild lateral hip pain. She had mild terminal range of motion in all planes. She had a negative straight leg raise and a positive left posterior pressure. It was noted that an MRI was deferred and she was to possibly consider interventional spine treatment. PX.2.

12. Petitioner continued to follow-up and on July 20, 2012, Dr. Jayanthi recommended an MRI due to her continued symptoms. PX.2.

13. Petitioner underwent an MRI of the lumbar spine on July 20, 2012. The impression was degenerative disc disease at L4-L5 with disc extrusion, synovial cyst formation and ligamentum flavum thickening causing moderate central canal stenosis and neural foramina compromise. PX.1.

14. Petitioner was seen by Dr. Jayanthi on October 5, 2012. She reviewed the MRI and noted that it revealed L4-L5 lumbar disc with synovial cyst/facet hypertrophy with left lumbar

radiculitis. They discussed the significance of the disc herniation and the progression to the nerve root irritation. Petitioner was hesitant for spine intervention. She was to follow-up in 3 to 6 months. PX.2.

15. Petitioner was seen by Dr. Jayanthi on July 5, 2013. She had attended therapy and was now concerned about a lump in her lower back. She had increasing left leg pain and now knee pain. She had continued pain and limitations. She had mild weakness with resisted abduction of the hip and pain with resisted Ober testing. She had tenderness to palpation of the trochanteric bursa and proximal ITB. The assessment was left L4-L5 lumbar disc with synovial cyst/facet hypertrophy with left lumbar radiculitis. She was to consider an injection. PX.2.

16. Petitioner underwent a left lateral hip injection on July 13, 2013 and followed-up on September 27, 2013. She had little pain relief and now had severe leg pain more recently over the last couple weeks. She continued to work. Examination revealed a painful single heel raise on the left side. She had a positive seated and supine straight leg raise at 40 degrees. The assessment was left L4-L5 lumbar disc with synovial cyst/facet hypertrophy with left lumbar radiculitis and lateral hip/gluteus medius syndrome with trochanteric bursitis. She was to consider interventional spine injections. A referral to a physiatry, a pain center and Dr. Lawrence Frank in Elmhurst was recommended. PX.2.

17. Petitioner underwent a course of acupuncture.

18. Petitioner was seen by Dr. Jayanthi on August 8, 2014. It was noted that Petitioner tried non-operative treatment and avoided intervention for over 2 years. She was now interested in interventional spine treatments; specifically, she wanted to see a spine surgeon. She was referred to Dr. Alexander Ghanayem. A repeat MRI was recommended. PX.2.

19. Petitioner underwent an MRI of the lumbar spine on August 25, 2014. The MRI revealed degenerative changes at L4-L5 where there was a central disc protrusion as well as moderate severe facet hypertrophic change, ligamentous redundancy and a left sided synovial cyst contributing to moderate central canal stenosis and bilateral foraminal narrowing. There was a tiny right central synovial cyst, not seen on prior study, causing mild impingement on the posterior lateral thecal sac on the right. PX.1.

20. Petitioner saw Dr. Alexander Ghanayem on August 28, 2014. She reported her accident and that she developed back pain and left sided leg pain that has persisted. Her conservative care has not helped. Examination revealed tenderness at the base of the lumbar spine and into the left sciatic notch. Her range of motion increased her buttock and thigh pain. Her sensation was diminished at L5 on the left. He reviewed the MRI and noted that it revealed spondylolisthesis at L4-L5 and a facet joint cyst at L4-L5 that was causing stenosis and left sided neurologic compression. He recommended a lumbar laminectomy and fusion for her

spondylolisthesis with stenosis and facet joint cyst that was causing neurologic compression that has not responded to conservative care. PX.2.

21. Petitioner presented to Dr. Frank Phillips of Rush University on October 3, 2014 for a second opinion. She reported her work accident and that she has had persistent left leg radicular pain since. She also reported some achy back pain but her leg radicular pain dominated. It was significantly affecting her ability to do her usual day-to-day activities. Examination revealed some tenderness and left greater trochanter and no lumbar tenderness. Her straight leg raise caused some hamstring tightness at 80 degrees. He reviewed the MRI and noted that Petitioner had grade 1 spondylolisthesis at L4-L5 and facet hypertrophy and moderate underlying spinal stenosis. She also had a left sided facet cyst impinging on the thecal sac and L5 nerve root. He noted that surgery would consist of decompression and fusion. PX.4.

22. Petitioner testified that she tried to pursue treatment only to have her insurance cancel it as they wanted more therapy. T.38. She underwent therapy and then decided not to undergo therapy as she did not have enough accumulated time to take off from work. She then tried to pursue treatment through her workers' compensation insurance carrier.

23. Petitioner underwent an CT scan of the lumbar spine on March 2, 2015. The scan revealed degenerative changes at L4-L5 with a mild disc bulge and bilateral facet/ligamentum flavum hypertrophy resulting in mild spinal canal stenosis. PX.5.

24. Petitioner was seen by Dr. Harel Deutsch on March 20, 2015 for another opinion as she did not want a fusion. She reported back pain and left leg pain and weakness since 2011. Examination revealed a negative bilateral straight leg raise. There were no positive Waddell signs. The assessment was synovial cyst of the lumbar facet joint and lumbar stenosis. He noted that her pain was described as severe and interfered with her day-to-day activities. He recommended a left L4-L5 removal of the synovial cyst. PX.9.

25. Dr. Ghanayem authored a report to Petitioner's attorney on February 10, 2019 regarding his August 28, 2014 examination. He noted that Petitioner related her condition to the January 7, 2011 fall. He diagnosed Petitioner with symptomatic lumbar stenosis and spondylolisthesis at L4-L5 and a facet joint cyst. He was unaware of any prior significant low back issues that predated her work injury. He opined that the work injury aggravated her lumbar stenosis and spondylolisthesis. Her treatment was reasonable and necessary. She needed a lumbar laminectomy and fusion for her stenosis and spondylolisthesis, which was related to her work accident. PX.1.

26. Dr. Ghanayem is a board-certified orthopedic surgeon and was deposed May 15, 2019. He only saw the Petitioner on August 28, 2014. Petitioner reported her January 7, 2011 accident and that she has had persistent back pain and left sided leg pain. PX.1. pg.8. Examination revealed tenderness at the base of her lumbar spine and into the left sciatic

notch. Her range of motion caused buttock and thigh pain. The straight leg raise with a tension sign cause some buttock pain on the left and her sensation was diminished in the L5 dermatome on the left. *Id.* He noted that the MRI revealed spondylolisthesis at L4-L5 as well as a facet joint cyst at that level as well. This caused stenosis and left sided neurologic compression. Dr. Ghanayem explained that spondylolisthesis is when one vertebral body slips forward on the other vertebral body. PX.1. pg.11. This can be traumatically induced or genetic. *Id.* Dr. Ghanayem stated that the spondylolisthesis likely predated the accident and the facet cyst may have predated the injury. Her symptoms from the spondylolisthesis were related to the work accident. PX.1. pg.12. Her cyst was going forward from the facet joint and pinching the nerve. *Id.* He recommended a lumbar laminectomy and fusion at L4-L5. PX.1. pg.13.

27. Dr. Ghanayem drafted a narrative report on February 10, 2019. PX.1. pg.14. He stated that her treatment prior to him seeing her was reasonable. Her condition was, at minimum, aggravated by the work accident. PX.1. pg.15. He noted that Petitioner did not report any prior issues and she did not seek medical treatment until April 4, 2011. This did not change his opinion as it takes a while to get into a specialist and she could have just hoped it would go away. PX.1. pg.17. He noted that it was a back injury and 3 months is not an unreasonable amount of time to wait. PX.1. pg.18.

28. On cross-examination, Dr. Ghanayem did not know if Petitioner was still working when he examined her. PX.1. pg.19. He stated that stenosis can be degenerative or traumatically induced. PX.1. pg.21. The MRI findings were consistent with her complaints of radiating pain to the lateral side of her left leg and hip and down to the left lateral aspect of her knee. PX.1. pg.21.

29. On re-direct examination, he noted that the initial x-ray did not pick up the spondylolisthesis. PX.1. pg.25-26.

30. Dr. Graf is board certified in orthopedic surgery and was deposed on February 22, 2019. He performed a Section 12 examination on July 13, 2018. His examination revealed that Petitioner could only squat 1/3 of the way down and reaching from a squatted position reproduced low back pain. RX.1. pg.15. She had full motor strength. She had subjective decreased sensation in the lateral aspect of the left shin. She had a negative straight leg raise. There was a positive sitting straight leg raise that was equivocal meaning not positive or negative. *Id.* She had full range of motion in the hip though she complained of back pain with the left sided hip range of motion. *Id.* He reviewed the MRI and noted that it revealed moderate central disc herniation at L4-L5 with a right sided facet cyst compressing the L5 nerve root. There was significant disc space height collapse at L4-L5 per the x-ray. This was compared to the MRI from August 2014 in which the lumbar disc herniation had reduced drastically in size. There was a facet cyst on the left at L4-L5 with facet hypertrophy. He diagnosed Petitioner with pre-existing lumbar facet arthrosis or degeneration with a lumbar facet cyst and a lumbar disc herniation at L4-L5. Regardless

of causation, she needed a lumbar decompression and fusion at L4-L5. Her symptoms were consistent with the MRI findings. RX.1. pg.17. She could work full-duty as she had been working without restriction up until the examination. RX.1. pg.18. He did not think there was causation based upon the 3 month gap in treatment before she sought treatment.

31. On cross-examination, Dr. Graf stated that the treatment and proposed surgery was reasonable and necessary. RX.1. pg.30. Some of the conditions were degenerative in nature. She had a herniated disc at L4-L5 indicated on the July 20, 2012 MRI. RX.1. pg.32. He stated that the disc herniation can be caused by trauma. RX.1. pg.34. He cannot say for certain the disc herniation existed prior to the accident. RX.1. pg.35. He noted Petitioner denied any prior issues. *Id.* He stated that it is possible that her fall caused the herniation. *Id.* It also could cause her condition to go from asymptomatic to symptomatic. RX.1. pg.36. He noted that Petitioner indicated that she eventually had issues sleeping due to pain and that was why she sought treatment. RX.1. pg.37.

32. Currently, Petitioner testified that she has pain daily when sitting for a long period of time. She had to get a handicap sticker as she can only walk a limited distance. It takes her 45 minutes in the morning to straighten up. T.41. She has worked full-time but has taken time off due to pain. *Id.* She takes pain medication, gets massages and uses heating pads.

33. On cross-examination, she has been employed by Cook County for 35 years. She denied any prior injury or treatment to her low back or left hip. T.43. She does not recall being diagnosed with SI joint dysfunction prior to January 7, 2011. T.43. She worked regular duties from January 2011 through February 2015. She was off work from February 2015 through May 2015. T.46.

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 (4th Dist. 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).

In *McAllister v. Ill. Workers' Comp.* Comm'n, 2020 IL 124848, the Illinois Supreme Court noted three categories of risks recognized by case law: "(1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics." *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162; *Baldwin*, 409 Ill. App. 3d at 478; *First Cash Financial Services*, 367 Ill. App. 3d at 105.

McAllister explained that "the first step in risk analysis is to determine whether the claimant's injuries arose out of an employment-related risk—a risk distinctly associated with the

claimant's employment." *Mytnik*, 2016 IL App (1st) 152116WC, ¶ 39, 409 Ill. Dec. 491, 67 N.E.3d 946; *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 38, 409 Ill. Dec. 359, 67 N.E.3d 571. As noted above, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Caterpillar Tractor*, 129 Ill. 2d at 58; see also *The Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 18, 376 Ill. Dec. 823, 1 N.E.3d 535; *Sisbro*, 207 Ill. 2d at 204.

The Court further explained that employment risks involve risks that are distinctly associated with employment. "Employment risks include the obvious kinds of industrial injuries and occupational diseases and are universally compensated." *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 162. Examples of employment-related risks include "tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling." *First Cash Financial Services*, 367 Ill. App. 3d at 106. Injuries resulting from a risk distinctly associated with employment are deemed to arise out of the claimant's employment and are compensable under the Act. *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 35, 409 Ill. Dec. 359, 67 N.E.3d 571.

If it is established that the risk of injury falls within one of the three categories of employment-related acts delineated in *Caterpillar Tractor*—risks that are distinctly associated with employment—then it is established that the injury "arose out of" the employment. See, *e.g., Autumn Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC, ¶ 18, 990 N.E.2d 901, 371 Ill. Dec. 713

McAllister further explained that *Caterpillar Tractor* prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine "everyday activities." In analyzing whether an injury resulting from an everyday activity or common bodily movement arises out of a claimant's employment it must first be determined whether the employee was injured performing one of the three categories of employment-related acts delineated in *Caterpillar Tractor. Caterpillar Tractor*, 129 Ill. 2d at 58; see also *The Venture—Newberg-Perini, Stone & Webster*, 2013 IL 115728, ¶ 18; [**25] *Sisbro*, 207 Ill. 2d at 204.

The Court stated that *Caterpillar Tractor* prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment, when a claimant is injured performing job duties involving common bodily movements or routine everyday activities. *Sisbro* and *Caterpillar Tractor* make it clear that common bodily movements and everyday activities are compensable and employment related if the common bodily movement resulting in an injury had its origin in some risks connected with, or incidental to, employment so as to create a causal connection between the employment and the accidental injury. *Sisbro*, 207 Ill. 2d at 203 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58). *Caterpillar Tractor* does not require a claimant to provide additional

evidence establishing that he was exposed to the risk of injury, either qualitatively or quantitatively, to a greater degree than the general public, once he has presented proof that he was involved in an employment-related accident. *Caterpillar Tractor*, 129 Ill. 2d at 58.

Here, the evidence supports that Petitioner was injured due to an employment related risk. Petitioner presented to work at the Markham clinic. Her job duties included, among other things, answering phones. The employee workstations had chairs with wheels and the chairs had no backs or arms. On the day of the injury, Petitioner was attempting to sit in the stool to answer a phone call when the stool rolled out from under her. Petitioner described the floors as being recently waxed and similar to that of an "ice skating rink." Her description of the accident was corroborated by the two witness reports. Both of the reports indicated that the chair rolled out from under her as she was attempting to sit.

As stated above, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. The Commission finds that the act of sitting in this particular chair while performing her job duties represents an act that can reasonably expected to be performed incident to her assigned duties, and is, therefore, a risk distinctly associated with her employment. The chairs were provided by the employer for the employees use. The chairs had wheels with no arms or backs and were on linoleum floors. The floors had just been recently waxed. She was in the process of sitting in the chair to answer a work-related phone call when the accident occurred. The Commission finds that the Petitioner was injured as the result of an employment related risk and, therefore, the accident arose out of and in the course of her employment.

The Commission finds that the accident is compensable under the neutral risk analysis as well. The third category of risk involves neutral risks that have no particular employment or personal characteristics. *Illinois Consolidated Telephone Co.*, 314 Ill. App. 3d at 353 (Rakowski, J., specially concurring). "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." *Springfield Urban League*, 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." *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014, 944 N.E.2d 800, 348 Ill. Dec. 559 (2011).

The evidence supports that Petitioner's injuries are compensable under the neutral risk analysis as well. Qualitatively, the chair provided to the employees contributed to the risk of injury. The chair was similar to a stool on rollers and had no back or arm support and was located on a linoleum floor. The Petitioner would sit on this chair while performing various aspects of her job. Petitioner's job duties and use of the chair qualitatively increased her risk of injury. Quantitively,

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Petitioner was exposed to the risk of injury more frequently than the general public. The chair provided to the employees is not a chair that is commonly used among the general public. Petitioner had to sit in this type of chair frequently throughout the day, which increased her risk of injury more frequently than the general public.

The Commission further finds that Petitioner's current condition is causally related to her work-related injury. Following her injury, Petitioner continued to work and only sought treatment three months later when her condition failed to improve. The Commission agrees with Dr. Ghanayem that this is not an unreasonable amount of time to wait for treatment in hopes of improvement.

When Petitioner first sought treatment on April 4, 2011, she complained of pain radiating from the left hip down to her ankle. She had no tenderness to the lumbar spine. X-ray of the lumbar spine revealed mild narrowing of the L4-L5 intervertebral disk height. Petitioner continued to work and undergo some medical treatment without improvement. The MRI revealed degenerative disc disease at L4-L5 with disc extrusion, synovial cyst formation and ligamentum flavum thickening that was causing moderate central canal stenosis and neural foramina compromise. A fusion was ultimately recommended when conservative care failed.

Petitioner's treating physician, Dr. Jayanthi noted there was causation from her original injury and Dr. Ghanayem opined that Petitioner's symptoms were causally related to her injury as there was no indication of any prior back issues. Respondent's Section 12 examiner, however, found no causal connection based largely upon the gap between the injury and initial medical treatment.

The Commission finds Dr. Ghanayem's opinion more persuasive than Dr. Graf's opinion. As noted above, Dr. Graf's opinion was premised, in part, upon the initial gap in treatment. However, the Commission finds that waiting 3 months to seek treatment was not unreasonable. Petitioner credibly testified that she tried to work through her issues and only sought treatment once her condition failed to resolve itself. Dr. Graf noted that her symptoms were consistent with the MRI and that she needed a lumbar decompression and fusion at L4-L5. Dr. Graf acknowledged that it was possible that her fall caused the herniation and could have caused her condition to go from asymptomatic to symptomatic. Dr. Ghanayem's opinion is more persuasive. He credibly testified that the gap in treatment was not unreasonable and he noted that the fall would cause her symptoms. He further noted that her complaints were consistent with the objective evidence. Based upon the credible evidence, the Commission finds that Petitioner established causal connection. Based upon the finding of accident and causal connection, the Commission finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Ghanayem.

The Commission, however, finds that Petitioner exceeded her choice of two physicians as noted by the Arbitrator. Therefore, Petitioner is entitled to all reasonable and necessary medical expenses except those incurred from Dr. Laich, Swedish Covenant Hospital, Athletico, and Dr.

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Deutsch as they fall outside her choice of two physicians. The Commission makes no findings relative to TTD benefits as that issue was reserved for a later date by the parties.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 10, 2020 is hereby reversed for reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses pursuant to Sections 8(a) & 8.2 of the Act. The Respondent is not responsible for expenses incurred from Dr. Laich, Swedish Covenant Hospital, Athletico, or Dr. Deutsch as those expenses were incurred outside Petitioner's choice of two physicians.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective medical treatment as recommended by Dr. Alexander Ghanayem.

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.

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: DEC 31 2020

D. Douglas McCarthy

DDM/tdm
O: 12/9/20
052

Stephen Mathis

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

DUNN, KATHY
Employee/Petitioner

Case# **12WC043254**

COOK COUNTY
Employer/Respondent

20IWCC0774

On 2/10/2020, 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:

4239 LAW OFFICES OF JOHN S ELIASIK
180 N LASALLE ST
SUITE 3700
CHICAGO, IL 60601

2337 INMAN & FITZGIBBONS LTD
G STEVEN MURDOCK
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

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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)

Kathy Dunn,
Employee/Petitioner

v.

Cook County,
Employer/Respondent

Case # **12** WC **43254**

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, IL**, on **12/19/19**. 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. [ ] 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 **1/7/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**104,769.60**; the average weekly wage was $**2,014.80**.

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

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

Respondent shall be given a credit of $**0.00** 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 and concludes Petitioner failed to prove by a preponderance of the credible evidence she sustained accidental injuries arising out of and in the course of her employment with Respondent and the Arbitrator further finds and concludes Petitioner failed to prove by a preponderance of the credible evidence that a causal connection exists between her claimed current condition of ill-being and the alleged work accident. Therefore, the Arbitrator denies Petitioner's claims for 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.

Robert M. Harris

Signature of Arbitrator

February 6, 2020
Date

ICArbDec19(b)

FEB 10 2020

Kathy Dunn
vs.
Cook County

12 WC 43254

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner claims that on January 7, 2011 she was a 51 year-old employee of Respondent, married with no dependent children and earning $2,014.80 per week when she fell out of a chair causing a herniated lumbar disc and injury to her left hip. (Arb. Ex. 1 and Arb. Ex. 2)

The parties stipulated Petitioner was earning $2,014.80 per week in her employment with Respondent as of January 7, 2011 and Respondent has paid no benefits of any kind to Petitioner for this claim. The issues before the Arbitrator at hearing are whether Petitioner's accident arose out of and in the course of her employment with Respondent, whether Petitioner's current condition of ill-being is causally related to the alleged accident, and whether Petitioner is entitled to the claimed medical expenses, both past and prospective, and temporary total disability benefits. This matter was brought pursuant to Section 19(b) of the Act, so the nature and extent of any permanent partial disability is reserved for future proceedings. (Arb. Ex. 1)

Prior to the start of the 19(b) trial, a statement was made on the record and the parties have agreed that Petitioner's claim for temporary total disability benefits for the period of February 18, 2015 through May 16, 2015, a total of 12-3/7 weeks, as claimed on the Request for Hearing, will also be reserved for future proceedings and not ruled upon by the Arbitrator in this current 19(b) Trial. (Arb. Ex. 1)

Petitioner testified that on January 7, 2011 she was employed by Respondent as a Public Health Nurse III as a Supervisor of medical staff for Respondent. In this role, she was assigned to oversee various Cook County medical clinics at various court facilities throughout the county, including the ones at Bridgeview and Markham. Petitioner described her job as a "desk job" being primarily sedentary in nature supervising medical staff at these various clinics.

On January 7, 2011 Petitioner entered the Markham court facility medical clinic, which had just been fully remodeled over the course of about one year prior to this. Petitioner testified this was her first time in the new facility, and she arrived at about 2:15 p.m. just as a telephone call was coming into the facility for her. Petitioner reported that the facility floors were slippery and shiny linoleum because they were new. As she went

to sit on a stool at one of the workstations to take the telephone call, the stool rolled out from under her. The stools, she testified, consisted of four or five legs on rollers with no back or arm rests. As she went to sit down, the stool rolled out from under her, and she fell to the floor landing on her left side and left hip. Petitioner immediately noticed pain in her left hip, but she continued working and finished her day. Petitioner notified her Supervisor, Barbara Fisley, of this incident.

Written statements of Petitioner, Tya Robinson-May and Gwendolyn Pinkney, both dated January 10, 2011, confirm that on January 7, 2011 at approximately 2:15 p.m., Petitioner entered the Cook County medical clinic in Markham and proceeded to a workstation to answer a telephone call. (PX. 8) As Petitioner did so, the chair on which she went to sit "rolled" out from under her. In her statement, Petitioner only stated that the chair rolled away, making no mention of her or the chair "slipping" and making no reference of a "slippery floor." (PX. 8)

Petitioner testified that prior to January 7, 2011 she had had no prior accidents or medical treatment for her left shoulder, left hip or low back. After this incident on January 7, 2011, Petitioner continued working her normal duties and did not seek medical treatment until April 4, 2011, almost three months later after the incident.

Petitioner testified and the treating medical records confirm she first presented for medical treatment on April 4, 2011 with Dr. Patricia Higgins at Loyola University Medical Center. (PX. 2) Petitioner reported a past medical history consisting of the following: hypertension (dx 2012), total hysterectomy (2012), lumbar spondylolisthesis facet joint cyst at L4-L5 with left-sided stenosis (no date indicated), supraventricular tachycardia, SI joint dysfunction and lumbar radiculitis. Petitioner denied history of any prior back or hip pain. As for the current complaints, Petitioner provided a history of falling off a stool "at the end of January 2011" landing on her left side. Over the course of the last 3-4 weeks she complained of "bone pain" in the left hip radiating down the left leg to the ankle. Petitioner had not received any medical treatment to this point and had simply been taking OTC ibuprofen without relief. (PX. 2)

On clinical examination, Dr. Higgins noted the following positive findings: a slight limp favoring the left lower extremity; slight pain to palpation over the left piriformis; and pain with palpation over the iliac crest. Range of motion and strength of the left hip, the left lower extremity and the lumbar spine were within normal limits. An x-ray examination showed degenerative disk disease of the lumbar spine along with osteopenia. Dr. Higgins diagnosed Petitioner with left hip pain from a fall with possible left hip bursitis and with degenerative

disk disease of the lumbosacral spine. (PX. 2) Dr. Higgins prescribed Norco as needed for pain along with a Medrol dosepak. Dr. Higgins indicated that physical therapy may be needed in the future but did not prescribe it at that time. Dr. Higgins referred Petitioner to Darien Medical Group for follow up in one week if no improvement. (PX. 2)

Petitioner then presented on April 11, 2011 to Dr. Heidi Renner with Loyola Medical Group in Darien, Illinois. (PX. 2) Petitioner continued to complain of ongoing left hip pain after falling at work on January 7, 2011. Petitioner reported limited improvement with the medications prescribed one week earlier. Dr. Renner recommended Petitioner begin a course of physical therapy but Petitioner declined. Dr. Renner issued a trial prescription for Mobic. (PX. 2)

Petitioner returned to Dr. Renner for follow up on April 28, 2011. (PX. 2) Petitioner continued to report no improvement in her condition. Other than pain along the IT band, her clinical examination was reportedly normal. Dr. Renner diagnosed Petitioner with left leg pain possibly related to the IT band from the low back and with a normal left hip examination. Again, physical therapy was recommended but Petitioner declined. Instead, "pt prefers to see sports med and will make an appt with Dr Jayanthi." (PX. 2)

Dr. Neeru Jayanthi at Loyola University Medical Center in Burr Ridge first examined Petitioner on May 6, 2011. (PX. 2) On clinical examination, Dr. Jayanthi noted the following positive findings: positive left-sided Trendelenberg test; mild spine, paraspinal, left SI joint, piriformis and greater trochanter/gluteus medius tenderness; and mildly limited ROM at end ranges of the lumbar spine but normal left hip ROM. As for diagnostic x-rays, Dr. Jayanthi noted degenerative disk disease at L4-L5 and minimal calcifications near the greater trochanter on the left. Dr. Jayanthi diagnosed Petitioner with left SI joint dysfunction, gluteus medius/trochanteric bursitis and piriformis pain. Dr. Jayanthi recommended a course of Naprosyn and recommended Petitioner continue with the Norco as needed for pain. Dr. Jayanthi did not believe work restrictions were needed and recommended she continue exercising on her own. Dr. Jayanthi also recommended weight reduction, noting her BMI of 30. Petitioner was to return to him in four weeks for follow up. (PX. 2)

Petitioner returned to Dr. Jayanthi on June 3, 2011 reporting improvement but some continued symptoms and residual deficits. (PX. 2) Petitioner had apparently started physical therapy as she reported this was providing improvement. Dr. Jayanthi noted improvement on clinical examination as well. The diagnosis

remained unchanged. Petitioner was to continue with the current treatment plan and return in four weeks for follow up. (PX. 2)

When Petitioner returned to Dr. Jayanthi on July 1, 2011 as scheduled she was reportedly "overall improved." (PX. 2) Petitioner was to begin a home exercise program and return in three months for follow up, sooner if needed.

Petitioner instead returned to Dr. Jayanthi five months later on December 2, 2011. (PX. 2) Petitioner reported that she had continued with her home exercise program and was beginning to have some moderate left hip and SI joint pain as well as left leg pain. Petitioner also complained of low back pain and trouble walking for long periods. Petitioner was still working full-duty at this point. On clinical examination, the only positive findings noted by Dr. Jayanthi were the following: mild left SI joint tenderness to palpation; weak hip abductors; mild lateral left hip pain; mild pain with terminal ROM of the lumbar spine in all planes (but full ROM of the left hip); and positive left posterior pressure along the sacrum. Dr. Jayanthi diagnosed Petitioner with left SI joint dysfunction, gluteus medius/trochanteric bursitis, piriformis pain and possible left lumbar radiculitis with mild nerve root tension. Dr. Jayanthi referred Petitioner for physical therapy, recommended a lumbar corset, and issued scripts for a Medrol dosepak and Vicodin, the latter to be taken as needed for pain. Dr. Jayanthi indicated that an MRI may be warranted, but not at that time. (PX. 2)

Two months later on February 9, 2012 Petitioner returned to Dr. Jayanthi reporting that overall she was doing better. (PX. 2) Dr. Jayanthi noted minimal findings on clinical examination. At that time Dr. Jayanthi recommended Petitioner continue with home exercises and told her to continue working full-duty. Petitioner was to return in six weeks, and if feeling well at that time, he would declare her at MMI. There is no record of Petitioner returning to Dr. Jayanthi as scheduled six weeks later. (PX. 2)

The next recorded visit with Dr. Jayanthi took place on July 20, 2012, more than five months since Petitioner last saw him. (PX. 2) Petitioner now reported that she was getting some radiating pain down into her left foot and leg every day, mostly with walking. Petitioner was still able to continue working full-duty. Petitioner reported taking Vicodin occasionally as well as ibuprofen at times. Petitioner continued doing home exercises. Dr. Jayanthi noted minimal findings on exam, although he now noted a mildly positive straight leg raise test on the left. Dr. Jayanthi continued to diagnose her with left SI joint dysfunction, gluteus medius/trochanteric bursitis, piriformis pain and possible left lumbar radiculitis with mild nerve root tension.

Dr. Jayanthi referred Petitioner for a lumbar MRI scan and recommended she continue with her home exercises in the interim. Petitioner was to return to him following the MRI. (PX. 2)

Over two months later, Petitioner underwent an MRI scan of her lumbar spine on October 5, 2012 at Loyola University Medical Center. (PX. 2) According to the report, this revealed findings consistent with degenerative disk disease at L4-L5 including an extruded disc at this level with synovial cyst formation and moderate canal stenosis with neural foramina compromise. The report mentions no acute findings. (PX. 2)

Petitioner returned to Dr. Jayanthi on October 5, 2012 following her MRI. (PX. 2) Petitioner continued to have complaints of radiating pain down into her left foot and leg every day, mostly with walking. Dr. Jayanthi reviewed the MRI concluding this showed a left L4-L5 disc protrusion with synovial cyst and facet hypertrophy. In addition to his prior diagnosis, he added "left L4-L5 lumbar disc." Dr. Jayanthi attributed her ongoing complaints to the L4-L5 disc and recommended interventional treatment for this. Dr. Jayanthi suggested acupuncture as an option and provided her with a list of physicians. Petitioner was to return to Dr. Jayanthi for follow up in 3-6 months, sooner if symptoms worsened. (PX. 2)

Dr. Jayanthi next saw Petitioner again on November 19, 2012 when she declined ESI as a treatment option. (PX. 2) Petitioner reported having difficulty working because of her symptoms. The clinical examination, diagnosis and treatment recommendations remained unchanged from the October 2012 visit.

Petitioner returned three months later on February 22, 2013. (PX. 2) Petitioner complained of continued low back pain with radicular symptoms, particularly with walking. She continued working full-duty in the interim. On clinical examination, Dr. Jayanthi noted Petitioner had increase in pain complaints as compared to when he last examined her. His diagnosis remained unchanged. Petitioner continued to refuse ESI treatment. Dr. Jayanthi refilled a script for Lidoderm patches and referred her for additional physical therapy. (PX. 2)

Petitioner returned to Dr. Jayanthi four months later on June 28, 2013. (PX. 2) Petitioner reported receiving physical therapy but continued to have increasing left leg and now left knee pain. Petitioner also complained of a lump in her low back. Following his clinical examination of Petitioner, Dr. Jayanthi recommended Petitioner have a ESI injection at L4-L5 along with a left lateral hip cortisone injection near the greater trochanter. Petitioner wished to consider this and stated she would return should she wish to proceed. Dr. Jayanthi authorized Petitioner to remain on sedentary duty through September 15, 2013. (PX. 2)

Three months later on September 27, 2013 Dr. Jayanthi re-examined Petitioner. (PX. 2) Dr. Jayanthi indicated Petitioner had received an injection into the left lateral hip on July 13 with little relief of her symptoms. At this point, Petitioner complained of severe left leg pain over the past couple of weeks although she had continued working. The diagnosis remained unchanged. Dr. Jayanthi recommended evaluations with physiatry (Dr. Bajaj) and pain management (Dr. Buck) as well as an evaluation with Dr. Lawrence Frank in Elmhurst. Dr. Jayanthi issued a script for Prednisone and Vicodin. Petitioner was to return for follow up in 3-6 months, sooner if needed. (PX. 2)

Dr. Kit Lee, an "integrative medicine consultant" at Loyola, examined Petitioner on December 6, 2013 on referral from Dr. Jayanthi. (PX. 2) Dr. Lee indicated Petitioner presented for an acupuncture evaluation and treatment. In addition to the history of work accident and treatment up to this point, Dr. Lee noted that Petitioner was currently going through a divorce and having to take care of her mother who was ill at the time. Dr. Lee confirmed the diagnosis and explained to Petitioner the risks and benefits of acupuncture, during which time Dr. Lee also "discussed role of stress in pain syndromes and discussed stress management." Petitioner then began a course of six acupuncture treatments on December 12, 2013 and continuing the second and third on January 7 and 21, 2014. Petitioner reported no improvement in her symptoms at each visit. (PX. 2)

Dr. Jayanthi saw Petitioner again on February 17, 2014. (PX. 2) Petitioner reported trying acupuncture with no relief of her symptoms. Petitioner continued to perform activities of daily living and continued working. Petitioner stated she still did not want to have the ESI that Dr. Jayanthi had been recommending. The diagnosis remained unchanged as did Dr. Jayanthi's recommendation that Petitioner continue with acupuncture or otherwise have an ESI. Dr. Jayanthi issued a script for Lyrica and asked that she return in six weeks to see how Petitioner was doing. (PX. 2)

Petitioner received her fourth acupuncture treatment with Dr. Lee on March 19, 2014. (PX. 2)

On May 19, 2014 Petitioner returned to Dr. Jayanthi. (PX. 2) Petitioner claimed to be "doing poorly, has had severe nerve pain. She was taking care of her mom, who then passed away 1 month ago." Petitioner did not have any relief with acupuncture and currently complained of left lateral hip pain and leg pain. The diagnosis remained the same. Dr. Jayanthi recommended a Medrol dosepak, Norco and Lyrica as well as Naprosyn. Dr. Jayanthi informed Petitioner that "recent emotional stress from losing her mother . . . neuropathic pain may occur and possibly be more painful," which is consistent with Dr. Lee said in that initial visit on December 6,

2013. Dr. Jayanthi referred Petitioner to Dr. Choi, to Dr. Lee, to Dr. Bajaj and to Dr. Buck or Dr. Rhagevendra for consultation and treatment, asking that Petitioner return to Dr. Jayanthi for follow up in 6-8 weeks. (PX. 2)

Petitioner returned to Dr. Jayanthi over 12 weeks later on August 8, 2014 with no record of her seeing any of the recommended consultants in the interim. (PX. 2) Petitioner had tried the prescribed medications with no benefit, and she stopped taking the Lyrica secondary to side effects. Overall Petitioner complained she was feeling worse and in more pain and had become frustrated as a result. Petitioner inquired about further interventional or surgical options, and Dr. Jayanthi stated that she should try an ESI, which she again refused. Dr. Jayanthi ordered a repeat MRI scan and referred the claimant to Dr. Ghanayem or Dr. Wojenik for a surgical consultation. Dr. Jayanthi prescribed Prednisone again and asked that she return to him as needed. (PX. 2)

Petitioner underwent a second lumbar MRI scan at Loyola on August 11, 2014 at the request of Dr. Jayanthi. (PX. 2) This study was compared to the study from October 5, 2012. According to the radiologist, this revealed a small disk protrusion at L4-L5 and a tiny, but more noticeable when compared to the prior study, facet joint cyst at that level causing stenosis and left-sided neurologic compression. (PX. 2)

Dr. Alexander Ghanayem at Loyola University Medical Center first examined Petitioner on August 28, 2014. (PX. 2) Petitioner provided a consistent history the work incident and treatment. On clinical examination, Dr. Ghanayem noted the following positive findings: tenderness at the base of the lumbar spine and left sciatic notch; pain with ROM of the lumbar spine; and diminished sensation at L5 on the left. Dr. Ghanayem reviewed the MRI scan finding spondylolisthesis at L4-L5 and a facet joint cyst at that level causing stenosis and left-sided neurologic compression. Dr. Ghanayem recommended a lumbar laminectomy and fusion at L4-L5 and causally related this condition and need for surgery to the January 7, 2011 work incident. Petitioner never returned to Dr. Ghanayem. (PX. 2)

On October 3, 2014 Petitioner presented to Dr. Frank Phillips at Midwest Orthopedics at Rush for examination. (PX. 4) Petitioner provided a consistent history of injury and treatment. Petitioner complained of continued severe left leg radicular pain and of some achy back pain. Petitioner also reported she was "reluctant to do epidurals, as she has had bad experiences with these in the past." On clinical examination, Dr. Phillips noted the following positive findings: tenderness over the left greater trochanter; some limited ROM of the lumbar spine secondary to pain; and hamstring tightness with straight leg raising at 80 degrees. He reviewed her MRI films from August 2014 concluding the same findings as noted by the radiologist. Dr. Phillips diagnosed

Petitioner with spondylolisthesis and a facet cyst with severe stenosis at L4-L5. Petitioner inquired as to surgical options, and he recommended a translaminal interbody fusion rather than the typical decompression and fusion as the former is less invasive. Petitioner reportedly told Dr. Phillips that she wished to proceed. However, there are no further records of any treatment with Dr. Phillips or Midwest Orthopedics at Rush. (PX. 4)

Petitioner then presented on February 26, 2015 to another physician, Dr. Daniel Laich at Swedish Covenant Medical Group with complaints of low back and left leg pain as well as tingling in the left ankle. (PX. 5) Petitioner informed him that she had previously seen Dr. Phillips and Dr. Ghanayem, both of whom recommended she undergo a lumbar fusion. Petitioner described the onset of her symptoms as a fall in January 2011 with one prior injury to her "neck or back" in a 2001 motor vehicle accident. Petitioner provided a consistent history of treatment. Dr. Laich had access to and reviewed the MRI film images from August 2014 stating that these showed "greatest disease at L4-L5." Following his clinical examination of Petitioner, Dr. Laich diagnosed Petitioner with a herniated lumbar disk and SI joint dysfunction. Dr. Laich recommended a CT scan and asked that she return following same. (PX. 5)

On March 2, 2015 Petitioner underwent a CT scan of her lumbar spine at Swedish Covenant Hospital in Chicago. (PX. 5) According to the report, this revealed findings consistent with those shown on her MRI, including degenerative disk disease of the lumbar spine most prominent at L4-L5 resulting in "mild spinal canal stenosis."

Dr. Laich re-examined Petitioner on March 19, 2015 following her CT scan. (PX. 5) Dr. Laich concluded from his review of the films that Petitioner had grade I "antereolisthesis at L4-L5 with severe facet disease and concomitant lateral ligament hypertrophy with resultant coronal malalignment with L4 on L5 listhesis and anular deformity. Slight vac facet on the right at L5-S1. Diffuse disk bulge/contained disk. Stenosis is primarily at L4-L5." Dr. Laich diagnosed the Petitioner with a herniated L4-L5 disk and with SI joint dysfunction. Dr. Laich recommended surgery consisting of an L4-L5 decompression and fusion. (PX. 5) Petitioner did not return to Dr. Laich after March 19, 2015.

Petitioner testified that in 2015 she did not want to have surgery and opted for additional conservative management. Petitioner received physical therapy at Athletico Physical Therapy on referral from Dr. Daniel Laich from March 30, 2015 through June 23, 2015. (PX. 7) There is no evidence that Petitioner has returned to Dr. Laich or Athletico for any additional treatment since 2015.

Dr. Harel Deutsch at Rush University Neurosurgery examined Petitioner on March 20, 2015. (PX. 9) Petitioner presented with complaints of back pain and left leg pain and weakness since 2011. Petitioner reported no improvement with injections and physical therapy. Dr. Deutsch reported no positive findings on clinical examination of Petitioner's lumbar spine or lower extremity, including noting no tenderness to palpation and normal range of motion. Dr. Deutsch reviewed MRI films from August 2014 and concluded that Petitioner had a synovial cyst of a lumbar facet joint along with lumbar stenosis. He believed she had failed conservative management and recommended surgery consisting of removal of the left L4/L5 synovial cyst. (PX. 9) There is no evidence that Petitioner has ever returned to see Dr. Deutsch.

There is no evidence that Petitioner has sought any further medical treatment for her left hip or low back since she was last seen at Athletico on June 23, 2015, over four years ago.

The most recent medical evaluation of Petitioner available to the Arbitrator for review and consideration is the Section 12 examination of Petitioner by Dr. Carl Graf at the request of Respondent on July 13, 2018. Dr. Graf testified by way of deposition on February 22, 2019. (RX. 1) As with Dr. Higgins on April 4, 2011, Petitioner presented to Dr. Graf with a history of no history of prior low back injury or treatment. (RX. 1, Ex. 2) Dr. Graf reviewed the treating medical records and examined Petitioner on July 13, 2018 finding that while Petitioner does have a herniated lumbar disc and pre-existing degenerative disc disease in her lumbar spine, but he opined that neither condition was medically causally related to the claimed work accident, either by way of direct cause or aggravation. (RX. 1, pp. 17, 19; RX. 1, Ex. 2) Dr. Graf did agree that the recommendation for a lumbar decompression and single-level fusion is reasonable, but he also believed that a simple microdiscectomy may be all that Petitioner may need to alleviate her symptoms. (RX. 1, p. 18, RX. 1, Ex. 2) Dr. Graf confirmed, however, that either surgery would not medically causally related to the January 7, 2011 incident at work. (RX. 1, pp. 31, 37) Dr. Graf also opined that Petitoner had no functional limitations as a result of the January 7, 2011 incident. (RX. 1, pp. 18-19)

On May 15, 2019 Dr. Alexander Ghanayem testified. (PX. 1) Prior to this deposition, he provided Petitioner's counsel with a brief narrative statement Dr. Ghanayem authored back in February 2019 at the request of Ms. Dunn's attorney. (PX. 1, Ex. 2) Dr. Ghanayem testified consistently with that statement contained adding that his opinion was supported by what he visualized in the MRI films he reviewed. Dr. Ghanayem confirmed that if Petitioner continued presently to have the same symptoms she had when he saw her on that one occasion back on August 28, 2014, almost five years earlier, he would order an updated MRI, and if the updated MRI was consistent with the findings viewed in the prior films, he would continue to make

the same surgical recommendation. On cross-examination, Dr. Ghanayem was unable to recall what, if any, treatment records of Petitioner he reviewed at the time he examined her aside from her Loyola chart. Dr. Graf also confirmed that Petitioner reported to him she'd had no prior injury or treatment for her lumbar spine before 2011.

CONCLUSIONS OF LAW

Regarding disputed issue C: Whether Petitioner's accident arose out of and in the course of her employment with Respondent, the Arbitrator finds and concludes as follows:

The Arbitrator adopts and incorporates the above Statement of Facts into this and all Sections below.

The Arbitrator finds and concludes Petitioner has failed to prove by a preponderance of the credible evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent on July 7, 2011.

At this outset of this Decision, the Arbitrator states that he finds the credibility of Petitioner to be in question. Petitioner testified that she had no prior injury or treatment for her low back, left hip or left shoulder before the incident on January 7, 2011. In fact, she did provide a similar history to Drs. Higgins, Ghanayem, Deutsch and Graf. However, when she presented to Dr. Laich, she informed him she had a prior injury to her "neck or back" following a motor vehicle accident ten years earlier. This was not explained further by Petitioner in any of her medical records or her testimony at trial. While the accident was perhaps remote to the events in this case, the Arbitrator questions the credibility of Petitioner not recalling her being involved in a motor vehicle accident that resulted in pain to her spine when asked directly about such an event. Petitioner also offered new and uncorroborated testimony on key issues and points that questions her credibility.

The disputed accident issues involve an analysis of "arising out of" and the issue of "increased risk." After reviewing some preliminary matters, the ***Arbitrator finds and concludes this issue is resolved pursuant to the current applicable law as set forth in the recent cases*** *Kevin McAllister v. The Illinois Workers' Compensation Commission (North Pond),* 2019 IL App (1st) No. 1-16-2747WC and *Javier Moreno v. The Illinois Workers' Compensation Commission (Not Just Grass, Inc.),* 2020 IL App 2d No. 2-17-0736WC (released January 14, 2020).

It is well-settled in Illinois that for an employee to obtain benefits under the provisions of the Illinois Workers' Compensation Act, the employee bears the burden of proving by a preponderance of the evidence that the accident giving rise to the injury and claim for benefits arose out of and in the course of her employment with the employer. In the case at bar, the facts are undisputed that when Petitioner fell to the floor at Respondent's facility on January 7, 2011, she was there during normal working hours and performing her regular work tasks. As Respondent agrees, there is no question in this case as to whether the alleged accident occurred "in the course" of her employment with Respondent; it clearly did.

The threshold disputed question and defense Respondent raised is whether the alleged accident also "arose out of" Petitioner's employment. Based on a careful review of the record, the Arbitrator finds and concludes that the alleged accident on January 7, 2011 did not arise out of Petitioner's employment with Respondent.

"For an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. [I]f the injury results from a hazard to which the employee would have been equally exposed apart from the employment, or a risk personal to the employee, it is not compensable." *Noonan v. Illinois Workers' Comp. Comm'n*, 65 N.E.3d 530, 535, 408 Ill. Dec. 308, 313, 2016 WL 6162452 (1st Dist. 2016) (citing *Orsini v. Industrial Comm'n,* 117 Ill.2d 38, 45, 109 Ill. Dec. 166, 509 N.E.2d 1005, 1008 (1987) and *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 59, 541 N.E.2d 667 (1989)).

The Commission's first task in determining whether the injury arose out of the claimant's employment is to ***categorize the risk to which the claimant was exposed*** in light of its factual findings relevant to the mechanism of injury. *First cash Financial Services v. Industrial Comm'n,*367 Ill. App. 3rd 102, 105, 853 N.E. 2d 799, 803 (2006). Consistent with these principles, this court has categorized the three risks to which an employee may be exposed: "(1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not have any particular employment or personal characteristics." *Noonan v. Illinois Workers' Comp. Comm'n*, 65 N.E.3d 530, 535, 408 Ill. Dec. 308, 313, 2016 WL 6162452 (citing *Metropolitan Water Reclamation District of Greater Chicago v. Workers' Compensation Comm'n,* 407 Ill.App.3d 1010, 1013, 348 Ill. Dec. 559, 944 N.E.2d 800, 804 (2011).) "Neutral" here means neither personal to the claimant no distinctly associated with the employment.

The facts of the present case are analogous to those found in *Noonan*. In that case the claimant's job duties as a clerk required him to fill out forms and occasionally answer telephone calls. He was injured at work when the rolling chair he was sitting in "went out from underneath" him as he reached to retrieve a dropped pen and fell to the floor. The Illinois Workers' Compensation Commission and the Appellate Court both found that the act described therein ***was not incidental to his assigned work duties***. In particular, the act of reaching to the floor while sitting in a chair was not required by claimant's job duties. The fact that he was reaching to retrieve a dropped pen to be used to fill out forms did not warrant an opposite conclusion. ***It was concluded that the risk of injury at issue was simply not one "distinctly associated" with claimant's employment.*** *Noonan v. Illinois Workers' Comp. Comm'n,* 2016 IL App (1st) 152300WC, ¶ 21, 65 N.E.3d 530, 536, 408 Ill. Dec. 308, 314, 2016 WL 6162452.

Next, the Supreme Court has found that injuries arising from three categories are compensable:

(1) acts the employer instructs the employee to perform;

(2) acts which the employee has a common law duty to perform while performing his duties for his employer;

(3) acts which the employee might be reasonably expected to perform incident to his assigned duties.

"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." ***Orsini v. Industrial Comm'n,*** 117 Ill. 2d 38, 45, 509 N.E. 2d 1005, 1008 (1987).

Alternatively, **neutral risks** - risks that have no particular employment characteristics - 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. Such an increased risk may be either qualitative, such as some aspect of employment which contributes to the risk, or quantitative, such as where the employee is exposed to a common risk more frequently than the general public.

Further, the Supreme Court has set forth, without qualification, the following principles for determining whether an injury arises out of employment:

"An injury 'arises out of' one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform, or acts which the employee might reasonably be expected to perform incident to his 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 his duties.***" (emphasis added) *Sisbro, Inc., v. Industrial Comm'n,* 207 Ill. 2d 193, 203-204 (2003).

Therefore, as noted above, Supreme Court precedent (adopted by the *McCallister Court*) has found that injuries arising from three categories are compensable:

(1) acts the employer instructs the employee to perform;

(2) acts which the employee has a common law duty to perform while performing his duties for his employer;

(3) acts which the employee might be reasonably expected to perform incident to his assigned duties.

"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." ***Orsini v. Industrial Comm'n,*** 117 Ill. 2d 38, 45, 509 N.E. 2d 1005, 1008 (198

Thus, the *McCallister* Court held at page 18, "We find that it is when any of the aforementioned three categories of acts (as listed directly above) are determined to be present that the risk resulting in injury is 'distinctly associated with the employment', i.e., not a neutral risk that is subject to a neutral-risk analysis." The *McAllister* Court further held, "The nature of the employee's work and the specific duties he or she is required to perform are what determine whether an employee is subjected to an employment risk rather than a neutral risk." The *McAllister* Court further held, "There must be an inquiry into, or consideration of, the nature of an employee's work for that the employer and his specific job duties." On this issue, the Supreme Court in *Orsini* instructs that a "risk is incidental to the employment when it belongs to or is connected with what the employee ***has to do in fulfilling his job duties.***" *Orsini,* 117 Ill. 2d at 45. And as the *McAllister* Court then added, "There is no guesswork here. The Commission, in exercising its judgment, may determine what acts are incidental to a claimant's employment by considering evidence of the nature of the employment and the claimant's specific job duties. ***If the act the claimant is performing at the time of injury was not necessary to the fulfillment of his specific job duties, then the act is not incidental to employment." Orsini clearly focuses on and emphasizes the duties of a claimant.***

In this case, after applying the above law, Petitioner's act of sitting on the stool was not necessary to the fulfillment of her specific job duties; therefore, that act was not incidental to her employment.

In other words, again as found in McAllister, the Court found it "clearer and more straightforward to focus the employment risk inquiry on whether the injury-producing act was required by the claimant's specific job duties and not whether it could be further considered an "activity of daily living." Activities necessary to the fulfillment of a claimant's job duties present risks that are distinct or peculiar to the employment and, as a result, are not common to the general public." The activity performed must be

required by the employment. ***Here, Petitioner's act of sitting on the stool was not required by her employment. This was not an act the employee had to do to fulfill her duties. Petitioner was not injured while performing an act (sitting on a stool) she was instructed to perform. That is the end of the inquiry.***

INITIAL INQUIRY: When categorizing risk, the first step is to determine whether the claimant's injuries resulted from a risk with employment-related characteristics. When a claimant is injured due to an employment-related risk - a risk directly associated with his or her employment – it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public. **ANALYSIS: In the present case,** Petitioner went to a workstation to answer a telephone and as she was doing so attempted to sit in a chair that rolled out from under her. ***There is nothing to suggest that her work duties and this chair rolling out from her was in any way peculiar to her employment or was required by her employment.*** Petitioner was ***not*** instructed to sit on the exam stool chair. Petitioner did ***not*** have a duty to perform that particular activity (sit on the exam stool). The evidence does ***not*** indicate that sitting on the exam stool was incidental to her employment because sitting on the exam stool was ***not*** necessary to the fulfillment of her specific job duties. The risk to claimant here from the activity at issue was far too removed from the actual and necessary requirements of Petitioner's employment job duties to be considered an "employment-related" risk. The activity at issue had no particular employment characteristics (supervising workers) and therefore Petitioner was not injured as a result of an employment-related risk.

As the Court in *McAllister* p. 32 held, "Ultimately, what makes a risk distinct or peculiar to the employment is its origin in, or relationship to, the specific duties of the claimant's employment. ***A risk that is required by the claimant's employment and necessary to the fulfillment of the claimant's job duties*** removes it from the realm of what is common to the general public..." ***Here, the act of sitting is not a risk that is required by the claimant's employment and is not an act that is necessary for the fulfillment of the claimant's job duties.***

Following directly this line of legal reasoning and holdings found in *McAllister*, the *Moreno* Court applied its analysis in categorizing the risk of harm and held that the proper analysis must reference Petitioner's employment or his specific work duties; this is an analysis of the claimant's employment and the work duties he or she was required or expected to perform. ***The only relevant question therefore is whether Petitioner's act of sitting in the seat was or was not "distinctly related to her employment" (or, in other words, as noted above, was that act a risk that is required by the claimant's employment and necessary to the fulfillment of the claimant's job duties ?) Based on an application of this law, the answer is no.***

When, then, is a "neutral-risk" analysis applied? The Commission must determine the connection, or lack thereof, between the claimant's injury and his employment duties/***required work duties***. Only after it is determined that a risk is ***not*** employment-related should the Commission consider and apply a neutral-risk analysis.

Because the Arbitrator has determined that Petitioner's act of sitting on the chair was not employment-related as it was ***not a required duty of her job***, a neutral-risk analysis can then be applied.

Therefore, the Arbitrator finds and concludes ***Petitioner has not established that she was exposed to a neutral risk to a greater degree than the general public*** and therefore her injury also was non-compensable. Ultimately, Petitioner failed to establish that her employment increased or enhanced her risk of injury in any way. A "neutral-risk" analysis governs claims that involve "everyday activities" or common bodily movements. Petitioner presented ***no evidence*** that she was exposed to the risk of harm to a greater degree than the general public. She presented no persuasive evidence **that her employment duties qualitatively** increased her risk of harm, and she presented no evidence at all that her employment duties **quantitatively** increased her risk of harm, that is, she was exposed to a common risk more frequently than the general public **(sitting in a chair).**

While Petitioner testified at trial and for the first time stated that the floors in the Markham facility were shiny and slippery, that the new floors in the office of the Markham clinic were highly polished and very slick, and that this is what caused the stool to shoot out from under her. However, Petitioner's description of the floor is not credible or plausible and is not corroborated by any evidence; further, this significant testimony is not supported by either of Petitioner's contemporaneous statements from January 10, 2011 that the **chair "rolled away** (PX 8 - "Cook County Department of Health Accident/Incident Report")" or her January 7, 2011 statement that **"the chair rolled out from under me..."** (PX 8 – "Employee's Accident Report"). ***There is no mention in her either statement that either she or the chair slipped or that the chair was defective or hazardous or that a condition or defect was present with the floor which contributed in any way to the chair rolling out/away from under her. Significantly, neither of the two witnesses who provided written statements made any mention of the floor being "highly polished and very slick" or that the floors were even in fact polished or slick. (PX 8 – "Witness Statement Report" dated 1/7/2011, Tya S. Robinson-May and "Witness Statement Report" dated 1/7/2011, Gwendolyn Pinckey). Neither witness who completed these statements appeared to testify on Petitioner's behalf.***

The record holds no evidence of anything peculiar, hazardous or defective about this exam chair in question or Respondent's facility or floor that would support a finding that the exam chair and/or floor increased the risk of an accident on January 7, 2011 or that they were in any way incidental to or unique to her employment with Respondent.

Further, Petitioner argues she "was required to sit at a desk to prepare her reports, that this was in the normal course of her job duties, and that the office area of the clinic was reserved for Respondent's employees only." Petitioner further argued, "Petitioner did not have a choice but to sit on this stool at this desk provided by Respondent, and the floor was in such a condition as to cause a high risk of the examination stool sliding out from under her." None of these assertions, even if accepted as true, placed Petitioner at an increased risk of injury or satisfies the "arising out of" component.

First, the Arbitrator does not find it plausible that Petitioner "was ***required*** to sit at a desk to prepare her reports, that this was in the normal course of her job duties." There was no corroborating evidence to support this claim, and this claim seems incredulous – why would Respondent "require" Petitioner to work at this desk - or any desk - to prepare her reports? Why would where she prepared her reports matter? Could she not work at a table or any other convenient place? The Arbitrator ***does not*** find it plausible that "Petitioner did not have a choice but to sit on this stool at this desk." Where there no other chairs anywhere for her to use? Not only is that statement not believable, and make no sense, it is not supported by any evidence in the record.

Second, no doubt siting at a desk to prepare her reports would be part of the normal course of her job duties (at least preparing her reports would be) but there was no evidence presented that sitting at a desk preparing reports placed Petitioner at an increased risk of injury.

Third, no doubt the office area of the clinic was reserved for Respondent's employees only. No doubt Petitioner was where she was supposed to be when this incident occurred. But there was no evidence presented that being where she was supposed to be when this incident occurred increased her risk of injury.

The Arbitrator is not persuaded by Petitioner's final argument (very similar to the above) that "her injury arose out of the course of her employment, because it was a risk particular to her work. As part of her job duties, she was required to sit and complete reports at an office space provided by Respondent, and to use seating provided by Respondent, who provided a medical examination stool for the task. This case is distinguishable from the line of cases involving falls from chairs where Petitioner was already seated and fell

out of a chair for a non-work-related reason, such as simply twisting or reaching for a dropped pen. In the present case, Petitioner was injured while attempting to sit at the desk and stool provided for her to perform her work." There are several distractions presented here: There was no evidence other than Petitioner's implausible testimony that "she was required to sit and complete reports at an office space provided by Respondent, and to use seating provided by Respondent, who provided a medical examination stool for the task." Where is the supporting evidence that Petitioner was "required to sit"? Where is the supporting evidence that Petitioner "was required use seating provided by Respondent"? Where is the supporting evidence that Respondent specifically "provided a medical examination stool for the task"? More likely, the exam stool was simply present there at the exam desk. There is no evidence Petitioner was required or assigned to use ***only*** that exam stool to do her job at the exam desk, a most unlikely scenario. Also see the prior paragraphs above.

Lastly, Petitioner arrived at the Respondent's facility about 2:15 p.m. ***just as a telephone call was coming into the facility for her.*** Petitioner reported that the facility floors were slippery and shiny linoleum because they were new. ***As she went to sit on a stool at one of the workstations to take the telephone call, the stool rolled out from under her.*** Petitioner apparently had not yet even picked up the phone when she fell. ***It is significant to emphasize that Petitioner offered no evidence as to why she had to first sit on the exam stool before taking the call, and no evidence whether she was required to take the telephone all at this particular exam desk. There was no evidence that Respondent required either.*** Further, how did Petitioner know the linoleum floor was new? (considering she testified this was her first time in the new facility).

In other words, all of the above indicates Petitioner offered uncorroborated and implausible testimony to support her theory of recovery.

For the above reasons, the Arbitrator finds and concludes Petitioner failed to prove by a preponderance of the credible evidence she sustained an accident arising out of and in the course of her employment on January 7, 2011. Therefore, Petitioner's claim for compensation is denied.

Regarding the Arbitration 19(b) Decision as to F: Whether Petitioner's condition of ill-being is causally related to the alleged work accident on January 7, 2011, the Arbitrator finds and concludes as follows:

Because the Arbitrator has found Petitioner has failed to prove accident, this issue is moot. However, for the sake of thoroughness, the Arbitrator finds and concludes Petitioner has failed to prove by a preponderance of the credible evidence that her current condition of ill-being is related to the incident of

January 7, 2011 and that Petitioner reached maximum medical improvement as of July 1, 2011 and any subsequent complaints, conditions and treatment are not causally related to the January 7, 2011 incident.

There is no requirement that the testimony of a treating physician be given greater weight than the testimony of a physician who has examined the employee solely for the purposes of testifying. *Pollard v. Indus. Comm'n*, 91 Ill. 2d 266, 277, 437 N.E.2d 612, 617, 62 Ill. Dec. 924, 929 (1982) (citing *Arcole Midwest Corp. v. Industrial Com.* (1980), 81 Ill.2d 11, 16, 39 Ill. Dec. 776, 405 N.E.2d 755.) Reviewing the medical evidence presented, including the conflicting testimony of Drs. Graf and Ghanayem, and weighing those opinions against the overall facts of this case, the Arbitrator finds Dr. Graf's opinions on medical causation as stated in his July 13, 2018 report and confirmed in his February 22, 2019 deposition to be more credible and weighty than the opinions of Dr. Ghanayem.

Petitioner saw both Dr. Ghanayem and Dr. Graf on one occasion, so Dr. Ghanayem in this case does not have the added credibility of having seen Petitioner on multiple occasions and arguably being more familiar with Petitioner's symptoms and history. Where there is a distinct enhancement in the credibility of Dr. Graf's opinion on the issue of medical causal connection is both in the timing of his examination of Petitioner as it relates to the current hearing and the timing of his examination to the date of his testimony. Dr. Graf examined Petitioner on July 13, 2018 and testified as to those findings about seven months later – a period of time in which there was likely little, if any, change in Petitioner's condition, and a period in which Dr. Graf's memory of the examination and findings would be somewhat more fresh than had he examined her four years prior to his testimony. In contrast, Dr. Ghanayem examined Petitioner on August 28, 2014 and testified almost five years later on May 15, 2019. In his testimony, Dr. Ghanayem speculated as to what he anticipated he expected her diagnosis would be and what he would propose for treatment under the assumption there was no change in her condition since he examined her on that one occasion years earlier. Dr. Ghanayem's conclusory written statement to Petitioner's counsel lends to the speculative, nonchalant manner in which he provided his opinion on medical causation in this case further discrediting that opinion.

Although some of Petitioner's other physicians provided some evidence of a causal connection between the January 7, 2011 incident and her condition of ill-being when seen by the respective physicians, those physicians have not seen Petitioner in over five years, and some of them (Drs. Phillips, Laisch and Deutch) on only one or two occasions. The Arbitrator finds and concludes their opinions or implied causal connection statements to be too remote in time and unpersuasive as sufficient proof of a current medical causal connection to the January 7, 2011 work incident.

Two of Petitioner's treating physicians, Drs. Jayanthi and Lee, suggested that stress may increase Petitioner's symptoms. The Arbitrator notes in reviewing Petitioner's medical treatment records that in times that Petitioner reported increased stressors (i.e. the passing of Petitioner's mother for whom Petitioner had provided end-of-life care) Petitioner also reported a worsening of her symptoms. The Arbitrator finds that there was, in fact, a correlation between increased stressors in Petitioner's history that correlated with an increase in her symptoms and her need for additional treatment. As for any symptoms resulting from the incident on January 7, 2011, Petitioner seemed to have plateaued by July 1, 2011 when Dr. Jayanthi recommended she continue with home exercises and return in three months for follow up, and Petitioner did not return for five months instead and at which time she presented with a new complaint – low back pain.

Finally, there is no evidence whatsoever that Petitioner has received any medical treatment for her alleged condition of ill-being since June 23, 2015, about a full four and a half years prior to this trial. This further weakens and discredits any claim of a medical causal connection of any current complaints Petitioner has to her work accident almost nine years ago when over half of that time she has not returned for any further treatment and when she did receive treatment, she did so very sporadically as noted in the medical records submitted into evidence.

For all of these reasons, the Arbitrator finds and concludes Petitioner has failed to prove a causal connection exists between the herniated L4-L5 disk and any other current condition of ill-being and the work incident occurring on January 7, 2011. The Arbitrator finds that Petitioner sustained a contusion and related symptoms in the incident on January 7, 2011 for which Petitioner achieved maximum medical improvement as of July 1, 2011 and that any subsequent complaints, conditions and treatment are not medically causally related to the January 7, 2011 incident. For this reason, the Arbitrator denies any claim Petitioner may have for post-July 1, 2011 medical or disability benefits.

Regarding the Arbitration 19(b) Decision as to J: Whether the medical services provided to Petitioner have been reasonable and necessary, the Arbitrator finds as follows:

Because the Arbitrator has found Petitioner has failed to prove accident and causal connection, this issue is moot. However, for the sake of thoroughness, the Arbitrator finds and concludes Petitioner has failed to prove by a preponderance of the credible evidence that the medical services provided to her after July 1, 2011 were reasonable and necessary.

Respondent's Section 12 examiner, Dr. Graf, testified that the treatment Petitioner received up to the date she was last treated prior to his evaluation had been reasonable and necessary. Dr. Graf further testified that the recommendation for a single-level fusion at L4-L5, while reasonable, was not the only surgical option to treat the condition. Dr. Graf opined that a microdiscectomy at that level may be sufficient to alleviate Petitioner's symptoms. The Arbitrator finds those opinions credible and persuasive and thus finds that Petitioner's medical treatment between April 4, 2011 through June 23, 2015 was reasonable and necessary as is the prospective surgery. ***However, for the reasons stated above, the Arbitrator finds that any medical treatment received by Petitioner after July 1, 2011 is not medically causally related to the January 7, 2011 incident at work.***

In addition, the Arbitrator finds and concludes Petitioner has exceeded the two choices of physicians to which employees are entitled under the Act. Petitioner initially presented to Loyola University Medical Center, so that constitutes her first choice of physician. Petitioner then began a course of treatment with several physicians in that medical group, all of whom fall within the chain of referrals for that first choice of physician.

Petitioner then chose a second physician, Dr. Frank Phillips at Midwest Orthopedics at Rush, who she saw on one occasion. Those are the two choices of physicians to which Petitioner is entitled to treat under the provisions of the Act.

All other physicians and facilities, which include Dr. Laich, Swedish Covenant Hospital, Athletico, Dr. Deutsch, fall outside Petitioner's first two choices of physician and regardless of reasonableness and necessity of treatment they may have provided or whether that treatment is causally related to a compensable accident, Respondent is not liable for payment of these medical expenses Petitioner incurred while treating with them.

Therefore, Respondent is not liable for any of the medical expenses incurred by Petitioner while treating with Dr. Laich, Swedish Covenant Hospital, Athletico, Dr. Deutsch and any referrals from same.

Robert M. Harris

February 6, 2020

Robert M. Harris, Arbitrator — Date

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

JENNIFER LINNABARY,

Petitioner,

20IWCC0775

vs.

NO: 18 WC 2354

RURAL KING,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 30, 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.

20IWCC0775

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: DEC 3 1 2020
DDM/pm
O: 12/22/2020
052

D. Douglas McCarthy

Stephen J. Mathis

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

20IWCC0775

LINNABARY, JENNIFER Case# **18WC002354**
Employee/Petitioner

RURAL KING
Employer/Respondent

On 1/30/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1937 TUGGLE SCHIRO LICHTENBERGER
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DANVILLE, IL 61832

2461 NYHAN BAMBRICK KINZIE & LOWRY
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CHICAGO, IL 60602

20IWCC0775

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)

Jennifer Linnabary
Employee/Petitioner

v.

Rural King
Employer/Respondent

Case # **18** WC **2354**

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 **Champaign**, on **12/5/19**. 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. ☒ 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, **10/30/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$24,336.00**; the average weekly wage was **$468.00**.

On the date of accident, Petitioner was **23** 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 **$10,999.51** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$10,999.51**.

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

ORDER

Respondent shall authorize and pay for prospective medical care as recommended by Dr. Kibler, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $312.00/week for 107 4/7 weeks, commencing 10/31/17 through 5/28/19 (82 weeks) and 6/10/19 through 12/5/19 (25 4/7), as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $10,999.51 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

1/28/2020
Date

FINDINGS OF FACT

TESTIMONY OF PETITIONER, JENNIFER LINNABARY

The parties stipulated and agreed that Respondent paid all related medical expenses up to the date of the hearing. They further stipulated that Respondent paid $10,999.51 in TTD benefits for which it is entitled to a credit.

Petitioner was employed as a splitter at Rural King in Mattoon, Illinois, beginning in August of 2017 (T. 11). A splitter splits product from a warehouse for distribution to different stores. She worked three days a week, twelve hours a day. She handled items that weighed anywhere from 0 to 50 pounds (T. 12).

On October 30, 2017 Petitioner was lifting a box weighing about 25 to 35 pounds. She turned to put it on the line and felt a stabbing burning pain in the right shoulder and lost all feeling in her arm (T. 12-13). She was in a lot of pain, her shoulder was burning, and she had no feeling in her arm right after the accident occurred (T. 13).

Petitioner had never injured her right shoulder or arm before that date. She had never had any treatment to the right arm or shoulder before her accident (T. 13-14).

After the injury Petitioner reported the accident and filled out an accident report. She was taken to the emergency room by a coworker upon the request of the supervisor, Paul Slifer (T. 14).

The care and treatment Petitioner obtained at Carle Convenient Care included trigger point injections in the right shoulder. The injections didn't help. She was still in pain. She was given a prescription for Norco and referred to Dr. Gurtler. She underwent an MRI of her shoulder. She was given off work status after that first visit (T. 14-15).

Petitioner was evaluated by Dr. Gurtler on December 7, 2017. Dr. Gurtler advised Petitioner her injury was outside the scope of his medical practice and referred her to Dr. Kibler. Dr. Gurtler continued her off work status (T. 15-16).

Petitioner was evaluated by Dr. Kibler on February 12, 2018. Dr. Kibler performed an examination and advised her that she needed surgery on the right scapula and trapeze (sic) tendon. Petitioner desires to have the surgery so she can get back to work and have full function of the arm (T. 16-17).

Petitioner has noticed no improvement to her right arm and shoulder since the accident. She is right side dominant (T. 17).

During the time Petitioner treated for her shoulder her doctors had her completely off work. No specific restrictions were imposed on the right arm and shoulder. She has been off work from the day of the accident until present day except for 12 days in 2019 when she attempted to work at Full-Fill Industries. She couldn't keep the job due to the repetitive motion. She received temporary total disability compensation benefits up to July, 2018, but nothing thereafter (T. 17-18).

Petitioner has not suffered any new injuries or accidents to the right shoulder or arm since 10-30-17. She admitted that on one occasion she opened a dryer door and had some sharp pains, but it was only temporary. She went back to the normal pain level (T. 19).

Currently, Petitioner remains in a lot of pain. She has a burning pain in the shoulder and it shoots down into the ribs and in the neck causing migraines. Symptoms are worse when moving the arm. Symptoms are better when resting (T. 19). She takes prescription medication for the right arm/shoulder condition including gabapentin. She also takes nonprescription Tylenol. She does not currently work (T. 19-20).

A nurse case manager from CorVel was assigned to work with Petitioner (T. 20).

Petitioner acknowledged she was depicted in surveillance footage shutting her SUV's back tailgate with her right arm. She explained she was able to close the tailgate, but it caused a lot of pain. She also acknowledged surveillance footage of her carrying a TV. She explained she was able to carry it, but it caused a lot of pain (T. 21-22).

Petitioner admitted she was married three days after the accident. She was scheduled to be married before the accident. Her right arm and shoulder hurt during the wedding and the party afterwards but she wasn't going to let it affect the marriage. She acknowledged she was depicted in Facebook pages admitted into evidence as Respondent's Exhibit 1 (T. 22-23).

Petitioner was examined by Dr. Biafora at the request of the insurance company. Dr. Biafora had her moving the arm in different positions. She told him she was in pain and was hurting. She couldn't do it. She testified that he still persisted and asked her to do push-ups off the wall. He had her in tears (T. 24-25).

CROSS EXAMINATION

On cross examination Petitioner admitted she sought medical treatment the same day of the accident. She gave a history that she was lifting a box that weighed between 25 and 35 pounds and felt a sharp pain in the right shoulder when she pivoted with the box. Her entire right arm went numb. By the time she treated, Petitioner complained of scapular pain with any use of her right arm (T. 26).

Petitioner admitted that when she went to Carle that first day, she denied any neck pain. During the physical examination, her right shoulder range of motion was limited due to pain. She admitted she had a dramatic pain response to light touch involving her scapular muscles. She was given trigger point injections but they did not help (T. 27).

Petitioner followed with Dr. Jamis on November 3, 2017. She told Dr. Jamis that her shoulder pain was the same as it was on October 30th. She also stated that it was not getting any better (T. 27-28). She still had numbness in her right arm, and that it was predominantly going down to the right hand. Petitioner agreed that it would be fair to say that between October 30th and November 3rd that she had severe right shoulder pain even with light touch (T. 28). She also had numbness in her right arm which limited her range of motion (T. 28-29).

Petitioner did not dispute that the Facebook photograph marked as Respondent's Exhibit 1 depicted her smiling (T. 29-30). She admitted she was able to use her right arm to hold her spouse's hand during the wedding ceremony (T. 30).

Petitioner had an MRI on November 27, 2017. She was seen by an orthopedic specialist, Dr. Gurtler, and gave a consistent history of the accident and that her shoulder hurt so bad after the accident she sought medical attention almost immediately (T. 30). She continued to complain about numbness and pain in the scapula (T. 30-31). She admitted Dr. Gurtler thought the MRI was mostly normal (T. 31). Dr. Gurtler noted pain complaints in the scapula and referred her to Dr. Kibler (T. 31).

Petitioner first saw Dr. Kibler on February 12, 2018 (T. 31-32). She told Dr. Kibler she had the same pain since the accident and had no improvement between October 30th and February 12th, 2018. She told Dr. Kibler she had difficulty with any type of right arm motion and that any motion of the right arm caused high levels of pain (T. 32). She rated her pain at seven out of ten (T. 32-33). She also told Dr. Kibler that any type of lifting up or out with her right arm caused pain (T. 33).

Dr. Kibler recommended surgery. He also wanted Petitioner to see a pain management doctor before the surgery (T. 33).

Dr. Jung first saw Petitioner on March 14, 2018. Petitioner told Dr. Jung that ever since the accident, she had significant constant burning, stabbing and aching pain (T. 33). She told him that the pain was aggravated with any movement of the arm (T. 33-34).

Petitioner had a prescription for Norco prior to seeing Dr. Jung. At that time, she was taking three to four 10 milligram Norcos per day. This medication was not helping with the pain (T. 34).

Petitioner was able to drive a vehicle when she saw Dr. Jung on March 14, 2018. She had a white Ford Escape at the time (T. 34). She was able to lift and carry her purse with the right arm around that time. She was able to close the car door with the right arm around that time. She was able to go shopping at Walgreens. On March 15, 2018, she was able to take her son to school. She was able to use her right hand to type on her cell phone (T. 35). She was able to open the car door and close it with the right arm (T. 35-36).

She went shopping at Walmart on March 15, 2018 and ate in the cafeteria. She was able to lift a chair and move it with both arms. While at Walmart that day, Petitioner also bought a flat screen television. She admitted she was able to open the rear door of the SUV with her right arm. She was also able to raise her right arm overhead in order to open the door (T. 36). She admitted she then used both arms to rearrange items in the back of the SUV. When she returned home that day, she was able to help carry the TV into the house. She admitted she used her right arm to reach up and close the large rear door of the SUV (T. 37).

Petitioner maintained she remains in the same constant state of pain as she has been since October 30, 2017 and that she's had no improvement in any of her pain or symptoms since the accident (T. 37).

TESTIMONY OF JEFF SAIS, INVESTIGATOR

Mr. Sais is employed at Meridian Investigations to perform surveillance details and get video of workmen's compensation claimants. He worked as a police officer for 20 years and took classes in Chicago to get licensed (T. 39).

Mr. Sais surveilled Petitioner on March 14 and 15, 2018 (T. 41-42). He did not surveil her in February of 2018 (T. 42). On March 14, 2018, Mr. Sais observed Petitioner going to a medical appointment during

which she exited her vehicle and re-entered the vehicle and went into the building for a medical appointment. She used the passenger's door. There was never any point on March 14, 2018 where he observed her and did not record her (T. 44).

On March 15, 2018, Mr. Sais observed Petitioner taking her child to school in the morning and returning home (T. 44). Later in the afternoon she took another child to school and then went to a gas station, and then to Subway. She had met with some people, sat inside Subway and then walked around Walmart, did some shopping and purchased a TV. Then she left Walmart and went home (T. 45).

At no point during March 14th and March 15th, did Mr. Sais notice Petitioner either scream or drop anything or shout out or wince or grimace (T. 46).

DOCUMENTARY EVIDENCE

Medical records from Carle Clinic beginning 8/25/04 show no prior injury or treatment to the right scapular area or shoulder before the accident (PX1, pgs. 1 – 75).

The first medical record following the accident shows that on 10/30/17 Petitioner was treated at the Carle Clinic. She gave a history of complaints to the right periscapular area that started earlier that morning at work after picking up a box estimated to weigh 25 to 35 pounds. Her right arm went numb for a bit and she had increased pain at the periscapular site with use of her right arm (PX1, pg. 75). She was administered three trigger point injections. She was diagnosed with periscapular pain. She was given off work until 11/4 (PX1, pg. 76).

In follow up on 11/3/17 the Petitioner's condition was not getting any better. She was diagnosed with acute right shoulder and right scapular pain. She was not responding to conservative treatment. An MRI of the right shoulder and scapula was ordered. She was taken off work until the MRI results came back (PX1, pg. 79).

An MRI of the right shoulder from 11/27/17 revealed supraspinatus and infraspinatus tendinopathy with partial thickness, partial width bursal surface tearing, degenerative changes of the humeral head, no full thickness rotator cuff tendon tear and an intact appearing glenoid labrum (PX1, pg. 99).

Dr. Gurtler evaluated the Petitioner on 12/7/17. Petitioner reported her numbness and scapular pain continued. She also had numbness in the right upper extremity, predominantly in the right hand. That portion of her problem was improved but the pain remained in the right superior medial border of the scapula. Dr. Gurtler thought the MRI was mostly normal. The MRI was of the shoulder and not specifically of her scapular area. An examination of the shoulder showed that she was only uncomfortable elevating the shoulder and flexion to about 90 degrees and in abduction to 90 degrees. Pain limited her. Her pain was pretty isolated. She was tender over the superior medial border of the scapula (PX1, pg. 80). She was given a prescription for pain medicine. Dr. Gurtler thought there was a specific injury at the superior medial border of the scapula. He offered an injection but if that did not help, he recommended a referral to a scapular specialist, Dr. Kibler (PX1, pgs. 81–82).

The Petitioner followed up with Dr. Jamis on 1/19/18 for continued right scapular pain. She was given a refill of hydrocodone as well as diclofenac. Flexeril was added. She was not cleared to return to work. A sling for her shoulder was ordered. She was to follow up in five weeks (PX1, pgs. 83- 85).

On 3/10/18 Petitioner presented to the emergency room complaining of right shoulder pain. She was given pain medication and told to follow up with her primary doctor (PX2, pgs. 225 – 226).

On 3/14/18 Petitioner established care with Dr. Jung at Carle for a pain medication program based on recommendations from Dr. Kibler. Norco was increased. Flexeril and Diclofenac were discontinued. Neurontin was continued (PX1, pgs. 148 – 150).

On 4/23/18 Dr. Jung adjusted Petitioner's pain medication switching from Neurontin to Lyrica due to nausea (PX1, pgs. 151 – 152).

An MRI of the chest without contrast, obtained on 5/26/18 at the request of Dr. Biafora, revealed no bilateral scapular or chest wall pathology, no localizing marrow or soft tissue edema, no suspicious mass visualized and an incidental finding regarding slight wall thickening of the cardiac left ventricle (PX2, pg. 28).

In follow up on 6/5/18 Dr. Jung increased the Petitioner's pain medication (PX1, pgs. 154 – 155).

On 6/9/18 Petitioner returned to the emergency room with right shoulder pain radiating to her neck. She was attempting to pull the dryer door open when she experienced a sharp pain in her right shoulder so severe she fell to the ground. Pain medication was administered and she was discharged (PX2, pg. 43 – 44).

In follow up on 7/5/18 Dr. Jung changed the Petitioner's pain medication to decreasing dosages (PX1, pgs. 156 – 157).

In follow up on 10/16/18 Dr. Jamis assessed chronic right scapular pain and refilled her Norco while waiting for surgery (PX1, pgs. 161 – 162).

The Petitioner went to the emergency room on 6/24/19 due to right scapular pain. She was diagnosed with acute exacerbation of chronic right shoulder pain, given a prescription for Toradol and Flexeril and told to apply ice and rest (PX1, pgs. 167 to 170).

The Petitioner returned to the emergency room on 9/10/19 due to ongoing right shoulder pain now with spasms in her right trapezius and right infrascapular area that were causing increased pain and headaches. A physical examination revealed any movement of the right shoulder passively caused discomfort in the infrascapular and intrascapular area. There was not so much discomfort in the shoulder joint itself to palpation. Range of motion was full passively but did elicit pain. She was diagnosed with chronic right shoulder pain with associated spasms. She was discharged with a prescription for valium for the muscle relaxer. She was to take ibuprofen for inflammation and pain. She was to follow up with her primary doctor (PX1, pgs. 170 – 172).

On 9/13/19 Petitioner returned to the emergency department for chronic right shoulder pain. She was given a prescription for pain and told to follow up with her primary care doctor (PX1, pgs. 173 – 174).

DEPOSITION TESTIMONY OF DR. KIBLER

Dr. Kibler practices in Lexington, Kentucky as an orthopedic surgeon with a sub-specialization in shoulder problems (PX4, pgs. 5 – 6). Doctors regularly refer patients to him in need of his specialty (PX4, pg. 7).

Dr. Kibler has performed 94 scapular muscle repairs in the last two years (PX4, pg. 9). Dr. Kibler estimated 80% of his practice is clinical and 20% is research and writing. He does very little medical legal work (PX4, pg. 10).

Dr. Kibler initially evaluated Petitioner on 2/12/18 (PX4, pg. 10). Dr. Kibler reviewed prior records including records from Dr. Gurtler and x-rays and MRI results (PX4, pg. 11). Petitioner advised Dr. Kibler of her accident when she was lifting a box. She described reaching across her body and pulled and felt a sharp pain and pop in the medial scapular border that radiated up to the neck (PX4, pg. 11). Petitioner described soreness and pain along the medial scapular border with pain radiating up into her neck as well as inability to do work because of pain (PX4, pgs. 11 – 12). Dr. Kibler summarized prior treatment. She was told she had a pulled muscle. She underwent physical therapy and rest, yet her pain got worse. She had further problems during therapy and treatment which actually seemed to make symptoms worse. Therapy was more of a rotator cuff type program with lifting and carrying and that seemed to make her pain worse (PX4, pg. 12). Dr. Kibler performed a physical evaluation and noted two major problems. One was the scapular injury. The other was paresthesia and parenthetic neuropathic pain. She had pain along the medial scapular border and along the inferomedial border. She had other areas of pain in the pectoralis minor, or the deltoid, and some areas along the upper trapezius as well. The findings relating to her scapula included pain, inability to retract the scapula back, difficulty using the arm in any position where her arm was out in front of the body because of the pain in the scapular area. There was no evidence of shoulder joint damage in terms of rotator cuff problems, instability or a dislocation. She had difficulty doing any scapular retraction because of the neuropathic pain. All of these tests were more difficult to do because of pain. She had both of these components going on with a high level of neuropathic pain and the findings of the scapula muscle injury (PX4, pgs. 12 – 13). Dr. Kibler diagnosed a clinical muscle injury overlain quite a bit by the pain response (PX4, pg. 13). Dr. Kibler opined that the cause of Petitioner's right shoulder symptoms was a scapular muscle injury (PX4, pg. 14). Dr. Kibler opined that the Petitioner's pain complaints were consistent with a scapular injury (PX4, pg. 15). Dr. Kibler could not discover any pre-existing condition that was aggravated or exacerbated to cause her symptomology. She had no specific problems in the past with scapular soreness or with inability to use her arm overhead (PX4, pg. 15).

Dr. Kibler re-evaluated Petitioner on 9/19/18. Since her last visit she had been in pain management and had a very significant and very gratifying decrease in the amount of peripheral pain. She had much less soreness down her arm, spasm, all the things that were secondary results of the pain which was down to 7 out of 10 instead of 9 out of 10. She was getting better from that standpoint. Her physical exam, because of the unmasking of the pain and getting rid of a lot of pain, was more specific. For the scapula itself she had what's referred to as a Type 1 scapular dyskinesis, which is a forward tilting of the scapula, which would indicate that her lower trapezius muscle, which would normally pull her scapula back, was not working well. She had impingement of her shoulder that with a specific movement was relieved. She had weakness of the muscle strength that was relieved by scapular stabilization. These were findings associated with a clinical syndrome, not exclusive, but are associated with a clinical syndrome with the muscle detachment. The point tenderness along the medial scapular border all the way down the medial border and then a palpable defect right along the border where the muscle is not attached well causes it to lose its tension and then kind of sink in. Then with any type of scapular retraction control she can't do because the muscles are not working well. So as a result of all those physical exam findings it was much more apparent that she met all the clinical inclusion criteria for a

scapular muscle detachment (PX4, pgs. 16 – 17). Based on these clinical findings Dr. Kibler recommended surgery (PX4, pg. 17).

Dr. Kibler explained why he would not expect to see a scapular tear on an MRI scan. He explained this had been reported twice in the literature and only 5 to 10% of MRIs will actually show something. This happens for several reasons. First it is very rare that they get an MRI of the scapula right after the acute event when the swelling would be present. In chronic cases MRIs do not show this. He further explained that a colleague at the Mayo Clinic showed how the low trapezius muscle which is not normally pulled away from the bone but kind of unraveled, appears intact because when you lay down for the MRI the muscle lays back down so it appears to be intact. The rhomboid muscles, which are the other muscles involved, don't pull away from the bone. They kind of thicken and scar down because they are actually fairly thin muscles and they are in the same plane of where they are normally attached to the bone. MRIs don't show abnormalities very well for these reasons and consequently are not very effective at improving or helping with the diagnosis (PX4, pgs. 17 – 18).

Dr. Kibler explained that he spent a lot of time over the last 15 years thinking about what diagnostic tests are able to show a tear. He concluded with a clinical diagnosis based on the following factors: there has to be a history of trauma. 75 to 80% or more of patients will show findings that include a history of acute trauma with immediate pain and soreness within several days after the injury; localized pain along the medial scapular border with a little palpable defect or a little area of divot; a high level of pain; inability to do activities that involve the arm out in front of the body because the shoulder blade is not controlled; the change in the symptoms by manual scapular stabilization by the examiner; and no relief by therapy or any other of these treatments are also part of the clinical diagnosis. If all of those clinical inclusion criteria are met, then the surgical findings and the post-operative outcomes can be pretty predictable. In this case Petitioner met all of those criteria (PX4, pgs. 18 – 19). Dr. Kibler explained the surgical procedure would be an open incision, identifying the muscles, pulling them back into the right position, and then drilling holes in the bone and actually sewing the muscles back to the bone. Research showed the average pain level decreased to 1.7 out of 10. Everybody gets under a 4. Dr. Kibler also expected an improved functional capability, not to normal, but somewhere between 75 to 90% of whatever the perceived norm is. Recovery time may be 6 to 8 months or even longer (PX4, pg. 19). Without surgery Petitioner's condition and prognosis would be as she was currently. With surgery her pain level and functional capabilities would likely improve. Without surgery her work status would be very limited. She could probably do something with her hands down at her side, maybe a little bit of finger function but certainly not any lifting away from her body or overhead. Any repetitive activities would be very difficult too because of the pain (PX4, pg. 20).

Dr. Kibler did not believe the Petitioner's pain complaints were out of proportion to her condition. Twenty percent or less have a high degree of pain. The fact that she's gotten better with pain management is a very good sign of improvement. Then, if the anatomic problem is fixed the pain will continue to decrease (PX4, pgs. 20 – 21).

CROSS-EXAMINATION

Dr. Kibler opined that the history of injury was consistent with one of the mechanisms by which the scapular muscle gets injured (PX4, pg. 23). Dr. Kibler opined that Petitioner's scapular muscle had been torn from the bone, probably not all the way but not functionally attached at the edge of the bone. That was the basis

for his surgical recommendation (PX4, pgs. 23 – 24). Dr. Kibler admitted he did not know how much the box weighed that Petitioner picked up causing her injury but that would only be one factor. Other factors would be the type of tension, the line of pull of a muscle, and the fatigue of the muscle, but that would be one of them. This type of injury could occur if the box weighed 100 pounds or 50 pounds or 40 or even 25 (PX4, pgs. 24 – 25). Dr. Kibler admitted that Petitioner's level of pain, 7 out of 10, was a pretty high level of pain (PX4, pg. 25). Dr. Kibler admitted that Petitioner told him she had difficulty with any type of motion with her arm, anything that she tried to use her arm out in front of her body or repetitively. She was also unable to do any type of activity with forward flexion (PX4, pg. 25). Dr. Kibler admitted she also told him she had severe pain and lack of function that had been continuous since October 30, 2017 but varied and intensified (PX4, pgs. 25 – 26). Dr. Kibler admitted that if medical records from a nurse practitioner on the date of the accident found dramatic pain response to light touch of the right periscapular muscles this would be consistent with her injury (PX4, pg. 26). Dr. Kibler admitted he was not aware Petitioner was married on November 2, 2017. Furthermore Dr. Kibler was not able to review photographs of Petitioner's wedding showing Petitioner during the ceremony not appearing to be in any pain (PX4, pgs. 26 – 27). Dr. Kibler admitted that during physical examination on 2/12/18 he noticed Petitioner was sensitive to touch anywhere along the posterior shoulder from the midline over the shoulder joint itself to the upper trapezius and down to the area below the inferomedial border of the scapula in the assessment. This pretty much described the large shoulder area including the scapula (PX4, pg. 27). Dr. Kibler attempted sulcus findings and a scapular retraction test but was unable due to pain. Petitioner was also unable to do a low roll maneuver (PX4, pgs. 27 – 28). Dr. Kibler admitted the shoulder MRI of 11/27/17 did not show anything in the shoulder joint itself (PX4, pg. 28). Dr. Kibler admitted that the MRI failed to show any rotator cuff or labral tearing which would be entirely consistent with Petitioner's history of injury and/or history of the progression from then and her symptoms. He explained, however, that this was not a shoulder joint problem (PX4, pgs. 28 – 29).

Dr. Kibler admitted that with the degree of problems Petitioner had he doubted she would be able to perform regular activities of daily living involving her right arm (PX4, pg. 29).

Dr. Kibler admitted he was not aware Petitioner saw Dr. Jung for pain management on 3/14/18 nor did he have any pain management records (PX4, pg. 29).

Dr. Kibler was not aware that in the course of 14 weeks from December of 17 through March of 2018 Petitioner was prescribed 380 tablets of Norco but he wouldn't be surprised (PX4, pg. 29). Dr. Kibler was aware that Petitioner had a follow up MRI of the scapular area that was labeled as a chest MRI on 5/26/18 but the MRI found nothing wrong. The MRI results were never provided to Dr. Kibler for his review. He was advised by the Petitioner that Dr. Biafora advised there was nothing wrong (PX4, pgs. 29 – 30).

Dr. Kibler admitted that he recommended scapular muscle detachment surgery despite there being no sign of any scapular or any muscle detachment shown on the 5/26/18 MRI. He was not surprised by that finding (PX4, pgs. 30 – 31).

Dr. Kibler admitted he did not know exactly what Petitioner was doing with her right arm in the 11 months after the injury. He didn't put any specific limitations on her (PX4, pg. 31). Dr. Kibler admitted that considering her pain levels it would probably be consistent with her subjective pain complaints that she would not be using her right arm very much. After 11 months of this use Dr. Kibler agreed one can sometimes expect

to see some sort of muscle atrophy (PX4, pg. 31). Dr. Kibler admitted that as of 9/17/18 the Petitioner did not have the kind of atrophy one would expect from a nerve injury or a retracted muscle tear (PX4, pg. 31).

Dr. Kibler maintained that his surgical recommendation was not primarily based on her subjective complaints but on the clinical criteria listed previously. The factors he considered to be objective rather than subjective included the history of the injury, the area of localizing pain, the evaluation of the decreased bulk of the muscle in the area and the change in the symptoms based on stabilizing the scapula into the retracted position (PX4, pgs. 31 – 32). Dr. Kibler maintained that despite Petitioner's subjective complaints she could probably lift a large 67-inch flat screen TV with her right arm. She could probably lift it. He didn't know how much pain she had but all the other muscles were working pretty good (PX4, pg. 32). Furthermore, Dr. Kibler maintained that she could also probably lift her right arm above her head to close the rear door of her sport utility vehicle and pull that down with her right arm (PX4, pgs. 32 – 33). Dr. Kibler maintained Petitioner probably could perform these activities but would probably be in pain (PX4, pg. 33). Dr. Kibler believed Petitioner hopefully could do activities of daily living because she had to do those kinds of things. She has another arm. She has alternative ways to maneuver the arm. There were other ways to achieve activities of daily living. Dr. Kibler did not expect Petitioner to be able to use her right arm in activities of daily living on a repetitive basis or overhead lifting or kinds of things that would be much more difficult to do because of the pain and muscle weakness (PX4, pg. 34). Dr. Kibler would not change his opinion if he knew that on 3/15/18 Petitioner was able to use her right arm to lift a large flat screen TV above her head with no evidence of pain behavior. He explained that her arm was not paralyzed. Her arm was not falling off of her body (PX4, pg. 35).

On redirect, Dr. Kibler thought that the Norco would help Petitioner be able to do activities of daily living in less pain (PX4, pg. 35). Dr. Kibler reviewed Nurse Brown's notes on the day of the accident and opined that the Petitioner's history was not inconsistent with anything she told him (PX4, pg. 36).

On recross, Dr. Kibler admitted he did not have any records indicating the Petitioner reported to her doctors that the Norco did not help with her pain (PX4, pg. 36).

On further redirect, Dr. Kibler did not hear anything on direct, redirect, or recross to cause him to change his opinion on causation (PX4, pg. 37).

DEPOSITION OF DR. BIAFORA

Dr. Biafora has been employed at the Hand to Shoulder Associates for about 9 to 10 years as an orthopedic surgeon with a subspecialty in shoulder to hand surgery. He is board certified in orthopedic surgery with a subspecialty certificate in hand surgery (RX2, pgs. 3 – 4). Dr. Biafora examined Petitioner on 3/20/18 for an independent medical evaluation (RX2, pg. 5). Dr. Biafora first examined her approximately 5 months after the alleged accident (RX2, pg. 6). Petitioner advised Dr. Biafora that she was lifting a box that weighed about 25 to 30 pounds from about the level of her head and, as she was bringing the box down, she felt a sharp pain in the back of her shoulder and that her arm went numb. She felt she had no control of her right arm. Thereafter she was evaluated that same day and had trigger point injections. She ultimately had an MRI and began to follow with an orthopedic surgeon. She underwent a subsequent injection. She was then referred to an orthopedic surgeon as well as to pain management. At some point surgery was recommended (RX2, pgs. 6 – 7). She reported pain over the lateral and posterior aspect of the right shoulder. She described that any attempt at motion significantly aggravated her pain. She denied any numbness or tingling that day. She described that

about 2 times per week her arm became numb. She denied any prior right shoulder complaints. She described the medications she was taking which included Norco (RX2, pg. 7). Petitioner described her employment. At the time of the exam she had not worked since the date of the injury (RX 2, pgs. 8 – 9).

Dr. Biafora did not notice any atrophy in her shoulder. There was no difference in the musculature between the right and left shoulder on exam. There was no scapular winging (RX2, pg. 9). Petitioner could not do the scapular winging test due to pain (RX2, pg. 10). Dr. Biafora admitted that while palpating various areas Petitioner noted severe tenderness that included the midline cervical spine as well as the right paracervical musculature. There was also severe tenderness at the right scapula, at the medial border, and at the rhomboids, which was also at the medial border of the scapula near the midline of the back. There was also tenderness at the trapezius. There was some noted tenderness at the right shoulder though it appeared less tender than the other areas (RX2, pgs. 10 – 11). Dr. Biafora further admitted that when testing for active forward flexion Petitioner was only able to raise her hand to reach about 40 degrees, which was really not too much at all, when she began to have severe pain posteriorly. At that point Dr. Biafora attempted to see if he could push it up under his power so she didn't have to activate her musculature to see if it would decrease the pain and make sure she wasn't too stiff and was able to reach about 120 degrees. He felt that the motion was pretty soft, meaning he could probably go further, but she was protecting herself. When pushing her arm up, she became tearful and said there was severe pain (RX2, pgs. 10 -11). Regarding abduction test results Dr. Biafora indicated at 45 degrees, which was significantly limited, she began to develop severe pain and became tearful (RX2, pgs. 11 – 12). Dr. Biafora could not perform provocative examination of the right shoulder due to guarding. He was able to review x-rays which revealed no abnormalities. The MRI revealed nothing significant other than some tendinopathy in the rotator cuff, which was not an uncommon finding in normal shoulders. There was an incidental cyst within the bone of the shoulder or the proximal humerus, which was likely irrelevant (RX2, pgs. 12 – 13). Dr. Biafora could not find any objective findings based upon his reading of the right shoulder MRI that would support Petitioner's subjective pain complaints. Based on his review of records and tests and his physical examination there were no other objective findings to support Petitioner's subjective pain complaints (RX2, pg. 13).

Dr. Biafora felt that her subjective complaints were not supported by any objective findings. He felt it possible she may have sustained some type of strain of the shoulder, more specifically, the area of the scapula or peri-cervical musculature. But after 5 months typically he would expect that condition to significantly improve. Her pain level wasn't really appropriate for that diagnosis. Dr. Biafora ordered an MRI to rule out any other positive findings (RX2, pgs. 13 – 14). Further treatment would be reconsidered following the results of the MRI. However, he felt Petitioner should be weaned away from her medications (RX2, pgs. 14 – 15). Assuming the MRI to be negative Dr. Biafora would consider Petitioner's condition to be of unknown etiology (RX2, pg. 15). At the time of the exam Dr. Biafora felt that restrictions would be indicated including avoid use of the affected extremity and to perform clerical duties only at that time (RX2, pg. 15).

Following the examination Dr. Biafora reviewed the MRI. The MRI of the chest comparing the reported symptomatic versus the unsymptomatic scapulothoracic area dated 5/26/18 did not demonstrate any pathology according to the report. The MRI did not reveal anything significant (RX2, pg. 17). Based on the MRI report Dr. Biafora did not feel that there was any condition that would be related to the alleged work injury. Without objective findings supporting Petitioner's subjective complaints Dr. Biafora could not establish a causal relationship (RX2, pg. 18).

CROSS EXAMINATION

Dr. Biafora became a doctor 5 years prior to practicing medicine. He performed a fellowship in the hand and upper extremity. That fellowship also dealt with shoulder injuries. Dr. Biafora has several publications and presentations dealing not only with the hand, wrist and elbow but with the shoulder (RX2, pg. 20). Dr. Biafora has treated dozens of scapular injuries. He has not performed surgery on scapular muscle tears in the past (RX2, pg. 34, lines 8-13). Dr. Biafora diagnoses a scapular muscle tear based on the mechanism of injury, patient's complaints, exam findings and ultimately an MRI (RX2, pgs. 34 – 35).

Dr. Biafora admitted the Petitioner had no prior right arm or shoulder treatment or problems based on his review of the history. But, he added, Petitioner did not have a significant trauma. He couldn't imagine her having a scapular muscle tear. A scapular muscle tear required a lot of energy disbursed through the shoulder girdle or the scapulothoracic area to cause a tear, a piece of muscle tearing off the scapula. The trauma would be very significant. He was talking about high energy automobile accidents. Merely lifting a 20-pound box was not really something that was going to cause a tear of a muscle off of a scapula. Not even 30 pounds or 50 pounds and certainly not if the person did it on a repetitive basis (RX2, pgs. 37 – 38).

Dr. Biafora thought it could cause a strain but not to actually cause the muscle to tear off. He admitted once the muscle tears it could tear further. And once it tears it causes pain (RX2, pg. 38). It was Dr. Biafora's opinion that the Petitioner potentially may have had a strain. She possibly strained her periscapular musculature at the time of the alleged accident (RX2, pg. 39).

Dr. Biafora admitted that regardless of any findings or lack of findings the Petitioner's symptoms were at least consistent with a scapular injury, some of them. The injury could be a tearing of 5 muscles off the scapula versus a muscle strain (RX2, pg. 45). Dr. Biafora was of the opinion that the accident as stated could not have produced a scapular tear (RX2, pg. 46). Dr. Biafora opined that a scapular tear should be able to be seen on an MRI (RX2, pg. 47).

Respondent's Exhibit 3 is a subpoena return from Carle for all records pertaining to Dr. Jamis. Respondent's Exhibit 3 covers the period from 11/7/17 to 2/21/19 and details several visits to the emergency room for ongoing right shoulder pain. It also details correspondence between Petitioner and the provider most of which pertain to medication refills (RX3).

Respondent's Exhibit 4 consists of surveillance video taken of the Petitioner on 3/14 and 3/15/18 (RX 4). To the Arbitrator's perception the following was noted: the surveillance conducted on March 15, 2018 lasted approximately 22 minutes. The Petitioner is depicted in this video rarely raising her right arm above shoulder height. She is shown casually swinging her right arm while hanging at her side. On one occasion for a few seconds she is seen typing on her cell phone with her right arm extended in front of her but never over shoulder height. She is seen opening a car door on two occasions without any noticeable difficulty. Her facial expressions cannot be seen clearly due to lack of clarity. She is seen in a cafeteria sitting mostly. Her right arm is mostly unseen. She really never raised her right arm up. When she left she used her left hand and arm to replace the chair. She was clearly favoring her right arm during the surveillance. She carried her purse over her left arm. She was seen closing her back tailgate with her left arm after loading a TV. She is seen raising her right arm to close the tailgate when unloading the TV at home. She carried the TV with the left arm into the house. Surveillance conducted on 3/14/18 last approximately 5 minutes. In this video the Petitioner is depicted

driving her car but her right arm is never really depicted. The video is mostly blurry and offers very little. She is seen carrying her purse over her right shoulder and shutting her car door in an underhanded manner.

CONCLUSIONS

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

Petitioner credibly testified that she did not have any injuries or treatment to her right arm or shoulder prior to her accident. Her testimony is unrebutted. No evidence to the contrary has been submitted. Petitioner gave a consistent history of her accident to all medical providers. All physicians' progress notes related Petitioner's scapular condition to her work injury. Her condition never really improved. There was no evidence to suggest other causes of Petitioner's current condition. While she may have had some incidents where she aggravated her condition, nothing rose to level of breaking the original causal link to her accident. Causation can be established by the chain of events and evidence of prior good health.

From the time she was hired to the date of her accident Petitioner worked full time, 12 hours a day, three days a week. Prior to her accident Petitioner did not have any condition related to her right arm and shoulder. She was not given any negative job performances. Her job was considered heavy.

After her accident Petitioner noticed severe pain in the right shoulder. Despite treatment her right shoulder continued to cause severe pain. Despite conservative measures including injections and therapy Petitioner did not improve and was referred to a specialist, Dr. Kibler. An MRI did not reveal any abnormality. Dr. Gurtler opined there was a specific injury at the superior medial border of the scapula.

Two experts testified on the issue of causation: Dr. Kibler and Dr. Biafora. Dr. Kibler is the specialist Petitioner was referred to by Dr. Gurtler. Dr. Biafora is Respondent's Section 12 examiner. The depositions of both doctors were entered into evidence.

Dr. Kibler has been practicing medicine for over 40 years according to his CV. He has university appointments and is an associate clinical professor. He is currently involved in research regarding surgical outcomes of patients with medial scapular muscle detachments as well as other conditions. He publishes extensively. His CV is 67 pages long. Dr. Kibler has performed surgery on 94 scapular muscle tears in the last two years. Dr. Kibler is very well credentialed.

Dr. Kibler testified that Petitioner suffered a scapula muscle injury and that her complaints were consistent with a scapular tear. His opinion was based on a lack of findings on MRI, his physical examination results and persistent pain and difficulty using the arm. Dr. Kibler explained that he would not expect findings of a scapular tear on MRI examination because in his experience rarely is there an MRI right after the acute event when swelling would be present. He explained that in chronic cases MRIs do not show the tear. This is because when the MRI is taken the patient is laying down and that causes the scapular muscle to lay normal making it difficult to see the tear. For these reasons, Dr. Kibler does not rely exclusively on an MRI to make a diagnosis.

When Dr. Kibler evaluated the Petitioner a second time he diagnosed a Type 1 scapular dyskinesis or a forward tilting of the scapula. This was based on further physical exam findings from which he concluded she met the clinical inclusion criteria for a scapular muscle detachment.

Dr. Kibler was of the opinion that Petitioner's shoulder condition was caused by the accident and that she required surgery.

Dr. Biafora is certainly well qualified in his field of expertise. He has been practicing medicine for over 10 years. His CV is 5 pages in length. He has an extensive background in hand and wrist treatment. Dr. Biafora recorded five lectures involving the shoulder in his CV.

Dr. Biafora was given a consistent history with the accident by Petitioner. He performed a physical examination and noted no atrophy in her shoulder. He found no scapular winging in large part due to pain. He admitted Petitioner had severe tenderness in the right scapula near the midline of the back. He also noted tenderness at the trapezius. Further tests were limited due to guarding. He reviewed the MRI and found nothing significant. Dr. Biafora could not find any objective findings based on his review of the MRI that would support her subjective complaints. He felt she could have sustained some type of strain of the shoulder or the scapula or peri-cervical musculature. He felt after 5 months she should be significantly improved.

Dr. Biafora ordered another MRI to rule out any other positive findings. The subsequent MRI did not reveal any shoulder pathology or anything significant. Based on the lack of MRI findings Dr. Biafora did not feel there was any condition that would be related to the alleged work injury. Consequently, Dr. Biafora could not find a causal connection.

The Arbitrator finds the testimony and opinions of Dr. Kibler are more persuasive than those of Dr. Biafora. Dr. Kibler has much more experience and is much more credentialed for scapular tears than Dr. Biafora. While he has treated scapular tears in the past Dr. Biafora has no surgical experience with scapular tears. Dr. Kibler has performed 94 scapular surgeries in just the past 2 years. Furthermore, Dr. Biafora relies exclusively on positive MRI findings to diagnose a scapular tear. Dr. Kibler persuasively explained why a scapular tear would not be visualized on an MRI. Dr. Kibler's clinical diagnosis is based on a tried and true process and years of experience. The Arbitrator finds Dr. Kibler's opinion more persuasive because he has much more experience in the diagnosis and treatment of scapular tears.

The Arbitrator finds significant that both Dr. Kibler and Dr. Biafora agree that the accident caused some injury. To what extent they disagree. The Arbitrator finds Dr. Biafora's exclusive reliance on positive MRI findings to diagnose a scapular tear to be unpersuasive. This is especially true given the testimony and research and experience of Dr. Kibler. Dr. Kibler's research and experience in the field of scapular tears makes him well suited to clinically diagnose a scapular tear.

The video surveillance does not undermine the Petitioner's credibility. The Petitioner admitted doing all the activities depicted in the video. She admitted also that any activity caused pain. She was never restricted from reaching overhead. Closing a car door or a tailgate does not equate to no injury or no pain. When confronted with this evidence Dr. Kibler did not change his opinions. In fact, he acknowledged that Petitioner could do those activities but would probably be in pain.

The Arbitrator notes that Mr. Sais spent almost 30 hours observing petitioner and only produced less than 27 minutes of total surveillance and out of that maybe less than 30 seconds showing the Petitioner using her injured right arm. Most of that was in a limited and guarded manner. The Respondent's surveillance

merely depicted Petitioner engaging in benign activities of daily living. The Arbitrator is therefore not persuaded that the Petitioner is or was embellishing her symptoms.

The Arbitrator also notes Respondent's Exhibit 1, a Facebook posting of Petitioner's wedding ceremony. Respondent implies that this evidence undermines Petitioner's credibility because she was married three days after her accident and appeared to be happy. The Arbitrator finds this argument too speculative based on photos alone. Furthermore, she testified that she was not going to let her injury interfere with her wedding plans. The Arbitrator finds that petitioner enjoying her wedding despite her injury was not unreasonable and does not affect the credibility of her testimony regarding her symptoms following her accident.

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds that the condition of ill-being with respect to the Petitioner's right shoulder and scapula, including the need for right scapular surgery, is causally related to the accident of October 30, 2017.

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

The findings of fact and conclusions of law made above are hereto incorporated by reference herein.

Petitioner testified she wanted the right scapular surgery so she could get back to work and have full function of the arm. Dr. Kibler has had good results in reducing pain and improving function with scapular surgery. The Arbitrator finds Petitioner's desire to have the right shoulder and scapular surgery to be reasonable and the Respondent is therefore ordered to approve and pay for the same including all related treatment and all reasonable and necessary subsequent follow up care and treatment.

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

The findings of fact and conclusions of law made above are hereto incorporated by reference herein.

Respondent did not object to the period of claimed disability, except on the basis of liability. Having already found in Petitioner's favor on the issue of causal connection, the Arbitrator awards 107 4/7 weeks of temporary total disability compensation benefits.

Respondent shall pay Petitioner temporary total disability benefits of $312.00/week for 107 4/7 weeks, commencing 10/31/17 through 5/28/19 (82 weeks) and 6/10/19 through 12/5/19 (25 4/7), as provided in Section 8(b) of the Act. Respondent shall be given a credit of $10,999.51 for temporary total disability benefits that have been paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen Bourque, Jr.,

Petitioner,

20IWCC0776

vs.

NO: 17 WC 29758

WLS-TV,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary disability, permanent disability and evidentiary rulings, 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 28, 2020, is hereby affirmed and adopted.

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

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

20IWCC0776

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: DEC 3 1 2020
o: 12/3/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BOURQUW, STEPHEN
Employee/Petitioner

Case# **17WC029758**

WLS-TV
Employer/Respondent

20IWCC0776

On 1/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ HORWITZ & ASSOC
ZBIGNIEW BEDNARZ
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
BROOKE TORRENGA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)

COUNTY OF **COOK**)

20IWCC0776

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Stephen Bourque,
Employee/Petitioner

v.

WLS-TV,
Employer/Respondent

Case # **17** WC **29758**

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, Illinois**, on **11/21/2019**. 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 **6/28/2015**, 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 $**87,284.14**; the average weekly wage was $**1,678.54**.

On the date of accident, Petitioner was **34** 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

Respondent shall pay reasonable and necessary medical services of $**20,345.16**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**1,119.03**/week for a period of **10-5/7** weeks, commencing **9/15/2017** through **11/28/2017**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**735.37**/week for a period of **64.5** weeks because he sustained permanent partial disability to the extent of **30**% loss of use of the **right leg** pursuant to §**8(e)(12)** of the Act.

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

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

January 21, 2020
Date

JAN 28 2020

MEMORANDUM OF DECISION OF ARBITRATOR

STATEMENT OF FACTS

Petitioner's Testimony and Medical Treatment

Petitioner Stephen Bourque, 34 years old, lives in Shorewood, Illinois. (TA at 15-16, AX 1). Petitioner currently works for Respondent, WLS-TV, in Chicago, and has been working there since 2015. (TA at 16). Respondent is a TV news organization that operates out of a newsroom and equipment storage facility in Chicago, Illinois. (TA at 17).

Petitioner works for Respondent as a news photo-journalist. (TA at 17). Petitioner's shifts vary, but they normally last at least 8 hours with some overtime. (TA at 17-18). Petitioner works 5 days per week, resulting in 40 hours per week without overtime. (TA at 18). A typical day begins by Petitioner reporting to his assignment desk. (TA at 18). There, Petitioner is provided his assignment for the day; once he has his assignment, he loads his equipment into his assigned work vehicle and sets out to cover whatever news events are happening that day. (TA at 18-19). The equipment includes a camera, tripod, gear bags and anything else needed to complete a job in the field. (TA at 19). The camera alone can weigh over 50 pounds. (TA at 19). Petitioner works both indoors and outdoors; when working outdoors, he works in all kinds of weather. (TA at 19-20).

On June 28, 2015, Petitioner was assigned to cover the Chicago Pride Parade in the boys' town neighborhood on Chicago's north side. (TA at 20). Petitioner was assigned to a reporter, Jade Hernandez, to cover different parade floats. (TA at 21). Hernandez wanted to get coverage of the Blackhawks Stanley Cup float so Petitioner climbed onto the float by way of a side ladder. (TA at 22). After getting the video, Petitioner placed his camera over his shoulder and descended the ladder. (TA at 22). As Petitioner stepped down on to his right foot his right knee buckled under the weight of the camera, causing him to fall to the ground. (TA at 22-23). Hernandez helped him get up and to walk back to their news vehicle. (TA at 23). As they had already finished their work for the day, Petitioner drove the vehicle back to the newsroom facility. (TA at 23-24). Upon arriving to the newsroom, Petitioner reported the injury to his assignment editor, Kari Walker, his newsroom manager, Virginia Matos, and his operations manager, C.C. Boggiano. (TA at 24). Petitioner then completed an accident report where he documented an injury where he "landed funny" on his right leg and twisted his knee. (TA at 25, PX 6 at 2). After Petitioner completed his accident report, he went home and iced his knee and made an appointment with his primary care physician to evaluate his right knee.

Petitioner admitted he had a prior injury involving his right knee. (TA at 26). In approximately 1999 or 2000, Petitioner suffered a partial ACL tear while playing basketball in high school. (TA at 26-27). Petitioner underwent about 2 months of physical therapy after the injury, but was never recommended surgery. (TA at 26-27). Between the end of his treatment in high school and his June 28, 2015 work accident, Petitioner sought no additional treatment for his right knee. (TA at 28). Likewise during this period, Petitioner's right knee did not cause any pain or significant issues, nor did it impact his ability to work. (TA at 28-29). Lastly, Petitioner did not experience any giving way episodes, nor did he have any problems with stability in the right knee during this period. (TA at 28).

Petitioner first sought treatment on June 30, 2015. (TA at 29, PX 1 at 236-39). Petitioner was examined by a physicians' assistant, Aubrey Grabow, at DuPage Medical Group. (TA at 29, PX 1 at 237). Petitioner was recommended to ice and rest the knee. (TA at 29, PX 1 at 237). Grabow also discussed a potential need for an MRI depending on his symptoms. (TA at 29-30, PX 1 at 238). Petitioner returned for a follow-up on July 30, 2015 with much the same complaints. (TA at 30, PX 1 at 233-35). Petitioner was recommended physical therapy, which he started soon thereafter. (TA at 30, PX 1 at 233). Petitioner returned to DuPage Medical Group on September 1, 2015. (TA at 30-31, PX 1 at 206). At that time, Petitioner saw Dr. Stacey Carpenter with complaints of feeling like something was caught in the back of his throat. (TA at 31, PX 1 at 206). Dr. Carpenter ordered an ultrasound of Petitioner's is throat. (TA at 31, PX 1 at 208). Petitioner returned to Ms. Grabow the following day, September 2, 2015, to address his ongoing right knee complaints. (TA at 31, PX 1 at 203). Dr. Carpenter noted that Petitioner's knee condition improved with therapy but noted that his right knee gave out about 2 weeks prior. (TA at 31-32, PX 1 at 203). Petitioner testified that when he described his knee as "giving out," he meant that it felt unstable, particularly when carrying his equipment at work. (TA at 32). Grabow referred Petitioner to an orthopedic surgeon for further evaluation. (TA at 32, PX 1 at 204).

The following day, September 3, 2015, Petitioner underwent the ultrasound Dr. Carpenter recommended. (TA at 32, PX 1 at 11-12). Dr. Carpenter reviewed the ultrasound results on or about September 8, 2015 and identified a small mass on his thyroid. (TA at 32-33, PX 1 at 12). Dr. Carpenter recommended that Petitioner undergo a biopsy and referred him to a specialist to complete the same. (TA at 33, PX 1 at 12).

While Petitioner awaited his biopsy, he continued treatment for his right knee by seeing an orthopedic surgeon, Dr. Kenneth Sanders, on September 10, 2015. (TA at 33, PX 1 at 200-02). Petitioner presented with ongoing complaints of pain and stiffness in the right knee. (TA at 33, PX 1 at 201). Dr. Sanders examined him and recommended an MRI to evaluate any potential pathology. (TA at 33-34, PX 1 at 202). In the interim, Petitioner was examined by an otolaryngologist, Dr. Bryan Kemker, on September 16, 2015. (PX 1 at 198). Dr. Kemker confirmed the need for a biopsy and scheduled the same for September 25, 2015. (PX 1 at 198, 193).

Petitioner underwent the right knee MRI on September 28, 2015, and the biopsy on his thyroid on September 25, 2015. (TA at 34, PX 1 at 193, PX 2 at 5). Petitioner returned to Dr. Sanders on October 1, 2015. (TA at 34, PX 1 at 190-92). Dr. Sanders reviewed the MRI and noted the old ACL tear, but also that the menisci were intact. (TA at 34, PX 1 at 191, PX 2 at 5). Dr. Sanders administered a lidocaine injection and recommended that Petitioner return in 6 weeks. (TA at 34, PX 1 at 191).

The following day, October 2, 2015, Petitioner returned to Dr. Kemker to review his biopsy results. (TA at 35, PX 1 at 188). Dr. Kemker diagnosed Petitioner with thyroid cancer and recommended a total thyroidectomy surgery. (TA at 35, PX 1 at 189). About 2 weeks later, Petitioner again returned to Dr. Sanders for his right knee despite Dr. Sanders recommending he return in 6 weeks. (TA at 36, PX 1 at 186). At this visit, Petitioner noted that on October 11, 2015, about 5 days prior, his right knee again gave out on him again. (TA at 36-37, PX 1 at 186). Dr. Sanders recommended a "tincture of time" and a knee sleeve; but otherwise released Petitioner to return to him as needed. (TA at 37, PX 1 at 186).

At this stage, Petitioner suspended his treatment for the right knee and underwent treatment for his cancer diagnosis. (TA at 37-38). Petitioner underwent pre-operative testing with Dr. Carpenter on November 25, 2015. (PX 1 at 181). He then had his thyroidectomy surgery on December 15, 2015 and underwent radiation treatment thereafter. (TA at 38, PX 1 at 174, 176). Throughout the rest of 2016, Petitioner continued to battle various health issues including complications related his thyroid cancer, such as hypothyroidism and related hormone therapy, as well as other upper respiratory issues including asthma, chest congestion, sinusitis, bronchitis and strep throat. (PX 1 at 176, 170-71, 165-66, 158, 154, 149, 142, 138, 130, 126, 122-23). Finally, in late 2016, Petitioner was recommended sinus surgery by his ENT. (TA at 41, PX 1 at 119).

On January 30, 2017, Petitioner underwent sinus surgery, including a tonsillectomy, among other procedures. (TA at 41, PX 1 at 114, 111, 108). Petitioner continued to undergo treatment for these issues through the first half of 2017. (TA at 41, PX 1 at 104, 99, 94). Although Petitioner was not actively treating for the right knee during this hiatus, his records nevertheless continued to include repeated references to right knee complaints. (PX 1 at 154, 150, 105, 101, 96).

Finally, on May 1, 2017, Petitioner resumed his treatment for his right knee. (TA at 41-42, PX 1 at 92-93). On that day Petitioner was examined by another orthopedic surgeon, Dr. Kevin Walsh, on the recommendation of a family member. (TA at 43, 60, PX 1 at 93). Petitioner testified that he continued to experience buckling and instability in his right knee between his last visit with Dr. Sanders in 2015 and when he resumed his knee treatment with Dr. Walsh in 2017. (TA at 42). Petitioner presented to Dr. Walsh with ongoing achiness in his right knee since a work accident one and a half years ago. (TA at 43, PX 1 at 93). Dr. Walsh examined Petitioner and was suspicious of a meniscus tear, so he recommended a repeat MRI. (TA at 43, PX 1

at 93). Petitioner underwent the MRI on May 10, 2017 and returned to Dr. Walsh on May 15, 2017. (TA at 44, PX 1 at 91, 6). Dr. Walsh reviewed the MRI and diagnosed Petitioner with a torn medial meniscus, as well as the old ACL tear. (TA at 44, PX 1 at 91). Dr. Walsh recommended arthroscopic surgery, but Petitioner wanted to hold off as he was in his busy season. (TA at 44, PX 1 at 91). Petitioner returned again to Dr. Walsh on August 17, 2017 at which time he was scheduled for surgery. (TA at 45, PX 1 at 88-89).

Petitioner underwent arthroscopic surgery with Dr. Walsh on September 15, 2017, which included a reconstruction of the ACL as well as a partial medial meniscectomy. (TA at 45, PX 1 at 65-67). Dr. Walsh removed Petitioner from work at that time. (TA at 45). Petitioner returned to Dr. Walsh post-operatively on September 21, 2017. (TA at 45-46, PX 1 at 60). Dr. Walsh documented improvement in Petitioner's right knee stability and recommended he begin physical therapy. (TA at 46, PX 1 at 60). Petitioner started physical therapy at DuPage Medical Group on September 27, 2017. (TA at 46, PX 1 at 52). Petitioner returned for a final visit with Dr. Walsh on November 14, 2017. (TA at 46, PX 5 at 18). Petitioner wanted to be released back to work at that stage, but Dr. Walsh wanted him to complete physical therapy first. (TA at 46, PX 5 at 18). Dr. Walsh did release Petitioner back to work starting November 29, 2017, at which time Petitioner returned to work for Respondent. (TA at 46-47, PX 5 at 18). Petitioner testified he was removed from work from the date of his surgery, September 15, 2017, through the time he was released to full duty work, starting on November 29, 2017. (TA at 47).

Petitioner testified he notes weakness in his right knee, particularly while carrying his equipment at work. (TA at 47). This causes Petitioner to be more apprehensive while going up or down steps, or when getting into a vehicle. (TA at 47-48). Petitioner tends to shift his weight primarily to the left side when climbing stairs or entering a vehicle. (TA at 48). Petitioner also tends to use his upper body to further reduce weight-bearing on the right knee. (TA at 48). Petitioner testified that he manages his right knee with ibuprofen a couple times per week. (TA at 48). In the context of work, Petitioner testified that his right knee makes him a lot slower than he was before. (TA at 48-49). This impacts Petitioner's ability to keep pace with his reporters. (TA at 49). Petitioner did note, however, that the stability in his knee has improved with surgery, although it is not as stable as it was before his work accident. (TA at 49).

On cross-examination, Petitioner admitted that he did tear his ACL while playing basketball in the late 90's. (TA at 50). Petitioner testified, however, that he was able to continue playing basketball after that injury and, in fact, participated in Special Olympics basketball. (TA at 50). He admitted that he continues to do his job and that the job requires him to walk, stand, squat, and climb and to lift his camera that weighs over 50 pounds. (TA at 51-52). Petitioner confirmed that his right knee gave out on him when he stepped off the ladder in his work accident but could not remember how high off the ground that ladder was. (TA at 53). Petitioner

acknowledged the incidents of his knee giving out that he reported to Dr. Sanders also occurred at work. (TA at 55). Petitioner admitted he had no reason to believe that Dr. Sanders was not documenting his complaints. (TA at 56). Petitioner further admitted he did not advise Dr. Sanders of his thyroid condition at his last visit on October 16, 2015. (TA at 56). Nevertheless, Dr. Sanders released him without any prescriptions for additional treatment or medications related to the right knee. (TA at 56-57). Petitioner did clarify, however, that he was frequently taking ibuprofen to manage his right knee complaints after Dr. Sanders released him. (TA at 57). Petitioner acknowledged that Respondent was paying for his knee treatment through that initial release by Dr. Sanders, and Petitioner had no reason to believe that would stop. (TA at 58).

Petitioner testified he continues to undergo follow-up treatment for his thyroid cancer, although it is less frequent than it was previously. (TA at 58-60). Petitioner admitted that he did not have any formal treatment for his right knee between October of 2015 and May of 2017. (TA at 61). Petitioner acknowledged that none of his doctors recommended that he focus only on his thyroid condition instead of his knee. (TA at 61). Petitioner further admitted that none of his doctors told him he could not have knee surgery because of his thyroid issue. (TA at 61). In fact, when Petitioner did resume his knee treatment with Dr. Walsh in May of 2017, he was still undergoing treatment for both his thyroid cancer and his sinus issue. (TA at 61). Petitioner also did not miss any time from work during this period due to his knee. (TA at 61-62). Petitioner did miss time due to his other health conditions, but generally continued to work full duty without restriction. (TA at 62-63).

When Dr. Walsh recommended surgery in May of 2017, Petitioner delayed the surgery because the summer is his busy season. (TA at 63-64). Petitioner testified that as a freelance news photo-journalist, he would only be paid if he actually worked. (TA at 64). As the summertime was his busy period, Petitioner wanted to capitalize on that work while he could. (TA at 64). Petitioner acknowledged that he did not similarly delay his sinus surgery when that was recommended. (TA at 64). Although, Petitioner clarified that the surgery was not recommended during his busy season. (TA at 70).

On re-direct, Petitioner again reiterated that his right knee did not give out on him between his ACL injury in 2000, and his work accident in 2015. (TA at 66). Petitioner testified that he did experience instability in his right knee after the work accident in 2015. (TA at 67). This instability affected his work, but he was able to take breaks as needed. (TA at 67). Petitioner confirmed that the surgery recommended by Dr. Walsh was the first surgery ever recommended on his right knee. (TA at 69-70).

Deposition of Dr. Kevin Walsh

Dr. Kevin Walsh testified on Petitioner's behalf in an evidence deposition on July 8, 2019. (PX 5 at 1). Dr. Walsh is an orthopedic surgeon; he first became board certified in orthopedic surgery in 1990. (PX 5 at 5).

He focuses approximately 25% of his clinical practice in the treatment of the knee. (PX 5 at 6). Although he treats several other parts of the body, the knee comprises the largest minority share of his practice. (PX 5 at 6). Dr. Walsh performs approximately 300 knee surgeries per year; about 200 of those are arthroscopic surgeries involving the meniscus. (PX 5 at 7). Dr. Walsh performs approximately 12 to 24 ACL reconstructions per year. (PX 5 at 6-7).

Dr. Walsh testified that instability in the knee can present as a patient feeling as if the knee wants to buckle or give out. (PX 5 at 7). Dr. Walsh explained that the knee is held together by four ligaments that connect the tibia to the femur: the ACL, the PCL, the MCL and the LCL. (PX 5 at 7). If any one of those ligaments is torn, the patient may sense instability. (PX 5 at 7). However, some patients can have deficiency in one of those structures, for example the ACL, and not sense any instability. (PX 5 at 7).

Dr. Walsh testified he prepared two narrative reports at the request of Petitioner's attorney. (PX 5 at 8-9). Dr. Walsh reviewed medical records from DuPage Medical Group, Petitioner's MRI images and reports, as well as the Section 12 report prepared by Dr. J. Scott Player. (PX 5 at 9-10).

Dr. Walsh testified he treated Petitioner as a patient of his. (PX 5 at 7-8). Dr. Walsh first examined Petitioner on May 1, 2017. (PX 5 at 10-11). At that visit, Petitioner presented with achiness in his right knee resulting from a work accident one and a half years prior. (PX 5 at 11). Petitioner previously treated with Dr. Sanders and had undergone an MRI, which noted a prior ACL injury. (PX 5 at 11). Dr. Walsh noted a slight effusion in the right knee and a positive McMurray maneuver. (PX 5 at 11). Dr. Walsh explained that a McMurray maneuver is a test for evaluating the possibility of a meniscus tear. (PX 5 at 11-12). Dr. Walsh recommended a repeat MRI, which was completed on May 10, 2017. (PX 5 at 12). Dr. Walsh reviewed the MRI on May 15, 2017 and diagnosed Petitioner with a medial meniscus tear in addition to a chronic ACL tear. (PX 5 at 12-13). Dr. Walsh explained that a chronic ACL tear suggested that it had been torn for more than three months; most likely, it was related to the ACL injury in the late 90's. (PX 5 at 13). At that stage, Dr. Walsh recommended surgical repair, including a partial medial meniscectomy as well as an ACL reconstruction. (PX 5 at 13). Petitioner initially wanted to delay the surgery; but returned to Dr. Walsh on August 17, 2017. (PX 5 at 14). At that time, Dr. Walsh scheduled Petitioner for surgery on September 15, 2017. (PX 5 at 14).

Dr. Walsh also discussed the history of Petitioner's right knee condition. (PX 5 at 14-15). Dr. Walsh noted that Petitioner had been treating with Dr. Sanders in 2015, who felt the knee was stable and opted not to repair it at that time. (PX 5 at 15). However, Dr. Walsh noted Petitioner experienced a "giving way episode" after his June 28, 2015 work accident. (PX 5 at 15). That episode suggested to Dr. Walsh that Petitioner's right knee was, in fact, not stable. (PX 5 at 15-16). Dr. Walsh testified he was unaware of any stability issues prior to the 2015 work accident. (PX 5 at 16).

Dr. Walsh did perform the right knee surgery on September 15, 2017. (PX 5 at 17). Dr. Walsh noted intraoperatively that both the ACL and meniscus tears appeared to be chronic. (PX 5 at 17). Petitioner returned post-operatively to Dr. Walsh on September 21, 2017; at this stage Dr. Walsh noted that the knee was stable, that the wounds were clean and dry and ordered a course of physical therapy. (PX 5 at 17). Petitioner returned to Dr. Walsh on November 14, 2017 at which time his right knee was doing well. (PX 5 at 18). Dr. Walsh testified he authorized Petitioner to return to work once he completed physical therapy, which would be November 29, 2017. (PX 5 at 18). Dr. Walsh declared Petitioner at MMI at that stage. (PX 5 at 18).

Dr. Walsh testified that his diagnosis of Petitioner's right knee condition was status post-ACL reconstruction with a partial medial meniscectomy. (PX 5 at 19). Petitioner's knee was rock solid and was doing well. (PX 5 at 19). Dr. Walsh opined that the treatment necessary to relieve Petitioner from the effects of his right knee condition included the surgery he performed, as well as the post-operative physical therapy. (PX 5 at 19).

Dr. Walsh opined that the June 28, 2015 work accident represented an instability event that weakened the stability in Petitioner's right knee. (PX 5 at 19-20). Dr. Walsh noted Petitioner reported subsequent instability episodes; it was these episodes that ultimately tore the meniscus. (PX 5 at 20). Dr. Walsh explained that the pre-existing ACL deficiency, combined with the weakened stability in the knee, predisposed Petitioner to the meniscus tear. (PX 5 at 20). Dr. Walsh explained that the work accident was a cause of the need for the surgery he performed. (PX 5 at 20-21). Dr. Walsh further opined that the ACL probably needed to be reconstructed as soon as it was diagnosed, but Petitioner was able to function for over 15 years before the accident caused his recurrent instability which ultimately led to the meniscus tear. (PX 5 at 22-23).

Dr. Walsh compared the initial September 23, 2015 MRI to the later May 10, 2017 MRI. (PX 5 at 23-24). Dr. Walsh explained that despite the fact that the meniscus was not present on the earlier, post-accident MRI, he nevertheless felt the meniscus tear diagnosed in the later MRI was related to the accident. (PX 5 at 24). Dr. Walsh explained that the instability episodes started by the work accident caused the knee to become more and more unstable, which exposed the meniscus to a risk of tearing, which it in fact did. (PX 5 at 24). The natural history of an ACL deficiency is instability and risk of meniscal pathology; the fact that Petitioner had an ACL deficiency puts him at risk of the meniscus tearing especially in the context of recurrent instability. (PX 5 at 25-26). Since the work accident triggered the recurrent instability episodes, the work accident was a cause of the meniscus tear and the need for surgery. (PX 5 at 25-26).

Dr. Walsh supported his opinion by pointing to the June 30, 2015 office note that documented evidence of an acute injury. (PX 5 at 27-28). Dr. Walsh then pointed to two documented instances of knee instability in the records: first, on September 2, 2015 a physician's assistant documented that Petitioner's right knee gave out

two weeks prior; and second, on October 16, 2015, Dr. Sanders documented that Petitioner's knee gave out again on October 11, 2015. (PX 5 at 28-31). Lastly, Dr. Walsh indicated that his intraoperative findings suggested that both the ACL and the meniscus tears were chronic, or greater than 3 months old. (PX 5 at 32).

Dr. Walsh admitted that his treatment bill had already been paid by Petitioner's group health insurance. (PX 5 at 34). Dr. Walsh likewise admitted that he was paid $1,200 per hour to prepare his narrative reports, and another $1,200 per hour to testify during his deposition. (PX 5 at 34-35). Dr. Walsh testified that about 10% of his work involves medico-legal work like this; the rest is done in a clinical setting. (PX 5 at 35). The majority of that work is done at the request of employers or insurance carriers. (PX 5 at 35-36).

On cross-examination, Dr. Walsh agreed that Dr. Sanders noted a knee effusion at his initial visit. (PX 5 at 36-37). Dr. Walsh admitted that it was possible that a knee effusion could be present without any underlying pathology. (PX 5 at 37). Dr. Walsh noted that Petitioner's twisting injury likely shifted the bones in his knee out of place, but after they shifted back it caused swelling. (PX 5 at 37). Dr. Walsh explained that the instability episode would be temporary, but that it would recur as the soft tissues continue to stretch out and get loose. (PX 5 at 37-38). Dr. Walsh admitted that Dr. Sanders' initial evaluation revealed Petitioner's knee was not locked, whereas his initial evaluation revealed a locked knee. (PX 5 at 38-39). Dr. Walsh again admitted that in 2015, there was no meniscal pathology. (PX 5 at 39). Dr. Walsh further admitted Petitioner would have been at risk of a meniscal tear even without the June 28, 2015 work accident. (PX 5 at 40-41). Dr. Walsh agreed the meniscus tear did not occur immediately at the moment of the work accident. (PX 5 at 41). Dr. Walsh clarified, however, that his opinion was that the work accident was a cause, not the only cause, of the need for surgery. (PX 5 at 41-42, 48).

Dr. Walsh further explained that instability episodes can happen intermittently. (PX 5 at 43). Often times, patients will delay their surgeries because they feel their issue has resolved but actually they still need surgery. (PX 5 at 43-44). Dr. Walsh explained that any sort of pivoting activity could cause an instability episode; examples include playing tennis, basketball, soccer, volleyball, and jumping. (PX 5 at 44). Dr. Walsh explained that, for Petitioner, his meniscus tear was likely the result of multiple instability episodes after the work accident. (PX 5 at 46-49). Dr. Walsh opined that the work accident accelerated his need for surgery because it set off these recurring instability episodes. (PX 5 at 49). Dr. Walsh further opined that the work accident exacerbated the ACL deficiency evidenced by the recurring instability episodes. (PX 5 at 51).

On re-direct, Dr. Walsh clarified that his opinions would not change regardless of whether Petitioner twisted his knee stepping up onto the float, or down from the float. (PX 5 at 51-52). Dr. Walsh also explained that the instability episodes are caused by the bones shifting and grinding against each other. (PX 5 at 52). This friction is what can deteriorate the meniscus structures and create a risk they will tear. (PX 5 at 52). Dr. Walsh

explained that the work accident placed the knee structures in a weakened condition, which in turn caused the recurrent instability episodes. (PX 5 at 54).

Deposition of Dr. John Scot Player

Dr. John Scot Player testified on behalf of Respondent in an evidence deposition on September 10, 2019. (RX 1 at 1). Dr. Player has been an orthopedic surgeon since 1982. (RX 1 at 5). Dr. Player is a general orthopedic surgeon and his clinical practice includes the treatment of the knee. (RX 1 at 6).

Dr. Player examined Petitioner on September 13, 2017 at the request of Respondent. (RX 1 at 7). Dr. Player was provided medical records from June 28, 2015 through August 17, 2017, including records from Dr. Sanders, the physical therapy notes, and the MRI reports and images. (RX 1 at 8-9). Petitioner reported a history of stepping down off of a parade float when he heard a pop in his right knee. (RX 1 at 10). Petitioner acknowledged that he had a pre-existing issue in his knee dating back to his basketball injury in 2000. (RX 1 at 10). Dr. Player noted that this history was largely consistent with the June 30, 2015 office visit except that record specifically noted that Petitioner did not hear a pop. (RX 1 at 10-11).

Dr. Player went on to describe instability in the context of the knee. (RX 1 at 12). Dr. Player explained that collateral ligament instability would cause the knee to be loose from side to side. (RX 1 at 12). Particularly in the context of an ACL injury, this would make it difficult to pivot and turn. (RX 1 at 12). Dr. Player explained that clinical findings that he would associate with a knee instability would be an effusion, and a positive provocative maneuvers including an anterior drawer test, a Lachman's test or a pivot shift test. (RX 1 at 13-14). Dr. Player admitted that Petitioner reported to him complaints of knee instability subsequent to the work accident. (RX 1 at 15). Dr. Player then suggested that, based on the medical records, Petitioner experienced only one instability event after the work accident. (RX 1 at 15). Dr. Player indicated, however, that Dr. Sanders documented no clinical instability, despite the MRI showing ACL instability and deficiency. (RX 1 at 16). Dr. Player further explained that he would expect someone with chronic instability due to ACL insufficiency to experience instability episodes to occur multiple times a day, or multiple times a week. (RX 1 at 17). As a result, Dr. Player opined that Petitioner likely did not suffer any further injury to the ACL in the work accident based on the minimal effusion after the accident, infrequent subsequent instability episodes, Dr. Sander's finding of negative provocative maneuvers and the fact that Petitioner did not return for further treatment for a year and a half. (RX 1 at 17-19). Dr. Player also opined that Petitioner's weight likely contributed to his ongoing knee instability. (RX 1 at 20). Dr. Player admitted, however, that Petitioner reported that his symptoms were becoming increasingly worse since the accident, despite continuing to work. (RX 1 at 19-20).

Dr. Player performed a physical examination of both knees; he used the left knee as a "control." (RX 1 at 21). Dr. Player noted his examination was consistent with a chronic ACL problem and progressing instability. (RX 1 at 21-23). Dr. Player opined this was likely the result of a progressively slow deterioration of the ACL since the 2000 accident. (RX 1 at 23). Nevertheless, Dr. Player noted he found Petitioner's pain complaints credible, and he found no evidence of exaggeration. (RX 1 at 23-24).

Dr. Player's diagnosis for Petitioner's right knee was a chronic right knee ACL deficiency and a secondary medial meniscus bucket handle tear. (RX 1 at 24). Dr. Player felt that these conditions were not related to the work accident. (RX 1 at 24). Dr. Player based this opinion primarily on the medical records. (RX 1 at 26). Dr. Plyer relied in particular on Dr. Sander's initial findings of negative provocative maneuvers, followed by an extended period without treatment. (RX 1 at 27-28). Dr. Player then went on to explain that he felt the mechanism of injury was insufficient to cause an ACL injury and he opined it was not "sufficiently traumatic." (RX 1 at 29-30). Dr. Plyer nevertheless agreed that Petitioner was a surgical candidate at that time, but the need for that surgery was unrelated to the accident. (RX 1 at 31-32). Dr. Player opined that the instability episode at the time of the work accident was likely a manifestation of instability that was already present in the knee. (RX 1 at 32-33). Dr. Player opined that Petitioner likely reached MMI as to the work accident on October 16, 2015 when Dr. Sanders released him. (RX 1 at 34). Dr. Player further explained that the meniscus was at risk of tearing from the moment Petitioner suffered the ACL injury in 2000. (RX 1 at 35).

On cross-examination Dr. Player admitted he has not re-certified his board certification in orthopedic surgery since 1982. (RX 1 at 36). Dr. Player explained that re-certification was only required after 1985. (RX 1 at 36-37). Dr. Plyer also admitted that he stopped performing surgeries in 2006 due to medical reasons. (RX 1 at 37). Dr. Player testified he was paid $1,905.00 to prepare the Section 12 report on Petitioner. (RX 1 at 39). Dr. Player performs about 24 Section 12 examinations each year. (RX 1 at 40). For a deposition he charges $1,400.00 per hour. (RX 1 at 40). Approximately half of Dr. Player's work is in the realm of medical/legal projects. (RX 1 at 41).

Dr. Player further admitted that a patient with ACL deficiency could be asymptomatic. (RX 1 at 41). Dr. Player admitted that a patient could test negative for all of the provocative maneuvers and still nevertheless have an ACL deficiency. (RX 1 at 42). Dr. Player agreed a traumatic injury could cause a previously asymptomatic ACL deficiency to become symptomatic. (RX 1 at 42). Dr. Player admitted that not every patient with an ACL deficiency is a surgical candidate, particularly if they are asymptomatic. (RX 1 at 42). Dr. Player further admitted that not every patient with ACL deficiency demonstrates instability symptoms. (RX 1 at 43). Dr. Player agreed that the presence of instability in the knee increases the likelihood that a patient would be a surgical candidate. (RX 1 at 44). The reverse was also true; a patient with ACL deficiency who is not demonstrating instability

would more likely not be a surgical candidate. (RX 1 at 44). Dr. Player admitted that, for a patient with a pre-existing ACL deficiency, a traumatic injury could cause the knee to destabilize so much that it never recovers to its pre-injury state. (RX 1 at 44).

Dr. Player went on to explain that the ACL is the primary stabilizer and the menisci act as shock absorbers. (RX 1 at 45). Dr. Player explained that a patient with an ACL deficiency is at increased risk of further injuring the menisci, especially the medial meniscus which is the same meniscus that Petitioner injured. (RX 1 at 45). Dr. Player admitted that Petitioner volunteered the prior ACL injury and he reported no knee instability prior to his June 2015 work accident. (RX 1 at 47). Dr. Player further admitted he had no documentation demonstrating prior instability, but it was nevertheless his opinion that the instability was present. (RX 1 at 47-48).

Dr. Player agreed Petitioner did not have ACL surgery until about 17 years after his basketball injury. (RX 1 at 49). Dr. Player also testified the September 2, 2015 note that describes Petitioner's knee giving out two weeks prior was not documentation of instability. (RX 1 at 49-50). Dr. Player opined that a knee "giving out" does not necessarily describe an instability event. (RX 1 at 50). Dr. Player admitted that the first documented evidence of Petitioner's knee giving out was the September 2, 2015 note. (RX 1 at 50). Dr. Player admitted that the October 16, 2015 note from Dr. Sanders did document an instability event occurring on October 11, 2015. (RX 1 at 51). Dr. Player also admitted Petitioner reported to him an increase in his knee instability after the work accident in 2015. (RX 1 at 53-54). Dr. Player opined the work accident was not a cause of the need for the surgery Petitioner underwent. (RX 1 at 56).

Dr. Player agreed Petitioner suffered an injury to his right knee in his work accident. (RX 1 at 56). Dr. Player also agreed Petitioner's subjective complaints were consistent with his objective findings and he felt Petitioner was credible and had no reason to suspect Petitioner was magnifying his symptoms. (RX 1 at 56). Dr. Player agreed with Dr. Walsh's diagnosis as well as his treatment plan. (RX 1 at 57). Dr. Player opined Petitioner reached MMI on October 16, 2015 because he felt Petitioner's right knee returned to its pre-injury status despite the fact Petitioner experienced a giving way episode a mere 5 days prior on October 11, 2015. (RX 1 at 57).

Dr. Player admitted the extent of a patient's ACL deficiency may be directly related to the level of risk of the medial meniscus tearing. (RX 1 at 61). Dr. Player acknowledged that in September of 2015, about 15 years after the original ACL injury and the work accident, the medial meniscus was still intact. (RX 1 at 61). Then, in May of 2017, about 2 years after the work accident, the meniscus was torn. (RX 1 at 61-62). Nevertheless, it was his opinion that the work accident had "absolutely nothing" to do with the subsequent meniscus tear. (RX 1 at 62).

On re-direct, Dr. Player again confirmed he felt Petitioner's knee reached its pre-injury state in October 2015. (RX 1 at 64). However, when asked whether that pre-injury state was that of an unstable knee, he declined

to agree and instead testified that it was an "anterior cruciate deficient knee." (RX 1 at 64). Dr. Player further explained there is a difference between subjective complaints of knee instability, and clinical evidence of knee instability. (RX 1 at 64-65). Dr. Player opined there was no evidence whatsoever that the instability after the work accident was related to the ACL. (RX 1 at 67). Dr. Player opined the instability in 2017 was "clinical instability", whereas the instability complained of in 2015 was merely "subjective instability." (RX 1 at 68-69).

CONCLUSIONS OF LAW

The Arbitrator adopts and incorporates the facts indicated in the "Statement of Facts" above into all Sections in the "Conclusions of law."

C. Petitioner suffered an accident that arose out of and occurred in the course of his employment by Respondent.

The Arbitrator finds and concludes that Petitioner has proven by a preponderance of the credible evidence that he sustained an accident that arose out of and in the course of his employment with Respondent on June 28, 2015. The Arbitrator specifically finds and concludes Petitioner was a very credible witness. Further, as discussed in detail below, the Arbitrator specifically finds and concludes Petitioner's treating physician Dr. Walsh is more credible than Respondent's Section 12 examining expert Dr. Player. Accordingly, the Arbitrator places greater reliance and weight on Dr. Walsh's opinions, and adopts them as his own.

In order for a Petitioner's injury to be compensable, it must have arisen out of and in the course of Petitioner's employment by Respondent. "The 'in the course of' element refers to the time, place and circumstances under which the accident occurred. *Orsini v. Indus. Comm'n*, 117 Ill. 2d 38, 44, 109 Ill. Dec. 166, 509 N.E.2d 1005 (1987). Injuries that occur on an employer's premises within a reasonable time before and after work are generally deemed to arise out of and in the course of the employment." *Dodson v. Industrial Comm'n*, 308 Ill.App.3d 574-575; 720 N.E.2d 277 (5th Dist. 1999), citing *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill. 2d 52, 57, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989); *Archer Daniels Midland Co. v. Indus. Comm'n*, 91 Ill. 2d 210, 215, 62 Ill. Dec. 921, 437 N.E.2d 609 (1982).

"Whether an employee's injuries 'arose out of' the employment may be determined under two different approaches. First, an injury arises out of the employment where its origin stems from a risk connected with, or incidental to, the employment. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. 'A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties.' *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. Second, an injury arises out of the employment where it is caused by some risk to which

the employee is exposed to a greater degree than the general public by virtue of his employment." *Dodson v. Industrial Comm'n*, 308 Ill.App.3d at 575-76.

Turning to the first required prong, the Arbitrator finds and concludes that Petitioner's accident occurred in the course of his employment. The accident occurred while Petitioner was assigned by Respondent to cover the Chicago Pride Parade with a reporter. (TA at 20-22). Petitioner's injury occurred while he endeavored to get footage of the Chicago Blackhawks Stanley Cup parade float. (TA at 22). This is consistent with Petitioner's unrebutted testimony and accident report. (TA at 20-22, PX 6). As a result, the Arbitrator finds and concludes that that Petitioner's accident occurred in the course of his employment with Respondent.

Turning to the second required prong, the Arbitrator finds and concludes that Petitioner's accident arose out of his employment as well, that is, he has proven by a preponderance of the credible evidence that his specific employment duties performed directly placed him at an increased risk of injury.

On June 28, 2015, Petitioner was tasked with getting footage of a parade float. (TA at 20-22). This required the use of a camera that weighed in excess of 50 pounds. (TA at 19). While Petitioner was descending the parade float by way of a ladder, his right knee buckled under the weight of the camera as his foot hit the ground. (TA at 22-23). Accordingly, the Arbitrator finds and concludes that Petitioner was exposed to a specific risk incidental to and required by the duties of his employment: his knee buckling under the added weight of his 50 pound camera. Petitioner's work as a new photo-journalist specifically required him to carry the camera on his shoulder, while his assignment specifically required him to climb and descend the ladder to access the float. (TA at 22-23). As a result, the increased risk that Petitioner's right knee could buckle under the weight of the camera is entirely connected to the direct nature of the required work he was performing. Therefore, the Arbitrator finds and concludes that Petitioner's accident arose out of his employment.

In short, the Arbitrator finds and concludes that Petitioner's accident arose out of and in the course of his employment with Respondent because it occurred during an assignment which Respondent directed, and that his injury occurred as a direct result of an inherent and increased risk in the specific and required nature of his work: his knee buckling under the weight of his heavy camera as he descended a ladder on the side of the parade float

Petitioner has more than sufficiently proven "accident" under either theory of recovery (that is, whether analyzing accident "risk" under the *Adcock* or *McAllister/Moreno* application theories (*McAllister v. Illinois Workers' Comp. Comm'n*, 2019 IL App (1st) 162747WC, ¶ 38, 73; *Moreno v. Illinois Workers' Comp. Comm'n*, 2020 IL App (2d) 170736WC-U, 12-13.)

Lastly, the Arbitrator notes that although Respondent raised "accident" as a disputed issue at trial, Respondent later stipulated in its post-hearing submissions that an accident did occur, under the theory that Petitioner was a "traveling employee." That theory of recovery can work as well, as the Arbitrator agrees that

Petitioner's job requires him to travel away from his employer's premises for work, and therefore he is a traveling employee. A traveling employee is in the course of his employment from the time he leaves home until he returns, and an injury sustained by a traveling employee arises out of his employment if he was injured while engaging in conduct that was reasonable and foreseeable to the employer. *Pryor v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130874WC. Petitioner in this case has met that burden, and therefore an accident occurred also under this theory.

F. Petitioner's current condition of ill-being is causally related to his injury.

The Arbitrator finds and concludes Petitioner has proven by a preponderance of the credible evidence a causal connection exists between Petitioner's current condition of ill-being in his right knee and the accidental injury sustained on June 28, 2015.

"A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *Int'l Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63-64. "When the claimant's version of the accident is uncontradicted and his testimony is unimpeached, his recital of the facts surrounding the accident may be sufficient to sustain an award. *Id.* at 64.

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

A work-related injury need not be the sole or principal causative factor of the claimant's injuries, as long as it was a causative factor in the resulting condition of ill-being; whether other incidents, work-related or not, may have aggravated the claimant's condition is irrelevant. *Vogel v. Industrial Commission*, 354 Ill. App. 3d 780, 821 N.E.2d 807, 290 Ill. Dec. 495 (2d Dist. 2005). In fact, "[e]very natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent

intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury." 821 N.E.2d at 812.

In this claim, the Petitioner established the three prongs of the *Int'l Harvester* test as it relates to his June 28, 2015 accident. **First**, Petitioner provided unrebutted and credible testimony that his right knee was stable prior to his work accident, supported by the medical evidence in record. (TA at 28).

Petitioner further testified that prior to his work accident, excluding a couple of months of treatment in the year 2000 after a basketball injury, he never sought treatment, nor did he have significant pain or issues in the right knee until his June 28, 2015 work accident. (TA at 28).

The record is likewise conspicuously absent any medical records documenting complaints of right knee pain or instability prior to his work accident. As a result, Petitioner has met the first prong of the *Int'l Harvester* test by establishing a prior condition of good health.

Petitioner likewise fulfilled the second prong by credibly testifying that he suffered an accident involving his knee. (TA at 22-23). That testimony was further corroborated by an accident report he completed that same day. (PX 6).

Lastly, Petitioner fulfilled the third prong by establishing a clear, subsequent disabling condition. Petitioner credible and honestly testified he suffered from recurrent and ongoing instability issues in the right knee subsequent to his work accident. (TA at 67). This testimony is further corroborated by the medical records; there are two specific instances of knee instability documented: first, on September 2, 2015, referencing a giving way episode two weeks prior, and then again on October 16, 2015, referencing another giving way episode 5 days prior. (TA at 31-32, 36-37, PX 1 at 186, 203). Petitioner's medical records likewise make several references to knee complaints in the period between his last visit with Dr. Sanders on October 16, 2015 and his first visit with Dr. Walsh on May 1, 2017. (PX 1 at 154, 150, 105, 101, 96).

Furthermore, the treating physician's medical testimony further supports a finding of causal connection. Dr. Walsh opined that the June 28, 2015 work accident represented an instability event that weakened the stability in Petitioner's right knee. (PX 5 at 19-20). Dr. Walsh pointed to the subsequent instability episodes documented in the records and opined that this was evidence of the instability that ultimately tore the meniscus. (PX 5 at 20). Dr. Walsh explained that the pre-existing ACL deficiency, combined with the weakened stability in the knee, predisposed Petitioner to the meniscus tear. (PX 5 at 20). Dr. Walsh explained that the work accident was a cause of the need for the surgery he performed, although not the sole cause. (PX 5 at 20-21). Given Dr. Walsh's credible and well-reasoned and well-documented opinions, the Arbitrator finds and concludes that Petitioner's work accident thereafter placed his right knee into a weakened condition which ultimately led to Petitioner's meniscus tear and necessitated surgery. Dr. Walsh testified the meniscus tear was a natural consequence of the

knee instability caused by the work accident and the Arbitrator adopts this assessment. It was that recurrent instability that then caused the internal structures of the knee to repeatedly slide out of place and grind against each other which exposed the meniscus to the increased risk of tearing. (PX 5 at 21-22, 37-38, 52, 54).

The Arbitrator does not find Dr. Player or his opinions similarly persuasive and discounts them. First, Dr. Player admitted on cross-examination that an ACL deficiency can remain asymptomatic and that not every patient with an ACL deficiency experiences instability. (RX 1 at 41, 43). Nevertheless, on direct Dr. Player maintained that he would expect a patient with an ACL deficiency to experience instability episodes multiple times per day. (RX 1 at 17). Dr. Player explained that Petitioner's work accident merely represented a "manifestation of his pre-existing problem" a term left inadequately explained and equally unconvincing. (RX 1 at 29-30). Dr. Player held this opinion despite the significant fact that he felt Petitioner credibly provided a history of no instability episodes prior to his work accident. (RX 1 at 47, 56). Dr. Player similarly testified he had no medical documentation that showed any history of prior knee instability or complaints. This lack of evidence, of course, very much weakens the foundation for his opinions. (RX 1 at 47-48). In fact, Dr. Player had no documentation whatsoever concerning Petitioner's prior treatment for his ACL injury in 2000; that history was credible and honestly volunteered by Petitioner. (RX 1 at 47). Dr. Player admitted that Petitioner reported to him an increase of knee instability complaints after his 2015 work accident. (RX 1 at 53-54). Dr. Player did not, and could not, dispute this history, as he had no evidence to the contrary.

Dr. Player further admitted that Petitioner lived 15 years with his pre-existing ACL tear without having surgery. (RX 1 at 49). After those 15 years, Petitioner's meniscus remained intact even after the work accident. (RX 1 at 61, PX 2 at 5). Within a year and a half after the work accident, Petitioner was diagnosed with a meniscus tear. (PX 1 at 91, RX 1 at 61-62). Despite this chronology, and Dr. Player's admission that an ACL deficiency would expose the medial meniscus specifically to a risk of tearing, Dr. Player nevertheless testified that the work accident had "absolutely nothing" to do with the meniscus tear. (RX 1 at 45, 62). This was Dr. Player's opinion despite his significant admission that instability in the knee would increase the likelihood that a particular patient would require surgery. (RX 1 at 44). That was what happened to Petitioner. This was not credible or persuasive opinion testimony against Petitioner.

Lastly, Dr. Player testified that a knee "giving out" does not necessarily describe an "instability event." (RX 1 at 50). Dr. Player went on to make a somewhat arbitrary and ultimately unclear and unpersuasive distinction between "clinical instability" and "subjective instability;" even though Petitioner's knee was giving out on him and he experienced instability, that type of instability was not sufficient to meet Dr. Player's standard for "clinical instability." (RX 1 at 69-70). Dr. Player testified that Petitioner's right knee had returned to its pre-

injury state as of October 16, 2015, despite the fact that Petitioner reported a giving way episode occurred a mere 5 days prior. (RX 1 at 64, PX 1 at 186). This was not credible or persuasive opinion testimony against Petitioner.

The Arbitrator finds Dr. Walsh more credible, reliable and persuasive than Dr. Player.

The Arbitrator notes 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, 168 Ill. Dec. 756, 590 N.E. 2d 78, 82 (1992). **Lastly, not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician**. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 31 Ill.Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992). **That is the conclusion the Arbitrator has determined is warranted and proper in this claim.**

First, Dr. Walsh maintains a robust clinical surgical practice; he performs approximately 300 knee surgeries every year. (PX 5 at 7). Dr. Player, on the other hand, has not performed a single surgery in approximately 13 years. (RX 1 at 37). Additionally, Dr. Walsh devotes a mere 10% of his work to medical/legal projects, whereas Dr. Player devotes 50% of his work to these types of projects. (PX 5 at 35, RX 1 at 41). In fact, Dr. Walsh testified that the majority of the medical/legal work he does is done on behalf of an employer insurance company, a relevant fact not to be taken lightly. (PX 5 at 35). Lastly, Dr. Walsh demonstrated no opportunity or motive for secondary gain; he had already been paid for the surgery he performed by Petitioner's group health insurance. (PX 5 at 34).

Regarding the gap in treatment between Petitioner's release by Dr. Sanders in October of 2015, and his resumption of treatment with Dr. Walsh in May of 2017, the Arbitrator finds and concludes that Petitioner provided a reasonable explanation for the hiatus. Petitioner testified that he was diagnosed with thyroid cancer on October 2, 2015. (TA at 35, PX 1 at 189). Petitioenr's focus moved away from his unstable knee and towards his life-threatening diagnosis. (TA at 37-38, 42-43). Petitioner underwent a thyroidectomy followed by radiation to treat the cancer. (TA at 38, PX 1 at 174, 176). While Petitioner was treating for the cancer, he also began treating for a severe sinus issue that required surgical intervention. (TA at 41, PX 1 at 119). The Arbitrator finds

and concludes these other health issues form the basis of a reasonable explanation as to why Petitioner did not undergo ongoing formal treatment for his right knee, and the treatment is likewise supported by the medical records. (PX 1). The Arbitrator further finds and concludes that Petitioner credibly testified that his right knee continued to nevertheless bother him during this period; this testimony is also corroborated by the medical records insofar as they include repeated references to knee issues during this period. (TA at 42, PX 1 at 154, 150, 105, 101, 96).

In short, the Arbitrator finds and concludes that Petitioner's condition of ill-being in his right knee is the result of a pre-existing condition that was permanently aggravated/exacerbated/accelerated as a direct result and consequence of his June 28, 2015 work accident. The work accident placed Petitioner's right knee in a weakened condition which subsequently and ultimately resulted in the need for surgery as a natural consequence of the weakened condition. Specifically, the work accident caused recurrent instability in the ACL that deteriorated his medial meniscus over time, eventually resulting in the need for surgery. The Arbitrator relies on Petitioner's credible testimony that he did not experience instability in his knee between his ACL injury in 2000 and his work accident in 2015. The Arbitrator further relies on Dr. Walsh's credible explanation as to how such instability can lead to a meniscus tear, and points to the several documented instances of "giving way" found in the medical records subsequent to the accident. The Arbitrator is not persuaded by Dr. Player's testimony that the work accident had "nothing to do" with the knee instability or the meniscus tear, and that the meniscus tear was simply a natural progression of Petitioner's pre-existing ACL tear. Lastly, the Arbitrator is persuaded by Petitioner's explanation for his suspension of formal knee treatment due to his cancer diagnosis and other health issues. There is no credible evidence to contract or rebut this assertion and explanation. As a result, the Arbitrator finds and concludes that the current condition of ill-being in Petitioner's right knee is causally related to his June 28, 2015 work accident.

J. The medical services that were provided to Petitioner were reasonable and necessary. Respondent has not paid all charges for the reasonable and necessary medical services related to the right knee. Respondent shall pay for medical services in the amount of $20,345.16.

The Arbitrator finds and concludes Petitioner has proven by a preponderance of the credible evidence that the medical treatment provided to Petitioner has been both reasonable and necessary. The Arbitrator further finds and concludes Respondent is responsible and liable for payment of all the bills contained in Petitioner's Exhibit 7 for a total of $20,345.16, after any fee schedule reductions and/or adjustments. (PX 7).

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

Throughout his treatment, Petitioner always maintained a chain of referrals within his two choices of providers. In fact, Respondent stipulated to the same. (TA at 68-69). Dr. Walsh credibly testified that all of the treatment Petitioner underwent was reasonable and necessary, and related to his work accident. (PX 5 at 19). Dr. Player likewise confirmed that he agreed with Dr. Walsh's diagnosis and treatment plan. (RX 1 at 57).

As the Arbitrator finds and concludes that Petitioner's current condition of ill-being in his right knee is causally related to his work accident, that his medical treatment hereto has been reasonable and necessary, and that he has always been within his two choices of providers, Respondent shall be responsible and liable for payment of the bills listed in Petitioner Exhibit 7, totaling $20,345.16 after any fee schedule reductions and/or adjustments. (PX 7).

K. Petitioner is due temporary total disability benefits in the amount of $1,119.03 per week for 10-5/7 weeks for the period of September 15, 2017 through November 28, 2017.

The Arbitrator, having found that Petitioner's right knee condition and the related restrictions are causally connected to his accident, finds and concludes that Petitioner has proven by a preponderance of the credible evidence that he is entitled to an award of TTD for the periods of September 15, 2017 through November 28, 2017, being a period of 10-5/7 weeks.

Petitioner credibly testified he was removed from work from the date of his surgery, September 15, 2017, through the time he was released to full duty work, effective November 29, 2017. (TA at 47, PX 1 at 65-67). Dr. Walsh further credibly corroborated Petitioner's testimony. (PX 5 at 17-18).

Section 8(b) of the Act provides that "in cases where the temporary total incapacity for work continues for a period of 14 days of more from the day of the accident compensation shall commence on the day after the accident." 820 ILCS 305/8(b). "The compensation rate for temporary total incapacity . . . shall be equal to 66 2/3% of the employee's average weekly wage . . .". 820 ILCS 305/8(b)(1).

The parties stipulated that Petitioner's average weekly wage was $1,678.54 per week. (AX 1). 66-2/3% of the stipulated average weekly wage is $1,119.03. 820 ILCS 305/8(b)(1). Accordingly, the Arbitrator finds and concludes that Respondent is liable for $11,989.61 in TTD, which represents 10-57 weeks of TTD at a rate of $1,119.03 per week.

L. The nature and extent of Petitioner's injury amounts to 30% loss of use of the right leg. Respondent shall pay 64.5 weeks of permanent partial disability benefits at a rate of $735.37 per week, pursuant to Section 8(e)(12) of the Act.

The Arbitrator finds and concludes that Petitioner has proven the nature and extent of his injury amounts to 30% of the loss of use of the right leg, or 64.5 weeks of compensation at his weekly PPD rate of $735.37.

Section 8.1(b) of the Act provides that in determining the level of PPD in cases involving injuries on or after September 1, 2011, the Commission shall utilize the following factors, with no single factor to be outcome-determinative:

(i) The reported level of impairment pursuant to a PPD impairment report by a physician licensed to practice medicine in all its branches;

(ii) The occupation of the injured employee;

(iii) The age of the employee at the time of injury;

(iv) The employee's future earning capacity; and

(v) Evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1(b).

Nothing in Section 8.1(b) requires that a PPD impairment report be offered in evidence, and nothing in Section 8.1(b) precludes an award of PPD where neither party submits a PPD impairment report. See *Corn Belt Energy Corp. v. Workers' Compensation Comm'n*, 2016 IL App (3d) 150311WC.

Petitioner was injured when he stepped from a parade float while carrying heavy camera equipment. (TA at 22-23). He was ultimately diagnosed with a medial meniscus tear and an aggravated pre-existing ACL tear in this right knee. (PX 5 at 19-20). He underwent a right knee arthroscopy with a reconstruction of the ACL and a partial medial meniscectomy. (TA at 45, PX 1 at 65-67, PX 5 at 17).

With regard to subsection (i) of Section 8.1b(b), no PPD impairment report or opinion was offered into evidence by either party. The Arbitrator therefore assigns no weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of Petitioner, the Arbitrator notes that the record reveals that Petitioner was employed as a photo news journalist at the time of the accident and spent his days covering various news events in and around Chicago, doing heavy lifting, climbing ladders and stairs, walking, squatting and running. (TA at 17-20). Dr. Walsh last addressed Petitioner's work status on November 14, 2017, at which time he released Petitioner to return to full-duty work starting November 29, 2017. (TA at 46-47, PX 5 at 18). Petitioner returned to work for Respondent after his release and continues to work there as of the date of trial. (TA at 17, 46-47). He works a little slower than usual to make sure not to stress the knee. (TA

at 48-49). He also noted increased apprehension, particularly when carrying his heavy equipment at work. (TA at 47). He described relying more on his left knee and upper body to bear weight. (TA at 48). The Arbitrator therefore assigns greater weight to this factor.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that the Petitioner was 34 years old at the time of the accident. (AX 1). Therefore, the Petitioner has over 30 years left working with his continued issues. The Arbitrator therefore assigns greater weight to this factor.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes again that Dr. Walsh last addressed Petitioner's work status on November 14, 2017, at which time he released Petitioner to return to full-duty work starting November 29, 2017. (TA at 46-47, PX 5 at 18). Petitioner returned to work for Respondent and continues to work there as of the date of trial. (TA at 17, 46-47). There is no evidence in a loss of earning capacity. The Arbitrator therefore assigns lesser weight to this factor.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the records demonstrate that the Petitioner suffered a medial meniscus tear and an aggravation of a pre-existing ACL tear in this right knee. (PX 1 at 88-91, PX 5 at 19-20). Petitioner likewise testified the knee continues to feel weak, particularly when carrying heavy equipment. (TA at 47). He takes ibuprofen a couple times per week in order to manage his pain complaints. (TA at 48). The Arbitrator therefore assigns greater weight to this factor.

Based upon the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 30% loss of use of the right leg pursuant to Section 8(e)(12) of the Act. 820 ILCS 305/8(e)(12). This is equal to 64.5 weeks of PPD benefits at a rate of $735.37 per week, for a total of $47,431.37.

M. Petitioner has not proven Respondent should pay any penalties or fees under Sections 19(l), 19(k) or 16 of the Act.

In denying compensation, Respondent must reasonably rely in good faith on a medical opinion and must meet the burden of demonstrating a reasonable belief that its denial of liability was justified under the circumstances, as required by *Continental Distrib. Co. v. Indus. Comm'n*, 98 Ill.2d 407, 456 N.E.2d 847 (1983), *Bd. of Educ. v. Indus. Comm'n*, 93 Ill.2d 20, 442 N.E.2d 883 (1982) ("*Norwood*" case) and *Board of Educ. v. Indus. Comm'n*, 93 Ill.2d 1, 442 N.E.2d 861 (1982) ("*Tully*" case). In *Tully*, the Illinois Supreme Court held that where a delay has occurred in payment of workers' compensation benefits, the employer bears the burden of justifying the delay and the standard we hold him to is one of objective reasonableness in his belief. Thus it is

not good enough to merely assert honest belief that the employee's claim is invalid or that his award is not supported by the evidence; the employer's belief is "honest" only if the facts which a reasonable person in the employer's position would have warrant it. 42 N.E.2d at 865. The Court added in *Norwood* that whether an employer's conduct justifies the imposition of penalties is a factual question for the Commission. The employer's conduct is considered in terms of reasonableness. 442 N.E.2d at 885. It was further held in *Continental Distributing* that a Respondent's reliance on its own physician's opinion does not establish, by itself, that its challenge to liability was made in good faith. The test is not whether there is some conflict in medical opinion. Rather, it is whether the employer's conduct in relying on the medical opinion to contest liability is reasonable under all the circumstances presented. 56 N.E.2d at 851. Moreover, the Appellate Court has noted that the burden of proof of the reasonableness of its conduct is upon the employer. *Consol. Freightways, Inc. v. Indus. Comm'n*, 136 Ill.App.3d 630, 483 N.E.2d 652, 654 (1985); *accord*, *Ford Motor Co. v. Indus. Comm'n*, 140 Ill.App.3d, 488 N.E.2d 1296 (1986).

The Arbitrator finds that Respondent's reliance upon the opinion reports and testimony of Dr. Player ***minimally*** meets the reasonableness requirement. This case involves complex and difficult accident and causation questions and Respondent permissibly sought an expert opinion from Dr. Player to seek answers to those questions. It should be noted there is no evidence Respondent acted in bad faith with the intent to obtain medical opinions solely to avoid paying compensation. Further, the Arbitrator's finding and conclusion that Dr. Player's opinions are not as weighty and credible as those of Dr. Walsh does not also mean that Respondent unreasonably relied on Dr. Player's opinions.

Robert M. Harris

Arbitrator Robert M. Harris
Dated: January 21, 2020

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

Blanche Wilfore,

Petitioner,

20IWCC0777

vs.

NO: 12WC 18666

United Airlines,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 26, 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.

20IWCC0777

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

DATED: DEC 31 2020

Stephen J. Mathis

SJM/sj
o-12/9/2019
44

D. Douglas McCarthy

Douglas D. McCarthy

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WILFORE, BLANCHE
Employee/Petitioner

Case# **12WC018666**

UNITED AIRLINES INC
Employer/Respondent

20IWCC0777

On 3/26/2019, 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 2.41% 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:

1767 FREEMAN TUTAJ LLC
JAMES P TUTAJ
170 VENTER ST
GRAYSLAKE, IL 60030

0560 WIEDNER & McAULIFFE LTD
MARGARET G McGARRY
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

20IWCC0777

- [ ] 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

Blanche Wilfore
Employee/Petitioner

v.

United Airlines, Inc.
Employer/Respondent

Case # **12 WC 18666**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **September 18, 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 [ ] 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

20IWCC0777

FINDINGS

On **9/2/11**, 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 $**43,056.52**; the average weekly wage was $**828.01**.

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

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

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

Respondent shall be given a credit of $**30,124.83** for TTD, $**0** for TPD, $**82,646.62** for maintenance, and $0 for other benefits, for a total credit of $**112,771.45**.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $496.81/week for 150 weeks, because the injuries sustained caused the 30% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

03-26-19
Date

MAR 26 2019

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FINDINGS OF FACT

The petitioner, Ms. Blanche Wilfore, was employed by the respondent, United Airlines, as a flight attendant from 1978 until her retirement in 2018. The petitioner testified that she sustained injuries to her bilateral shoulder and neck on September 2, 2011 during an episode of turbulence on a flight from London to Chicago. Specifically, the petitioner reported sustained shoulder injuries while attempting to restrain herself in her jump seat. After the turbulence subsided, the petitioner contacted the purser and reported her injuries.

Medical Treatment

Treatment Prior to 9/2/11 Date of Accident:

The petitioner testified that she initially sustained an injury to her right shoulder in 2002 which subsequently resulted in the diagnosis of reflex sympathetic dystrophy (RSD). (TX p.93). This right shoulder injury was the subject of a disputed workers' compensation claim, Illinois Workers' Compensation Commission case number 04 WC 13844. (TX p.93). On March 19, 2003, the petitioner underwent a right shoulder arthroscopic rotator cuff repair performed by Dr. William Schwab. (RX 1). Post operatively, she continued to experience right shoulder symptoms and on March 31, 2004, Dr. Schwab performed a second right shoulder arthroscopy with debridement. (RX 1).

The petitioner testified that she sought medical treatment with Dr. Donald Schanz of West Michigan Pain after she developed RSD in 2004. (TX p.93-94). The petitioner was first evaluated by Dr. Schanz on December 17, 2004 at which point she was diagnosed with low-grade RSD of the right hand. (RX 1). Dr. Schanz recommended that the petitioner undergo a trial of sympathetic nerve blocks. Dr. Schanz authored an initial evaluation report which states, "I do not think that there is a direct relationship to her shoulder surgery and the onset of her symptoms." (RX 1).

Per the petitioner's testimony, on January 12, 2005, the petitioner sent an email to Dr. Schanz's office in which she requested that Dr. Schanz alter the opinions and statements contained in his initial evaluation report from December 17, 2004. (TX p.98-99). In that email, the petitioner addressed each page of the December 17, 2004 report, specifically listing the statements made by Dr. Schanz that she disagreed with. (RX 1).

At the conclusion of the email, the petitioner wrote, "There must be a Causal Relationship to my shoulder injury as to what may have triggered this RSD in order to claim it through Workman's Comp. Please, please correct ASAP so I can make sure that this claim is processed correctly and your office will be paid correctly." (RX 1, TX p.98-99). Dr. Schanz testified on deposition that at the request of the petitioner, he then went back and redacted portions of his original December 17, 2004 initial evaluation report. (RX 2, p.68-69).

From 2004 through 2005, the petitioner underwent multiple stellate ganglion nerve block (RX 1). After Dr. Schanz retired in 2005, the petitioner came under the care and treatment of his partner, Dr. Girish Juneja. (TX p.94). Dr. G. Juneja performed injection and saw the petitioner on

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a monthly basis for the diagnoses of right upper and lower extremity RDS. (RX 1).

Dr. G. Juneja released the petitioner to return to work at full duty following an October 19, 2006 evaluation. (RX 1). The petitioner testified that after she returned to work per that 2006 release, she did not experience any symptoms of RSD in her right upper or right lower extremities, nor did she seek medical treatment for RSD until 2014. (TX p.68-71).

Per Petitioner's Exhibit 1, the petitioner continued to undergo treatment with pain management physician Dr. G. Juneja of West Michigan Pain, as well as with primary care physician, Dr. Rashmi Juneja of Michigan Primary Care Partners. On June 24, 2008, the petitioner was seen by Dr. G. Juneja for RSD of the lower extremity. (PX 1, p.191). On July 10, 2008 and July 11, 2008 she returned with complaints of worsening RSD in the upper and lower extremities. (PX 1, p.188-189). She presented to Dr. R. Juneja for evaluations for RSD on December 2, 2008 and February 24, 2009. (PX 1, p.181,184).

On November 17, 2009, the petitioner returned to Dr. R. Juneja for RSD. Dr. Juneja noted that the RSD was "chronic and stable with meds." (PX 1, p.171). She presented to Dr. R. Juneja on April 13, 2010 and May 10, 2010 with complaints of right forearm and right shoulder pain. Dr. R. Juneja suggested bicipital tendinitis and recommended physical therapy and the use of Voltaren gel. (PX 1, p.162-164).

Medical Treatment after 9/2/11:

Following the September 2, 2011 accident, the petitioner presented to Dr. R. Juneja with complaints of pain in her neck, low back, and shoulder that began during an episode of turbulence on a flight home from London. While the report contains a reference to neck and low back involvement, Dr. R. Juneja's examination was limited to the petitioner's shoulder, which demonstrated mildly restricted range of motion. Dr. R. Juneja noted that the injury did not appear to be "major" and recommended physical therapy. (PX 1, p.158). Work restrictions were not recommended.

Physical therapy began on September 8, 2011 at The Center for Physical Rehabilitation. (PX 3). When the petitioner returned to Dr. R. Juneja on September 15, 2011, she reported improvement in her shoulder pain and range of motion and after eight seasons of therapy, she was discharged on November 14, 2011.

The petitioner next sought treatment with Dr. R. Juneja for shoulder pain on February 9, 2012. (PX 1, p.147). She reported that her shoulder pain initially improved following therapy, however, had since returned. The pain was worse in the right shoulder, yet both exhibited decreased range of motion. Dr. R. Juneja referred the petitioner for a right shoulder MRI scan and for a consultation with orthopedic Dr. Melissa DeNeil.

The February 10, 2012 right shoulder MRI scan revealed: post- surgical and attritional changes in the supraspinatus tendon without evidence of a recurrent tear; and, a small, likely insignificant, subacromial spur. (PX 4). Following the MRI, Dr. R. Juneja provided a right shoulder injection on February 24, 2012. (PX 1, p. 145).

The petitioner then presented to Dr. Melissa DeNeil for an evaluation on April 4, 2012. (PX 4). Upon presentation, the petitioner reported a history of right shoulder pain beginning in 2002 when she fell on an airplane. She underwent a right rotator cuff repair in 2003 and a revision surgery in 2004, after which she developed RSD. She underwent treatment for RSD for approximately two years and reportedly returned to work in 2006. The petitioner reported working without issue until she September 2011 when she developed significant pain in her right shoulder during an episode of turbulence.

Upon examination of the right shoulder, the petitioner demonstrated slightly decreased range of motion of the right shoulder and a mildly positive impingement sign. Dr. DeNeil reviewed the MRI films, noting that the anterior aspect of the right rotator cuff was "very thin." The petitioner was diagnosed with persistent right shoulder pain following a previous rotator cuff repair with a recurrent injury. Dr. DeNeil recommended an arthroscopic revision acromioplasty, and evaluation of the labrum with possible labral debridement or repair and possible tenodesis. (PX 4). In the interim, Dr. DeNeil released to the petitioner to continue working as a flight attendant without restrictions. (PX 4).

The petitioner testified that she did not undergo the right shoulder surgery in 2012 due to concerns of possible post-operative RSD. She continued to work full duty and while she continued to undergo medical treatment with Dr. R. Juneja for various conditions through 2012 and 2013, she did not return to treatment for her right shoulder until February 12, 2014 when she presented to Dr. DeNeil. (PX 2). She reported ongoing right shoulder pain for which Dr. DeNeil again recommended arthroscopic surgery. (PX 2).

On February 17, 2014, the petitioner presented to Dr. Nikhil Verma of Midwest Orthopedics at Rush for an independent medical examination. (PX 1). Following a physical examination and review of the right shoulder MRI films, Dr. Verma diagnosed right shoulder recurrent impingement with a possible recurrent rotator cuff tear. Dr. Verma recommended that the petitioner undergo an arthroscopic subacromial decompression with evaluation of the rotator cuff and possible revision repair and biceps tenodesis. In the interim, the petitioner was released to continue working full duty.

Ultimately, the petitioner opted to undergo the recommended right shoulder treatment with Dr. Bernard Bach of Midwest Orthopedics at Rush. (PX 2). She presented to Dr. Bach on October 20, 2014 with complaints of bilateral shoulder pain. Dr. Bach recommended pre-operative physical therapy for the left and right shoulders and an updated right shoulder MRI scan. Dr. Bach provided an injection for both the right and left shoulder and recommended that the petitioner return to work with restrictions against overhead lifting. The petitioner testified that she did not return to work as a flight attendant after October 20, 2014. (TX p.9).

After completing the six week course of therapy, the petitioner returned to Dr. Bach on December 1, 2014. Dr. Bach noted that the updated right shoulder MRI scan revealed a possible re-tear of the supraspinatus muscle. The petitioner reported improvement in the left shoulder with the injection and therapy. The right shoulder remained symptomatic and accordingly, surgery was scheduled. (PX 2).

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On December 30, 2014, Dr. Bach performed a right shoulder arthroscopic debridement surgery, which included biceps tenotomy, limited synovectomy, debridement of the articular surface of the rotator cuff, and open subpectoral biceps tenodesis. (PX 2).

Post-operatively, the petitioner returned to Dr. Bach on January 12, 2015. The petitioner voiced concern about the appearance of her incision, however, there were no significant pain complaints voiced. An examination revealed good range of motion, good external rotation, and no signs of frozen shoulder. Dr. Bach recommended that the petitioner begin physical therapy one week later and return for a follow up evaluation in four weeks. In the interim, she was given sedentary restrictions. (PX 2).

The following day, on January 13, 2015, the petitioner called Dr. R. Juneja's office with complaints of a "flare up" of RSD in her right hand. The petitioner requested a referral to pain management physician Dr. Girish Juneja. (PX 1).

On January 14, 2015, the petitioner began physical therapy. The initial evaluation notes indicate the petitioner reported improvement in her shoulder pain and movement following surgery. (PX 2). The report does not contain any reference to RSD symptoms. Therapy was recommended twice per week for six weeks.

The petitioner presented to Dr. R. Juneja on January 22, 2015. She reported a "flare up" of her RSD and requested pain control. The medical record does not reference any physical examination findings relative to RSD. The petitioner was diagnosed with shoulder pain. Dr. R. Juneja opined that the petitioner was "doing as well as can be expected" and recommended that the petitioner return in four weeks for reevaluation.

The petitioner testified that on February 9, 2015, she flew to Brazil. (TX p.83, RX 3). She returned home on February 11, 2015 and presented for physical therapy later that same day. The February 11, 2015 physical therapy progress note indicates that the petitioner reported improvement with regard to her shoulder pain and range of motion. The petitioner did report weakness, yet the physical therapy progress note does not contain any indication of symptoms related to RSD. (PX 4).

On February 13, 2015 the petitioner presented to Dr. Girish Juneja for an evaluation of right shoulder pain and RSD. The petitioner reported experiencing RSD symptoms in her right arm following the December 2014 shoulder surgery. In addition to pain, the petitioner reported weakness, paresthesia in the thumb, index, and middle fingers, swelling, and erythema. Following an examination, Dr. G. Juneja diagnosed RSD of the right upper extremity for which he recommended a stellate ganglion block on the right. The doctor noted that should the petitioner fail to improve with the ganglion block, he would consider a cervical epidural steroid injection as the petitioner demonstrated radicular-type pain. In the interim, the petitioner was advised to continue physical therapy. (PX 1).

The petitioner returned to Dr. Bach for a re-evaluation on February 16, 2015. The report notes that the petitioner claimed to have experienced a flare-up of pre-existing complex regional

pain syndrome in the right shoulder approximately two weeks after her shoulder surgery. Dr. Bach noted that the petitioner was treating with a pain physician closer to her home who felt that her symptoms were secondary to CRPS or a brachial plexopathy. The petitioner was noted to be scheduled for a ganglion block on March 4, 2015.

An examination revealed pain over the lateral aspect of the right shoulder, in the elbow, and in the lateral aspect of the right forearm, affecting the fifth digit. Dr. Bach noted 90 degrees of active forward elevation, 170 degrees of passive elevation, 90 degrees of active shoulder abduction, and 160 degrees of passive shoulder abduction. There was 4/5 strength with supraspinatus and subscapularis testing and with external rotation. Dr. Bach noted that the overlying skin surrounding the petitioner's incisions appeared to be normal. The petitioner had full grip strength in her right hand and was neurovascularly intact in her right upper extremity. Dr. Bach recommended that the petitioner continue physical therapy and return for a re-evaluation in six weeks. In the interim, she was to follow up with her pain management physician. (PX 2).

On March 3, 2015 the petitioner returned to Dr. R. Juneja. The petitioner reported feeling as though she had experienced a flare-up of her RSD since her shoulder surgery and was hoping the upcoming injection would provide relief. She also reported left shoulder pain and nausea which she associated with the anesthesia used at the time of her December 2014 surgery. The medical record does not contain findings of a physical examination. The petitioner was diagnosed with bursitis of the shoulder and was referred for an MRI of the left shoulder. (PX 1, p.96).

Physical therapy continued. The March 4, 2015 therapy progress note indicates that the petitioner reported decreasing pain and improving strength in the right arm. The petitioner noted 50% to 60% improvement overall and felt as though her range of motion was improving. While the petitioner did report a catching sensation with certain movements, she advised that the intensity of her pain was decreasing. The physical therapist opined that the petitioner's pain control had significantly improved. (PX 4).

On March 5, 2015 Dr. G. Juneja performed a cervical epidural steroid injection at the C7-T1 level. The report indicates that Dr. G. Juneja opted to proceed with the cervical epidural injection before trying a sympathetic ganglion block. (PX 1, p.94).

The petitioner continued with physical therapy and the March 27, 2015 progress note indicates that the petitioner reported improvement of the right shoulder pain and increased strength. (PX 4). A physical examination revealed mild stiffness with end range of internal rotation. Active and passive range of motion of the right shoulder was within normal limits in all plains. The therapist commented that the petitioner was continuing to progress with strength and range of motion. It was recommended that she continue therapy one to two times per week for four to six weeks.

On March 30, 2015 the petitioner returned to Dr. Bach. (PX 2). The petitioner reported improvement in the character of right shoulder pain as compared to her pre-operative status. The petitioner reported night pain in the left shoulder and brought a recent left shoulder MRI scan for

Dr. Bach's review. It was noted that she had a history of a left shoulder rotator cuff repair approximately 19 years earlier. A physical examination of the right shoulder revealed forward elevation at 170 degrees, abduction at 170 degrees, external rotation at the horizontal at 90 degrees, internal rotation at the horizontal at 50 degrees, external rotation at her side at 50 degrees, and internal rotation at her side to the T10 level. A physical examination of the left shoulder revealed tenderness over the long head of the biceps tendon and some decreased range of motion.

Upon review of the left shoulder MRI scan, Dr. Bach noted inflammation within the rotator cuff and biceps tendon with no detachment. Dr. Bach opined that the petitioner had minimal glenohumeral arthritis on the left. He advised the petitioner that her prior rotator cuff repair was intact and she did not have frozen shoulder. A left shoulder cortisone injection was provided and Dr. Bach recommended physical therapy for the left shoulder in conjunction with therapy for the right shoulder. With regard to the right shoulder, Dr. Bach noted that the petitioner was making appropriate progress. He recommended that she return in six weeks at which point MMI was expected as was a full duty release to work. In the interim, she was released to return with restrictions of no carrying or lifting or overhead use of the right arm.

The petitioner testified that after the evaluation with Dr. Bach, she went on vacation to California from April 7, 2015 until April 9, 2015. (TX p.103). Upon her returned, she presented to Dr. G. Juneja on April 16, 2015 for a stellate ganglion block. The procedure report indicates that the prior epidural injection had not provided relief and accordingly a stellate ganglion block was performed. (PX 1, p.91).

After the injection, the petitioner returned to Dr. G. Juneja's office on April 30, 2015. She reported that the injection had not been helpful and complained of right lower extremity and foot pain. The petitioner wished to undergo a sympathetic block for her right lower extremity symptoms. The office visit report does not contain findings of a physical examination of the right lower extremity. The petitioner was diagnosed with lower extremity RSD and was referred for a lumbar stellate ganglion block with Dr. G. Juneja. (PX 1, p.88).

Dr. G. Juneja performed lumbar sympathetic ganglion blocks on May 7, 2015 and May 28, 2015 for lower extremity symptoms. The petitioner returned to Dr. G. Juneja on June 5, 2015 with reports of right arm pain. She reported that the injections had helped; however, she felt as though she was having adverse reactions to the steroid component of the injected medications. Dr. G. Juneja recommended a set of sympathetic blocks without cortisone. (PX 1, p.82).

Physical therapy continued. The June 8, 2015 therapy progress note indicates that the petitioner reported decreased shoulder pain; however, for the first time, she reported RSD symptoms to the therapist. The therapist opined that the petitioner had reached a slight plateau and recommended holding therapy secondary to the petitioner's RSD flare-up and ongoing injections. (PX 4).

On June 11, 2015 Dr. G. Juneja performed a stellate ganglion injection for the right upper extremity symptoms. She then returned to Dr. Bach for a reevaluation on June 22, 2015. She reported undergoing weekly nerve blocks for escalating CRPS which had slowed down her

shoulder rehabilitation. Dr. Bach provided an updated script for bilateral shoulder therapy to address the petitioner's remaining shoulder weakness. The petitioner was released with ten pound work restrictions and advised to return for a re-evaluation in eight weeks. (PX 2).

The petitioner began physical therapy for the bilateral shoulder on July 1, 2015 and underwent a stellate ganglion block with Dr. G. Juneja for the lower extremity symptoms on July 2, 2015. She presented to Dr. R. Juneja on July 7, 2015 for a follow up evaluation and then on July 10, 2015, she returned to Dr. G. Juneja for a stellate ganglion injection for the right upper extremity symptoms. (PX 1, p.70).

The petitioner returned for an evaluation with Dr. G. Juneja on July 23, 2015. She reported some improvement with the series of injections; however, she complained of frequent muscle spasms and difficulty using her right arm to perform repetitive lifting. The right shoulder pain was noted to come and go. Dr. G. Juneja recommended that the petitioner continue a home exercise program. It was noted that the petitioner was on "medical disability" and recommended that she return in one month for a follow-up evaluation. At that point an additional series of injections would be considered. (PX 1, p.68).

On August 6, 2015, the petitioner presented to Dr. R. Juneja for the purpose of completion of paper work relating to her shoulder injury for work. The petitioner reported twitching in her right arm and pain in her shoulder. The petitioner claimed that her RSD symptoms felt better with a "service dog" named "Max." The petitioner testified that "Max" is her family's pet dog that they bought years before her 2014 surgery. (TX p.88).

The petitioner continued with physical therapy. The August 5, 2015 therapy progress note summary indicates that the petitioner reported approximately 80% improvement in the function of her bilateral shoulders overall. She did still complain of difficulty with RSD flare-ups; however, she felt as though the RSD was slowly becoming under control. The petitioner reported that she felt as though she may be ready to return to work. It was noted that she planned to discuss a return to work in further detail at her next appointment. (PX 4).

On August 24, 2015 the petitioner returned to Dr. Bach. The petitioner had completed physical therapy for her bilateral shoulders. While she reported persistent CRPS in the right leg and arm, she felt as though the right upper extremity CRPS symptoms were improving. Following a physical examination, Dr. Bach placed the petitioner at maximum medical improvement relative to her right shoulder surgery. He suggested that the petitioner return to the office on an as needed basis for the right and left shoulders and that she continue to treat with her pain specialist in regard to the CRPS symptoms. Dr. Bach suggested that the pain management physician address the need for any restrictions relative to the CRPS. With respect to the right shoulder, Dr. Bach provided a work status report in which he released the petitioner to return to work at full duty. (PX 2).

After the petitioner was released to return to work at full duty by Dr. Bach, she presented to Dr. G. Juneja on September 4, 2015 to discuss work restrictions. Dr. Juneja noted that the petitioner had been released by her orthopedic surgeon. He then noted that the petitioner's history of right upper and lower extremity CRPS/RSD "affects her daily living." She reported

weakness and swelling in her hand and foot and difficulty walking over one half of a block due to "severe leg pain." The petitioner also reported difficulty performing repetitive lifting and issues with temperature changes. (PX 1, p.62-63).

Dr. Juneja noted that the petitioner was managing her RSD symptoms through daily exercises and stretching routines. With respect to the petitioner's ability to work, Dr. Juneja indicated that the petitioner's job duties as a flight attendant included walking, standing, and repetitive lifting and bending. As such, he opined that the petitioner's symptoms of CRPS/RSD prevented her from doing her job. The petitioner was authorized off of work for 30 days and was referred for a functional capacity evaluation. (PX 1, p.63).

At some point in the months before October 2015, the petitioner applied for Social Security Disability benefits. On October 5, 2015, the Social Security Administration issued a determination awarding the petitioner SSDI benefits. (PX 9).

The petitioner did not undergo the FCE recommended for determination of her ability to return to work until after the award for SSDI benefits was issued. On October 13, 2015, the petitioner presented to Mary Free Bed Rehabilitation Hospital for the functional capacity assessment. (PX 5). The FCE revealed limitations with respect to the use of the right upper extremity; however, there were no functional limitations with respect to the lower extremities. The petitioner had poor tolerance to right upper extremity force, repetition, and sustained usage. It was determined that she could lift between 15 and 35 pounds and push and pull up to 38 pounds. (PX 4).

On November 6, 2015, the petitioner returned to Dr. G. Juneja. She reported intermittent pain in the right upper and lower extremities. The FCE results were reviewed and Dr. Juneja noted "significant restrictions on the patient's functional level." Dr. Juneja diagnosed CRPS I of the right upper and lower extremities and opined that the petitioner was "unable to return to her usual duties without restrictions." Dr. G. Juneja placed the petitioner at maximum medical improvement, completed paper work, and recommended that she continue a home exercise program. (PX 1, p.55).

The petitioner testified that after she was placed at MMI, she continued to follow up with Dr. Juneja on a monthly basis for the purpose of having paper work completed for her employer. (TX p.90). On December 4, 2015 she returned to Dr. G. Juneja reporting that her symptoms "wax and wane." Dr. Juneja opined that the petitioner's condition was "stable" and completed the requested paperwork. (PX 1, p.54).

Follow-up evaluations continued with Dr. Juneja's office on a monthly basis for the completion of paper work. The corresponding reports from January 2016 through March 2016 note that the petitioner's condition was "stable." (PX 1). On March 31, 2016 Dr. G. Juneja provided a sympathetic ganglion block for the petitioner's right lower extremity. After the injection she returned for completion of paper work on April 1, 2016, May 6, 2016, and May 27, 2016. Each report indicates that the petitioner's symptoms varied in severity from day to day. Dr. Juneja noted that the petitioner's symptoms remained stable.

Per the petitioner's testimony, and as evidenced in Respondent's Exhibit 3, the petitioner went on vacation to Florida in June 2016. (TX p.103). After she returned on June 26, 2016, she returned for her monthly evaluation with Dr. Juneja on July 1, 2016. Dr. Juneja noted that the petitioner's symptoms remained stable and that her pain varied in severity on a daily basis. The doctor recommended continued restrictions per the FCE and monthly follow-up visits.

The petitioner testified that on July 18, 2016 she was interviewed telephonically by vocational rehabilitation counselor, Ms. Jacky Ormsby, at the request of her attorney. (TX p.104). The petitioner testified that during the phone interview, Ms. Ormsby asked various questions about the petitioner's medical condition, physical abilities, education, and work history. The petitioner testified that she answered each of Ms. Ormsby's questions honestly. (TX p.105).

Per Ms. Ormsby's report and deposition testimony, the petitioner reported that her work history was limited to one employer, United Airlines, and that she had not held any jobs or positions aside from that of a flight attendant for United Airlines since 1978. (PX 6, p.13-14). Per Ms. Ormsby's deposition testimony, the petitioner reported significant limitations which precluded her from leaving her house very often. (PX 6, p.38). The petitioner testified that she did not tell Ms. Ormsby that she had been on vacation the month before the interview. (TX p.105). Ms. Ormsby testified that based on what the petitioner reported at the time of the interview Ms. Ormsby believed that the petitioner required the use of a service dog and kept said dog with her at all times. (PX 6, p.48).

Monthly evaluations with Dr. Juneja took place in August, September, October, and November 2016 for the completion of paper work. On December 14, 2016 Dr. G. Juneja provided a lumbar sympathetic ganglion block for the petitioner's right lower extremity symptoms. The petitioner again reported a return of leg pain and the inability to walk. When the petitioner returned for a follow-up visit on December 30, 2016, she reported 50% improvement following the injection with symptoms varying from day to day. She returned to Dr. Juneja on January 27, 2017, at which point she reported significant improvement following the December 2016 injection. Dr. Juneja noted that her pain varied from day to day and recommended that she continue with restrictions per the FCE. (PX 1).

The petitioner returned to Dr. G. Juneja on February 24, 2017 for her monthly evaluation. The petitioner reported pain of varying degrees. Dr. Juneja noted that the petitioner was unable to perform repetitive tasks and was unable to walk for prolonged periods of time without resting. Dr. Juneja recommended restrictions per the FCE and a reevaluation in four weeks. (PX 1).

On March 9, 2017 the petitioner presented to Dr. R. Juneja. She reported that the previous Saturday, she reached for something and felt a sharp pain in her right shoulder blade and discomfort. She then went grocery shopping and was unable to move her right arm due to significant pain. Dr. Juneja noted that the petitioner had thoracic spine pain and shoulder pain with decreased range of motion. The petitioner was diagnosed with "shoulder lesions" and was referred to physical therapy. (PX 1).

The final report from Dr. Juneja's office reflects a follow-up evaluation on March 24,

2017. The appointment was solely for medication refills. A physical examination was not performed. (PX 1, p.1).

Independent Medical Examination:

On May 30, 2017 the petitioner presented to Dr. Kenneth Candido for an independent medical examination at the request of the respondent. Upon presentation, the petitioner reported sustaining injuries to her bilateral arms, neck, and back on September 2, 2011 when she was involved in turbulence on a flight from London to Chicago. She underwent right shoulder surgery in December 2014 and subsequently developed RSD in her right upper and lower extremities. At the time of the IME, she reported pain at a level of three out of four at rest and up to nine out of ten with activity. She claimed to experience swelling in the right hand and foot as well as color and temperature changes. (RX 8).

Dr. Candido's thorough physical examination is well documented in his report, which includes photographs of the petitioner and various charts summarizing the objective findings. With respect to the petitioner's upper extremities, the physical examination revealed no color changes, no sweating abnormalities, no tremors, no edema, and no obvious evidence of a blood flow abnormality. There were no trophic signs, including no alteration in hair or nail growth on the right side as compared to the left side. There was a minor reduction in the skin temperature only at the right forearm and dorsum of the right wrist as compared to the left, which Dr. Candido noted to be of unknown significance. Sensation was intact in all dermatomes and in major peripheral nerves of the right hand and arm. There was no weakness in the biceps, triceps, or deltoids of the right or left upper extremity and both had full range of motion. Circumference measurements of both arms were equal. (RX 8, p.14-16).

With regard to the lower extremities, Dr. Candido found no color changes, no swelling, no allodynia, and no hyperalgesia. There was full strength and symmetric reflexes bilaterally. The petitioner demonstrated a normal gait, and circumference and temperature measurements of both legs were symmetric. (RX 8, p.17-19).

At the conclusion of his examination, Dr. Candido opined that there were no objective findings consistent with active CRPS Type I or II, RSD, or causalgia in the upper or lower extremities. Dr. Candido opined that while the petitioner had a history or CRPS in the right hand, the condition was in remission at the time of the IME. Dr. Candido found no evidence of CRPS in the right foot, neither in the past nor at the time of the IME. (RX 8, p.20).

Dr. Candido noted that while the petitioner may have had a pre-existing history of CRPS, any acute exacerbation thereof following had resolved by the time of the IME and the petitioner's CRPS was in complete remission. In support of this opinion, Dr. Candido cited the lack of any evidence of muscle wasting, color changes, blood flow abnormality, sweating abnormality, hair or nail changes, or tremors found on physical examination. Dr. Candido specifically noted that atrophy from disuse would be an obligatory finding in someone with as lengthy of a history of CRPS as claimed by the petitioner, yet there was no atrophy found in the petitioner's right upper extremity. (RX 8, p.22).

Dr. Candido opined that because the petitioner's CRPS was in complete remission, any remaining pain was likely mild impingement syndrome of the right shoulder. With respect to further treatment, Dr. Candido opined that the petitioner did not require ongoing pain management or stellate ganglion blocks. Dr. Candido opined that the petitioner could return to work in a medium duty capacity, with no overhead lifting or carrying over 25 pounds, no overhead use of the right arm, and no lifting or carrying over 25 pounds on a repetitive basis. (RX 8, p.23).

Per the IME report, after the petitioner left Dr. Candido's office and returned to Michigan following the examination, she sent Dr. Candido's office an email which included a photograph she alleged to have been taken of her right arm during a flare-up of her CRPS/RSD. The email indicates "I no longer wear a ring or jewelry on the right hand or arm due to the painful inflammation on flare-ups." (*of note- the petitioner is wearing jewelry in the photograph, which was allegedly taken during a flare-up). The petitioner wrote that during flare-ups, her entire hand turned "black" and was very painful. She also claimed that her right foot swelled and experienced mild color change. Finally, the petitioner expressed a desire for future treatment to control her condition, including a cortisone injection in her left shoulder, lumbar injections for the leg CRPS, acupuncture, yoga stretches, and physical therapy/chiropractic treatment "when needed to reduce atrophy and keep [her] body/leg/foot/hand functioning." (RX 8, p.8).

Testimony of Petitioner's Vocational Rehabilitation Expert, Ms. Jacky Ormsby:

As noted above, certified rehabilitation counselor Ms. Jacky Ormsby testified that she was retained by the petitioner's attorney in July 2016 for the purpose of preparing a vocational assessment of the petitioner. (PX 6, p.5). In conjunction with the referral, Ms. Ormsby was given the following documents for consideration: the February 17, 2014 IME report of Dr. Verma; various reports of Dr. Bach; the Social Security Administration's October 5, 2015 decision; two United Airlines Employee Work Status forms; the October 13, 2015 FCE report; and, a United Airlines Section 4 Compensation Sheet. (PX 6, p.8-9). Ms. Ormsby testified that she also performed a telephonic interview of the petitioner for the purpose of gathering background information from the petitioner including medical information, education and work history, and information regarding any potential skills. (PX 6, p.5-6). The petitioner testified that the telephonic interview with Ms. Ormsby took place on July 18, 2016. (TX p.104). The petitioner testified that during the phone interview, Ms. Ormsby asked various questions about the petitioner's medical condition, physical abilities, education, and work history. The petitioner testified that she answered each of Ms. Ormsby's questions honestly. (TX p.105).

Ms. Ormsby testified that the petitioner's reported work history was limited to her employment with United Airlines. (PX 6, p.13-14). The petitioner reported that she began working in sales for United in 1978 and after six months, she became a flight attendant. The petitioner reported that between 1978 and the time of the interview, she had only ever worked as a flight attendant for United Airlines. (PX 6 p.14). Ms. Ormsby testified that while the petitioner had a computer, the petitioner reported limited skills in that regard. Specifically, the petitioner advised that she had basic knowledge of Microsoft Word but did not use a computer very often. (PX 6, p.16).

After reviewing the documents provided to her by the petitioner's attorney, and after the telephonic interview of the petitioner, Ms. Ormsby completed a Transferable Skills Analysis. Ms. Ormsby testified that this entailed inputting the information gleaned during the interview/review of the records into the "Oayses" computer program with then in turn generated possible job titles for the petitioner. Ms. Ormsby testified that while the Oayses software is commonly used within the vocational rehabilitation industry, she did not find the information generated by the software useful because of the petitioner's restrictions, education, training, and limited vocational background. (PX 6, p. 20-25).

Ms. Ormsby testified that following her completion of the Transferable Skills Analysis, she prepared a Labor Market Survey within the 30 mile radius of the petitioner's home in Ada, Michigan. (PX 6, p.26). Ms. Ormsby identified several positions within the petitioner's physical restrictions; however, she opined that the petitioner did not qualify for the positions because of the petitioner's lack of skills, lack of background and prior experience, and "advanced age." (PX 6, p.27). Based on the petitioner's lack of qualifications and physical restrictions, Ms. Ormsby testified that she did not believe that there was a stable labor market available for the petitioner within her geographic location. (PX 6, pg. 28).

Testimony of Respondent's Vocational Rehabilitation Expert, Ms. Sherry L. Ronning:

At the time of trial, the respondent presented the testimony of certified rehabilitation counselor Ms. Sherry L. Ronning. (TX p.166-210). Ms. Ronning is a vocational rehabilitation counselor in the Grand Rapids-Holland, Michigan area. She is employed with Genex Services for the purpose of providing vocational services in the setting of workers' compensation claims. In addition, approximately 50% of Ms. Ronning's practice in devoted to performing job placement services for various sectors of the population, including those with various cognitive and/or physical disabilities. (TX p.170). Ms. Ronning testified that her current employment also includes working in a school setting transitioning students with disabilities into jobs, aiding disabled veterans with job placement, and helping people on SSDI benefits find employment to supplement their income. (TX p.169-170).

As a vocational rehabilitation counselor in the Grand Rapids-Holland, MI, area, Ms. Ronning is familiar with the job market in Western Michigan. Ms. Ronning testified that at the time of trial, unemployment was at 4% in Grand Rapids, MI, and was at 3.1% in Holland, MI. She testified that the State of Michigan's employment office, Michigan Works, holds job fairs on a daily basis because of the multitude of available work in the area. (TX p.171).

Ms. Ronning testified that she was retained by the respondent through Genex Services in August 2018 for the purpose of preparing a wage earning capacity assessment of the petitioner. (TX p.172). Ms. Ronning did not interview the petitioner. (TX p.175). She testified that she relied upon the physical restrictions suggested in the IME report of Dr. Candido and the petitioner's resume as contained in the March 1, 2018 Social Pro Plus report for the completion of her assessment of the petitioner. (TX p.174). With respect to the IME report, Ms. Ronning noted the light to medium duty restrictions suggested by Dr. Candido; however, she testified that she also focused her job search on positions in the sedentary to light duty level. (TX p.174). With respect to the Social Pro Plus report, Ms. Ronning testified that she was able to determine the

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petitioner's education, work history, and skills from the petitioner's resume posted online. Specifically, the petitioner's resume contained an employment history that included: "Memories on a Disc January 2011-Present; Midwest Properties Referral Co. LLC February 2012-Present; United Airlines April 1978-Present; Jerry Holloway's Referral & Holding, LLC. January 2008-January 2011; and Five Star Real Estate Co. September 2006-January 2008." (RX 5, p. 23). In addition, based on the information contained in the resume, Ms. Ronning testified that through the Social Pro Plus report, she determined that the petitioner enjoyed working with computers and used computers in the course of her work as s real estate agent, and as the president of a company named "Memories on a Disc." (TX p.175, RX 5, p. 23, 30, 44-45).

Ms. Ronning testified that with the information obtained from the IME report and Social Pro Plus report, she performed a transferable skills analysis using the Oayses software commonly used in the vocational rehabilitation industry. Ms. Ronning testified she routinely uses the Oayses software in her practice when helping clients find employment. (TX p.177-178). Using the program, Ms. Ronning entered the petitioner's occupational titles into the software which then in turn generated potential jobs titles for the petitioner. After entering the occupational titles of real estate agent, flight attendant, and customer service representative, the Oayses software suggested positions including leasing agent, credit authorizer, fundraiser, and customer service representative. (TX p.178-179).

Based on the physical restrictions documented in Dr. Candido's report and the skills evidenced in the petitioner's employment history as noted on her resume in conjunction with the results generated by the Oayses software, Ms. Ronning determine appropriate possible occupations for the petitioner, including leasing assistant, customer service and project coordinator, customer service coordinator, and inside sales associate in real estate. (TX p.179). Ms. Ronning then used this information to find specific employment opportunities available to the petitioner within the petitioner's geographic location.

Ms. Ronning testified that she found numerous available positions when she performed her labor market survey in August 2018. For the purpose of her report, she identified four potential positions and the corresponding wages offered. Specifically, Ms. Ronning identified available positions as: a Leasing Assistant with Blu Holdings; a Customer Service and Project Coordinator with Corrigan Moving Systems; a Customer Service Coordinator with Pella Windows; and, Inside Sales Associate/ Real-estate Agent with Villas Group. She testified that she called these employers in August 2018 and confirmed the availability of the positions, the wages offered, and the criteria required for potential candidates. (TX p.180-184). In advance of the September 18, 2018 trial, Ms. Ronning contacted the employers again and determined that the positions with Pella Windows and Blu Holdings were still available. (TX p.183).

After calling these potential employers and confirming the availability of positions within the petitioner's skill set and restrictions, Ms. Ronning concluded that the petitioner is employable. Ms. Ronning testified with a reasonable degree of certainty within the field of vocational rehabilitation that a stable labor market does exist for the petitioner within her restrictions and within her geographic location. (TX p.188).

CONCLUSIONS OF LAW

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

The Arbitrator finds that the petitioner's current condition of ill-being is not causally related to the September 2, 2011 accident. With regard to September 2, 2011 injury, the petitioner sustained an injury to her right shoulder which resulted in an arthroscopic decompression surgery. The petitioner was placed at maximum medical improvement for the results of the September 2, 2011 injury as of August 24, 2015, and November 6, 2015.

The Arbitrator adopts the opinion of Dr. Kenneth Candido as not only the most recent medical report, but also the only medical opinion supported by objective findings. Based on his detailed, thorough, and photographically documented physical examination of the petitioner, Dr. Candido found no evidence to support a diagnosis of CRPS or RSD in either the right upper extremity or right lower extremity. Not only was there no evidence of active CRPS/RSD, there was no evidence to support the petitioner's claimed long standing chronic CRPS/RSD as there was no atrophy present in the petitioner's right upper or lower extremities.

The petitioner's CRPS/RSD diagnosis is based on her subjective reports. Given the totality of the evidence submitted at trial the petitioner's credibility is questionable at best.

First and foremost, in 2005 the petitioner specifically directed a treating physician, Dr. Schanz, to change his causal connection opinion relative to her prior treatment which was the subject of a disputed workers' compensation case. Dr. Schanz initially authored a report on December 17, 2004 in which he stated that the petitioner's condition of ill-being was not related to that prior work accident. After reading that report, the petitioner emailed the doctor a copy of the report with her handwritten changes. In the body of that email, the petitioner lists her disagreements with the doctor's opinions, with a page by page reference to the statements she opposed.

At the conclusion of her email to Dr. Schanz, the petitioner specifically wrote, "There must be a Causal Relationship to my shoulder injury as to what may have triggered this RSD in order to claim it through Workman's Comp. Please, please correct ASAP so I can make sure that this claim is processed correctly and your office will be paid correctly." Dr. Schanz testified on deposition that he then redacted several portions of his original December 17, 2004 initial evaluation report at the direction of the petitioner.

Relative to her prior CRPS/RSD diagnosis and treatment, at the time of the September 18, 2018 trial, the petitioner testified that after she returned to work in 2006, she did not experience any symptoms of CRPS/RSD nor did she seek medical treatment for said condition until after her December 2014 shoulder surgery. The medical records of Dr. Juneja contradict this testimony. In fact, the records offered by the petitioner, which begin with treatment in 2008, reveal that the petitioner consistently presented for treatment with symptoms of RSD in the right upper and lower extremity from 2008 through 2010.

The petitioner also provided false information to her vocational rehabilitation counselor, which was then used by Ms. Ormsby as the basis for her opinions as to the petitioner's employability. The petitioner advised Ms. Ormsby that her employment history was limited to her 39 years with United Airlines. During that time period, from 1978 on, the petitioner claimed

to never have worked in any other capacity than as a flight attendant. The petitioner told Ms. Ormsby that she only have very basic computer skills and did not use her computer often. She advised Ms. Ormsby that she rarely left the house and used a service dog constantly.

While the petitioner reported significant disability and very limited skills, Respondent's Exhibits 3, 4, and 5 suggest otherwise. The petitioner continued an active lifestyle following her December 2014 surgery, even traveling to Brazil in February 2015. While she informed Ms. Ormsby that she rarely left the house, the petitioner had actually been on vacation just prior to her interview with Ms. Ormsby. (RX 3). Further, while the petitioner was telling her doctors and Ms. Ormsby that she needed a "service dog," that dog was actually her family pet that she got well before her December 2014 surgery.

Finally, with respect to her employment history, the information contained in the petitioner's online resume and blog differs drastically from the information she provided to Ms. Ormsby. While the petitioner reported only one job and one employer for 39 years, the resume that she posted online lists six former/ current employers. That resume also lists the petitioner's skills as including "team building; strategic planning; marketing; leadership development; entrepreneurship; sales; management; business planning; management consulting; investment properties; selling; referrals; contract negotiation' real estate." (RX 5, p.23). While the petitioner claimed to have only basic knowledge of Microsoft Word, she was listed as the President of an online small business called "Memories on a Disc." (RX 5, p.30). Further, in a blog entry on the website "Active Rain," the petitioner discusses her decision to return to business full time and her participation in continuing education courses to learn about foreclosures and the real estate market. (RX 4, p.65).

In light of the petitioner's complete lack of credibility, the Arbitrator declines to rely on her subjective complaints with respect to her condition. As such, based on the objective medical evidence, the Arbitrator finds that the petitioner's current condition of ill-being is not related to the September 2, 2011 accident.

L. <u>What is the nature and extent of the petitioner's injury?</u>

In regard to the nature and extent of the petitioner's injury, the Arbitrator finds that the petitioner has sustained permanent partial disability under Section 8(d)2 of the Act in the amount of 30% loss of use of a person as a whole.

While the petitioner claims to be permanently totally disabled, the totality of the credible evidence suggests that the petitioner is more than capable of returning to work. None of the petitioner's treating physicians have restricted her from returning to work completely on a permanent basis. In fact, her treating surgeon, Dr. Bach, released the petitioner to work full duty. As outlined above, the Arbitrator adopts the opinions of Dr. Candido with respect to the petitioner's current physical condition. Dr. Candido's opinions are based on objective findings as opposed to the petitioner's subjective complaints. As such, based on the medical evidence, the petitioner is not restricted from returning to work.

Addressing the petitioner's employability, the arbitrator finds the opinions of Ms. Sherry Ronning, the respondent's vocational expert, more persuasive than those of the petitioner's vocational expert, Ms. Jacky Ormsby. Ms. Ormsby testified that her opinions regarding the

petitioner's employability are based on the information that the petitioner provided in respect to education, work history, and skill set. (PX 6, p.41). As evidenced in Respondent's Exhibits 4 and 5, and as outlined above, the petitioner provided Ms. Ormsby with incomplete information regarding her prior work history, education and skill set, and physical abilities.

Additionally, the Arbitrator notes that Ms. Ormsby is based in the Chicagoland area and testified that her entire practice as a certified rehabilitation counselor is devoted to preparing vocational assessments for the purpose of litigation. (PX 6, p.34). Ms. Ronning is employed as a certified rehabilitation counselor in the petitioner's specific geographic location, the Grand Rapids-Holland, Michigan area. In addition to her employment with Genex Services, approximately 50% of Ms. Ronning's practice in devoted to performing job placement services for various sectors of the population, including those with various cognitive and/or physical disabilities. (TX p.170). Ms. Ronning's testimony evidenced a strong working knowledge of the job market in the petitioner's location, and also within a wide range of varying limitations. As such, the Arbitrator adopts the opinion of Ms. Ronning in that there is gainful employment available for the petitioner within her geographic location.

To further highlight the petitioner's lack of credibility, while the petitioner testified that she would "return to work with bells on" if she could, she offered the determination of the Social Security Administration as evidence of her state of mind regarding her disability. The petitioner applied for SSDI benefits in mid-2015, within six months of her shoulder surgery. This suggests that the petitioner never intended to return to work with respondent as she held herself out as disabled before she was placed at MMI, before she completed physical therapy, and before permanent restrictions were even suggested. Given the petitioner's almost immediate application for SSDI benefits, coupled with her lack of credibility, the Arbitrator completely rejects petitioner's assertion that she would even consider returning to work should the opportunity present itself.

Based on the record as a whole and the totality of the evidence presented, the Arbitrator finds that the petitioner has sustained permanent partial disability under Section 8(d)2 of the Act in the amount of 30% loss of use of a person as a whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Angela Davis,

Petitioner,

20IWCC0778

vs. NO: 18WC 007818

Southern Illinois University,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, 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 March 12, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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

20IWCC0778

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

Pursuant to §19(f)(1) of the Act, this Decision and Opinion on Review of a claim against the State of Illinois is not subject to judicial review.

DATED: DEC 31 2020

Stephen J. Mathis

Douglas D. McCarthy

L. Elizabeth Coppoletti

SJM/sj
o-12/9/2020
44

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

DAVIS, ANGELA
Employee/Petitioner

Case# **18WC007818**

SOUTHERN ILLINOIS UNIVERSITY
Employer/Respondent

20IWCC0773

On 3/12/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.40% 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:

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SPRINGFIELD, IL 62794-9208

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

MAR 12 2020

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

20IWCC0778

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

njured 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)

Angela Davis
Employee/Petitioner

v.

Southern Illinois University
Employer/Respondent

Case # **18** WC **007818**

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville, IL**, on **12/19/19**. 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, 9/15/16, 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 52 weeks preceding the injury, Petitioner earned $22,482.50; the average weekly wage was $607.64.

On the date of accident, Petitioner was 53 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 no credits for TTD, Maintenance or other benefits.

ORDER

Respondent shall authorize and pay for prospective medical treatment as recommended by Dr. Bruce Schlafly, as provided in Section 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.

Carl Lee
Signature of Arbitrator

3/11/20
Date

MAR 12 2020

FINDINGS OF FACT

Petitioner, a 53-year-old, right-handed woman, began working for Southern Illinois University (SIU) HeadStart, as a teacher in approximately 2007. Her job duties were typical for elementary school teachers.

On 9/15/16, during an earthquake drill, Petitioner turned from what she was doing at the blackboard in the front of the room in order to administer instructions to her students. As she did so, she tripped over a student who had been running behind her, and fell. On her way down, she struck her left hand on a table, sustaining injuries to her left hand, wrist, and thumb.

She reported the injury, and was seen at the emergency room at St. Joseph's hospital in Murphysboro, IL. She was placed in a temporary hand cast, and referred to an orthopedic surgeon. She went to the Orthopaedic Institute of Southern Illinois on 9/20/16, and saw Dr. Roland Barr's physician's assistant. She was diagnosed with osteoarthritis of the CMC joint of her thumb, and a contusion of her left hand. She was given a thumb spica splint, prescribed physical therapy, and given work restrictions. When she returned on 11/15/16, she had considerable pain in her left thumb. Dr. Barr found that the primary cause of her pain was due to an aggravation of her arthritis at the base of her thumb, brought on when she struck her hand on the table on 9/15/16. He continued physical therapy and work restrictions, and did so again at Petitioner's next appointment on 12/13/16. On 1/9/17, Dr. Barr's physician's assistant administered a cortisone injection at the base of her left thumb at the CMC joint.

Petitioner consulted Dr. Timothy Leeburton, an orthopedic surgeon with the Memorial Medical Group on 3/1/17. He thought Petitioner had developed complex regional pain syndrome (CRPS), and wanted to treat that condition before addressing her CMC arthritis, or any associated tendon problem. He applied a short arm thumb spica cast, which was removed 3/31/17, at which time her advised Petitioner to wear a thumb spica splint. On 4/12/17, he ordered electrical studies, which were performed 5/8/17 by Dr. Khariton. Dr. Khariton said the studies demonstrated left mild carpal tunnel syndrome. An MRI of her left hand, which showed osteoarthritis. Dr. Leeburton administered a cortisone injection at the CMC base of her left thumb, but admitted on 7/10/17 that it provided no relief. Initially, Dr. Leeburton was reluctant to perform surgery, because of his concerns about CRPS, but when Petitioner saw him on 1/19/18, he recommended surgery for arthroplasty of the thumb CMC joint, as her symptoms mimicking CRPS has resolved.

On 4/24/17, Petitioner saw Dr. Razavi at the Orthopedic Center of Illinois. He diagnosed chronic left thumb pain due to basal joint osteoarthritis, and peripheral compression neuropathy of the left ulnar nerve at the elbow. His opinion was that the thumb problems were not caused by work, but that the elbow pathology was, and recommended additional treatment. However, when nerve studies were performed by Dr. Khariton on 5/8/17, they were negative for cubital tunnel syndrome.

On 2/20/18, Petitioner saw Dr. Anthony Sudekum at the Missouri Hand Center for a Section 12 examination. Dr. Sudekum found no evidence of CRPS, reflex sympathetic dystrophy, carpal tunnel syndrome, or cubital tunnel syndrome. He tested her grip and pinch strength, finding marked weakness in her left hand as compared to her right. He took x-rays of both hands, which revealed mild to moderate arthritis of the CMC joint of her right thumb, and moderate to severe arthritis at the CMC joint of her left thumb. Despite Petitioner being right-handed, he nonetheless stated that she had made a full recovery from her work injury on 9/15/16, which he described as a mild contusion to the left wrist, recommended she return to work without restrictions, and stated no further treatment was necessary. Dr. Sudekum was unable to explain the lack of problems prior to her work injury, except to suggest that Petitioner was lying:

Q Is it your testimony that it is impossible that her trauma to her left hand and wrist, when she fell, increased her symptoms?

A It is my opinion, with a reasonable degree of medical certainty, that that injury did not increase her symptoms. And that's based on my review of the medical records, the x-rays, the lack of any evidence of acute trauma.

My opinion is based on my review of the medical records, my discussion with her, my knowledge of the pathology and the pathophysiology, this is even – and very importantly, my knowledge of the pathophysiology of trauma.

...

Q No, no. My question is: is it possible that striking her left arm and left wrist on the table increased her symptoms?

A In my opinion, it did not. In my opinion, she may have sustained a minor contusion which resolved. But did it increase? Yeah, she could have had a transient increase in wrist pain from that, not of CMC arthritis pain.[1]

Q And that transient increase in wrist pain would be expected to go back to baseline, to where it had been, correct?

A It would be expected – as I think it did, in my opinion. I think that her subjective symptoms related to that injury did go back to baseline.

Q So you think that she was in the amount of pain that she's reported to various [since September] 15, 2016?

A Yes. Well, there's some question of symptom magnification too, so who knows? Because there was a plethora of symptoms that seemed to erupt during the course of her evaluation and treatment for this.

Apparently she didn't have those either, right? I mean, no shoulder pain, no elbow pain. ... No. It doesn't pass muster from my perspective.

Q It's not even possible?

A It's not possible. The record speaks for itself. The record is full of –

Q I'm not talking about this record. I'm asking, is it possible that trauma can cause a previously asymptomatic chronic condition to become symptomatic?

A Oh, sure. It's possible. **RX 4, pp. 86-88.**

On 12/12/18, Dr. Bruce Schlafly, a board-certified orthopedic surgeon specializing in hands and wrists, evaluated Petitioner. He reviewed all of her medical records, and offered several opinions when he testified by deposition on Petitioner's behalf on 9/24/19.

Dr. Schlafly diagnosed painful osteoarthritis and subluxation of the CMC joint at the base of Petitioner's left thumb. He noted that the pain this produced had resulted in significant loss of strength, especially pinch and grip strength. On examination, her pinch strength on the left measured 4 pounds, compared to 15 on the right; her grip measured 3 pounds for the left, compared to 40 on the left. Repeat testing confirmed the results. These findings were similar to those recorded by Respondent's expert, Dr. Sudekum.

Dr. Schlafly stated, "There is no evidence that Ms. Davis experienced pain and weakness in her left thumb prior to the work injury of 9/15/2016." He went on to explain:

Although it is probable that x-rays of her left hand and thumb immediately prior to this injury would have shown significant arthritis of the CMC joint at the base of the

[1] This stands in contrast to his physical examination, in which her pain was localized in her thumb and hand, rather than her wrist.

left thumb, arthritic CMC joints do not have normal cartilage, and cannot tolerate a direct blow to the joint the way normal joints can. Due to the loss of normal cartilage at the thumb CMC joint, caused by the arthritis, the joint surface does not have the normal cushion of a normal joint, and a direct blow to the joint such as this is more likely to produce permanent pain, and perhaps increased subluxation with swelling. It is my opinion that Ms. Davis' work injury of 9/152016 is the primary and prevailing factor in the cause of her ongoing pain and weakness involving her left thumb, centered at the CMC joint, and is the primary and prevailing factor in her need for additional treatment. The nonoperative treatment provided to this date has not been effective, and I therefore recommend surgical treatment for tendon interposition arthroplasty. **PX 1, Deposition Exhibit B, p. 6.**

Petitioner testified that she had no problems in her left wrist or thumb leading up to her work injury. She had been working as a teacher for approximately 10 years, without problems. She did admit to a prior left wrist problem over twenty years ago, when she had deQuervain's tendonitis, which was surgically released, but that following that procedure, her complaints had receded, and she went the next twenty years without problems until her 9/15/16 work injury. In fact, there were no medical records following Petitioner's deQuervain's tendon sheath release mentioning her left wrist, hand, or thumb, and no reports, from Petitioner or otherwise, that there had been any problems in her left hand, wrist, or thumb prior to her work injury.

Petitioner testified that her functioning has been significantly impacted in terms of using her left hand, though luckily, she is right-handed, and so is able to continue to teach. She lives with constant pain and weakness, and testified that she experiences a lack of dexterity, and spontaneous loss of grip. She has a graveyard of broken coffee cups to attest to this. She testified she is interested in further medical treatment, to try and get back to a level of functioning that will allow her to effectively use her left hand.

THE ARBITRATOR CONCLUDES:

Regarding disputed issue (F), the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's condition of ill-being (painful osteoarthritis and subluxation of the CMC joint at the base of her left thumb) is causally related to the work injury of September 15, 2016.

In support of this conclusion, the Arbitrator notes the following:

In over twenty years leading up to the injury, Petitioner had no complaints in her left wrist, hand, or thumb. There were no medical records even mentioning those body parts during those twenty years. While there is no disagreement that Petitioner had advanced osteoarthritis at the base of her CMC joint prior to the injury, it only became painful, and therefore disabling, following her 9/15/16 work injury. Dr. Sudekum could only allude to Petitioner's untruthfulness[2] to support his opinion that her condition had not changed following the 9/15/16 work injury.

[2] He could only allude, because there is no evidence that she has once lied during the pendency of this case.

The Arbitrator finds Dr. Schlafly's opinion more persuasive and in line with the evidence. Petitioner's left upper extremity was not pristine prior to her work injury, but it was demonstrably worse, and has continued to be worse for more than three years since the injury itself. If Dr. Sudekum were correct, then her pain and complaints would have returned to baseline by now; her testimony indicates it has not.

To suggest that Petitioner's work injury is not at all causally related to her current condition is unreasonable. She had no history of left hand, wrist, or thumb problems for over twenty years leading up to the work injury, and had been asymptomatic from her only prior injury to the same area of the body (deQuervain's tendonitis requiring a deQuervain's tendon sheath release in the 1990s) for over twenty years, at which point, she suffered a work injury, and can now barely use her left hand. Clearly the work injury, *at the least*, might have contributed to cause Petitioner's current condition of ill-being.

The Arbitrator finds Dr. Schlafly's opinions to be credible, and adopts them on all issues. Dr. Schlafly is an orthopedic surgeon who specializes in hands and wrists, and has offered reasonable surgical treatment that has a good chance of reducing her pain and improving her function. Dr. Sudekum, on the other land, apparently believes that Petitioner is lying, and she should effectively get over it.

Regarding disputed issue (K), the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is entitled to prospective medical care. In support of this conclusion, the Arbitrator notes the following:

As stated above, since Petitioner has extremely limited use of her left hand, experiences severe weakness, loss of dexterity, and spontaneous loss of grip. She has experienced these symptoms since her work injury of 9/15/16, before which they were not present. The Arbitrator credits Dr. Schlafly's proposed surgical intervention offers Petitioner the probability of improved strength and function, and the reduction of pain. In the absence of such a procedure, given the failure of conservative treatment, Petitioner is likely to be left with an effectively useless left hand. Because of the above, the Arbitrator concludes that Petitioner requires further care to relieve her from the effects of her 9/1/16 work injury.

CONCLUSION

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to her 9/15/16 work accident, and that Respondent is ordered to provide, authorize, and pay for prospective medical treatment consistent with Dr. Schlafly's recommendations.