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

Craig Eldridge,

Petitioner,

vs.

Kehe Distributors LLC,

Respondent.

21IWCC0043

NO: 14 WC 2899

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 permanent partial disability, permanent total disability, and penalties and fees, 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 with respect to the issue of penalties and fees. Petitioner submitted two Petitions for Penalties and Fees under sections 19(l), 19(k), and 16 of the Act. The first, filed on February 13, 2018, concerned unpaid medical bills. Petitioner attached a Section 12 report from Dr. Brian Forsythe as confirming that Petitioner's medical treatment had been reasonable and necessary. Petitioner also attached a group exhibit including letters to Respondent's counsel and medical bills from: Dr. Finn ($166.00 dated May 15, 2017); Premium Healthcare Solutions ($2,336.00 dated May 19, 2017); and Weiss Memorial Hospital ($1,066.82 - adjusted to $321.11 - dated May 15, 2017). The group exhibit also included Dr. Rabb's prescription for a functional capacity evaluation (FCE) dated June 27, 2017 and Petitioner's counsel's letter to Respondent's counsel seeking approval.

The second Petition for Penalties and Fees, filed on March 14, 2019, primarily addressed Respondent's termination of Petitioner's maintenance benefits on March 6, 2019 based on Petitioner's alleged refusal of two jobs. The petition denied that Petitioner refused two jobs but also alleged that Petitioner would nevertheless be entitled to wage differential benefits between his previously determined average weekly wage of $1,720.39 and the $640.00 he would earn working full-time at $16.00 per hour.

Petitioner maintains that the Arbitrator erred in denying both petitions, arguing that Respondent had no good faith basis to deny these payments. Petitioner also claims that Respondent stipulated that Petitioner was entitled to temporary total disability (TTD) and maintenance payments from May 15, 2017 through March 1, 2019, but did not issue these benefits from May 15, 2017 through August 17, 2017. However, the Request for Hearing indicates that Respondent disputed Petitioner's claims for TTD and maintenance and claimed that it already paid benefits from May 15, 2017 through March 1, 2019.

The standard for granting penalties pursuant to section 19(l) differs from the standard for granting penalties and attorney fees under sections 19(k) and 16. Section 19(l) provides in pertinent part, as follows:

> "*If the employee has made written demand for payment of benefits* under Section 8(a) [820 ILCS 305/8] or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d) [820 ILCS 305/8.2]. In case the employer or his or her insurance carrier shall *without good and just cause* fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission *shall* allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." (Emphases added.) 820 ILCS 305/19(l) (West 2016).

Penalties under section 19(l) are in the nature of a late fee. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763 (2003). In addition, the assessment of a penalty under section 19(l) is mandatory "[i]f the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515 (1998). The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Mechanical Devices*, 344 Ill. App. 3d at 763. The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9-10 (1982).

The standard for awarding penalties under section 19(k) is higher than the standard under 19(l). Section 19(k) of the Act provides, in pertinent part, as follows:

> "In case where there has been any *unreasonable or vexatious delay* of payment or intentional underpayment of compensation *** then the Commission *may* award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." (Emphases added.) 820 ILCS 305/19(k) (West 2016).

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 2016). "The amount of [attorney] fees to be assessed is a matter committed to the discretion of the Commission." *Williams v. Industrial Comm'n*, 336 Ill. App. 3d 513, 516 (2003). The calculation of a penalty award under section 19(k) is simply a mathematical computation of 50% of the amount payable at the time of the award. *Id.*

Sections 19(k) and 16 require more than an "unreasonable delay" in payment of an award. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514-15 (1998). It is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *Id.* at 515. Instead, section 19(k) penalties and section 16 fees are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *Id.* In addition, while section 19(l) penalties are mandatory, the imposition of penalties and attorney fees under sections 19(k) and section 16 is discretionary. *Id.*

Regarding the first petition, Petitioner satisfied the section 19(l) requirement of a written demand regarding the specified medical bills. The Arbitrator's conclusion that Petitioner failed to prove that he presented the outstanding balances to Respondent prior to the hearing is contradicted by the group exhibit to the first petition. The Arbitrator relied on testimony from Joanna Aquino, who worked as a return-to-work claims adjustor for Travelers Insurance, to conclude that Respondent paid all of the medical bills presented by Petitioner. However, Ms. Aquino testified that Respondent did not pay the bills in this first petition.

The issue then becomes whether Respondent had good and just cause for a delay in payment of the medical bills identified in the first petition. Respondent claims that Petitioner returned to Dr. Finn on May 15, 2017, two years and one month after his last office visit, but this overlooks that Petitioner treated with Dr. Finn on July 13, 2016 and with Dr. Raab on multiple visits in 2016 and early 2017. Respondent observes that Dr. Finn's May 15, 2017 did not contain an opinion on causation and that Dr. Wolin's June 13, 2017 note diagnosed unilateral post-traumatic osteoarthritis of the right knee. However, the Request for Hearing and the transcript of hearing clearly establish that the parties considered the issue of causal connection to have been determined in prior proceedings and not in dispute.

Respondent claims that had it been afforded the opportunity, it would have offered evidence to rebut the petition, including Respondent's June 2017 denial letter and an August 2017 pretrial agreement wherein the sitting Arbitrator recommended that TTD was to be paid through the date of the Section 12 examination. The record does not reflect, and Respondent does not explain, how it was precluded from offering any evidence, particularly including the denial letter.

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Respondent's Response Brief further refers to Petitioner's exhibits generally showing various payments by Respondent's group insurer. However, Respondent's own Exhibit 4 does not show any payments to the providers listed in the demand letters during the period from May 15, 2017 through August 17, 2017. Respondent's Exhibit 4 does indicate a payment to Weiss Memorial Hospital of $582.16 on July 9, 2016, outside the period which is the subject of the first petition. The Weiss bill included in the first petition is also included in Petitioner's Exhibit 9. The May 15, 2017 bill from Dr. Finn included in the first petition is included in Petitioner's Exhibit 8, bearing indications that nothing was paid by insurance or self-payment. The May 19, 2017 bill from Premium Healthcare Solutions is also Petitioner's Exhibit 11. Respondent notes that Petitioner did not testify that this bill remained unpaid, but again, Respondent's own payment ledger shows no payment for these services.

In short, Respondent offered no good and just cause for a delay in payment of the medical bills identified in the first petition well beyond the 14 days specified by section 19(l) of the Act. Given that more than a year elapsed between the filing of the first petition and the hearing, the Commission imposes the maximum section 19(l) penalty of $10,000.

The remaining issue regarding the first petition is whether Respondent's refusal to pay was deliberate or vexatious. Petitioner's Statement of Exceptions asserts that Respondent was clearly aware of the non-payment due to the multiple penalty petitions Petitioner filed, but there is only one petition regarding the medical billing. Moreover, Petitioner asserts that Respondent received notice of his petitions but produced no evidence of the alleged notice. Accordingly, the Commission exercises its discretion to deny Petitioner's request for penalties pursuant to section 19(k) and fees pursuant to section 16 of the Act.

Petitioner's second petition, while filed shortly after the termination of maintenance, does not attach a written demand required by section 19(l) and Petitioner identified no evidence that Respondent was served with the second petition (assuming that such would constitute a written demand). Moreover, the record establishes that Respondent had a good faith reason to dispute continued payment of maintenance after hearing that Petitioner was telling interviewers that the salaries being offered were inadequate. Petitioner alleges that he would have been entitled wage differential payments, but a permanency award differs from maintenance payments. Accordingly, the Arbitrator correctly denied section 19(l) penalties on the second petition and it follows that Petitioner also cannot meet the higher standard required to impose penalties under section 19(k) of the Act or award fees pursuant to section 16 of the Act.

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 20, 2020 is hereby affirmed and adopted as modified herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,146.93 per week for the period from May 15, 2017 through August 17, 2019, for a period of 13 and 4/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner's reasonable and necessary outstanding medical bills, pursuant to the fee schedule and §§8(a) and 8.2 of the Act, for the services provided by: Illinois Bone & Joint Institute in the amount of $238.00; University of Chicago Physicians Group (Dr. Henry Finn) – University of Chicago Bone & Joint Replacement in the amount of $166.00; Weiss Memorial Hospital in the amount of $3,851.94; Metropolitan Advanced Radiological Services in the amount of $68.00; Premium Healthcare Solutions in the amount of $2,336.00; and the Center for Athletic Medicine in the amount of $2,931.00. Respondent shall receive 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 Petitioner is receiving this credit, as provided by §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits, commencing January 31, 2019, of $570.29 per week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in §8(d)1 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is awarded $10,000 in penalties pursuant to §19(l) of the Act regarding the petition filed on February 13, 2018. Petitioner's Petitions for Penalties and fees are otherwise 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.

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:
o: 1/21/21
BNF/kcb
045

FEB 1 - 2021

Barbara N. Flores

Deborah L. Simpson

Deborah L. Simpson

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

CORRECTED

21IWCC0043

ELDRIDGE, CRAIG
Employee/Petitioner

Case# **14WC002899**

KEHE DISTRIBUTORS LLC
Employer/Respondent

On 3/20/2020, 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 0.30% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1876 CZAPLA LAW
EDWARD ADAM CZAPLA
1821 WALDEN OFFICE SQ #400
SCHAUMBURG, IL 60173

1139 NOBLE & ASSOCIATES
DENNIS J NOBLE
387 SHUMAN BLVD SUITE 210E
WARRENVILLE, IL 60563

21IWCC0043

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Craig Eldridge
Employee/Petitioner

v.

KEHE Distributors, LLC
Employer/Respondent

Case # 14 WC 2899

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles M. Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **July 15, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [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 [x] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **November 18, 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 $**89,460.38**; the average weekly wage was $**1,720.39**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **0** dependent children.

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

Respondent ***has*** 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 $1,146.93/week for 13.571 weeks, commencing 5/15/2017 through 8/17/2017, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $9,590.94, per 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 permanent partial disability benefits, commencing January 31, 2019, of $570.29/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Petitioner's request for penalties and fees pursuant to Sections 16, 19(k) and 19(l) of the Act is denied.

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

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

Signature of Arbitrator

March 19, 2020
Date

MAR 20 2020

Procedural History:

Petitioner previously tried this case before Arb. Hegarty on May 1, 2014 and a decision was rendered on June 2, 2014. No petition for review was filed. (Px. 15) A second hearing before Arb. Hegarty took place on December 4, 2014. Arb. Hegarty issued that decision of April 13, 2015 and the decision was affirmed and adopted by the Workers' Compensation Commission on February 1, 2016. (Px. 14) The Commission's decision provides the law of the case, leaving the following issues in dispute:

- [J] Payment of Reasonable and Necessary Medical Expenses;
- [K] Payment of TTD and/or Maintenance;
- [L] Nature and Extent; and
- [M] Imposition of penalties and/or fees.

Findings of Fact

Craig Eldridge testified that after the original 19b hearing he returned to work for KeHe until 2017. During that time, he had been referred by Dr. Rabb to Dr. Finn for right knee pain in 2015 receiving two injections. In July 2015 Dr. Finn mentioned Eldridge might be a total knee candidate down the road, but otherwise released Petitioner to full duty.

Mr. Eldridge returned to Dr. Rabb in June of 2016 after experiencing pain while at work unloading and stacking product. An FCE was ordered at this point. Petitioner underwent an FCE on July 20, 2016. Dr. Rabb would release Petitioner back to work with restrictions per the FCE of no kneeling, climbing or squatting. Petitioner continued working at this point.

In 2017 Mr. Eldridge claimed he was having difficulty getting "up and down" from certain positions and returned to Dr. Rabb on February 13, 2017, who, in turn, referred him back to Dr. Finn. Dr. Finn evaluated Petitioner on May 15, 2017. Petitioner was taken off work. An MRI scan was ordered. Post MRI Petitioner sought a second opinion with Dr. Preston Wolin who evaluated the Petitioner on June 5, 2017 prescribing a Synvisc injection and an off-loader brace. Eventually Dr. Wolin released Petitioner back to work again per the FCE.

TTD payments started on August 17, 2017 in conjunction with a scheduled IME with Dr. Bryan Forsythe. On September 13, 2017 Dr. Forsythe opined the barring proof of preexisting injury and treatment, the degenerative condition of the knee was related, and treatment to that point was reasonable. Once determined that KeHe would not be able to take Eldridge back with the current restrictions, Eldridge then claimed he started a self-directed job search. In November 2017 Petitioner demanded formal vocational rehabilitation.

A vocational counselor, Ms. Mary McMillan, began working with Petitioner in August 2018.

Mr. Eldridge testified that he began working for Jewel in 1977 and took on a management job in 1979 which prompted him to quit college. In 1994 Eldridge, citing the need for more family

time, took a position with Manischewitz Company. Three years later, KeHe purchased the distribution rights to Manischewitz and Petitioner started working with the Respondent through until 2017.

Eldridge testified that he has applied for or researched over 1300 jobs over the period of 1.5 years securing less than 5 in-person interviews and about 15 what he called "phone screening" discussions with prospective employers. Eldridge denied turning down any job offers claiming none were made.

On cross-examination Eldridge testified that he would be on the computer approximately one hour in the morning to research and/or apply to positions on-line; in the afternoon he would spend an additional one hour reading and responding to emails. Of the prospective employers he would only provide prior salary levels if asked and if the application called for it, his minimal salary threshold was listed at $50,000.00.

Mr. Eldridge denied telling Integrated/Ms. Weaver in January 2019 that he would not take a position that did not pay $90,000.00.

Eldridge claims his knee remains stiff, sore and swollen which he treats with ice and rest. He did return to Dr. Wolin who altered the restrictions to include sit/stand breaks every hour.

Laura Eldridge, Petitioner's wife, testified that she would get him ice several times a day for his knee. On cross-examination Mrs. Eldridge testified her husband would spend four to six hours or more on the computer looking for work.

Susan Entenberg (Vocational Expert for Eldridge) testified in her evidence deposition that she agreed with the Genex vocational plan as it existed in January 2019 but felt no stable job market would exist if Eldridge did not secure employment by April 2019.

Respondent's Witnesses:

Johanna Aquino testified that she is a return to work claims adjustor for Travelers Insurance for the past two and a half years. Ms. Aquino testified that she has been the claim specialist assigned to the claim since April 2018 and that TTD benefits were paid until March 2019 when benefits were suspended following discussions with the assigned vocational specialist. On re-direct testimony Johanna testified that she had paid all related bills that she had received.

Mary McMillin, testified that she is a vocational case manager for GENEX Services, initially met with Mr. Eldridge in the fall of 2018 to provide job placement services. Ms. McMillin testified that specifically he assisted Petitioner in revamping his resume, conduct bi-weekly vocational meetings to go over his job search, provide weekly job leads, follow up with potential employers and cold call employers to inquire about jobs within his capacity. Ms. McMillin provided vocational services for Petitioner from August 2018 through March 2019. She generated multiple reports detailing the progress and ultimate suspension of vocational efforts. Ms. McMillin testified that Petitioner complied with her recommendations for vocational services. However, from a compliance standpoint she was told differently from employers from follow-up

phone calls. Ms. McMillin testified that she called back three potential employers that interviewed Petitioner.

Ms. Rebecca Weaver with Integrated Access Corporation reported that Petitioner told her that he was not open to a salary that paid $45,000.00. His previous salary was twice that, $90,000.00. According to the report, Ms. Weaver was very surprised being a seasoned salesperson that Petitioner did not present himself pleasantly. She had recently hired someone of a similar background in that type of position and wanted to make a job offer to the Petitioner. The second interviewer that Ms. McMillin followed up with was Lucy with Midwest Goods for a sales associate/account executive position. Lucy advised that the job paid between $16.00 and $18.00 per hour. Petitioner told Lucy that he was not interested in the position due to the pay. According to Lucy, the job offer was declined and that it was "not on her end, but on his."

On cross-examination Ms. McMillin testified that she believed that based on the two potential job offers that Petitioner turned down that there was a stable labor market available for the Petitioner if he would be open to a lower salary.

Conclusions of Law

The Arbitrator adopts and incorporates the findings from the prior decisions of Arb. Hegarty from June 2, 2014 (Px. 15) and the Illinois Workers' Compensation Commission from February 1, 2016 (Px. 14).

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

At the time of the hearing, Petitioner claimed the following bills on the Request for Hearing form (Arb. 1, Px. 7-12):

Provider	Amount
Illinois Bone & Joint Institute (Px. 7):	$ 238.00
University of Chicago Physicians Group Dr. Henry Finn – University of Chicago Bone & Joint Replacement (Px. 8)	166.00
Weiss Memorial Hospital (Px. 9)	3,851.94
Metropolitan Advanced Radiological Services (Px. 10)	68.00
Premium Healthcare Solutions (Px. 11)	2,336.00
The Center for Athletic Medicine (Px. 12)	2,931.00

Based on the testimony of the Petitioner and the September 12, 2017, IME report of Dr. Brian Forsythe (Px. 16), the Arbitrator finds the listed, outstanding bills to be reasonable and necessary. To the extent that the listed bills remain outstanding, the Arbitrator assigns liability to

the Respondent to pay the reasonable and necessary medical services as provide in Sections 8(a) and 8.2 of the Act.

[K] What temporary benefits are in dispute?

The Arbitrator finds that Petitioner was temporarily and totally disabled from May 15, 2017 to August 18, 2017; or 13.571 weeks.

Maintenance benefits were terminated on March 1, 2019. Based on the Arbitrator's award of a wage differential benefits as outlined in Section L, the Arbitrator denies maintenance benefits past the January 30, 2019 job interview and offer.

[L] What is the nature and extent of the injury?

Petitioner claims to be permanently and totally disabled as a result of the November 18, 2013 work incident.

An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of wages to him. A.*M.T.C. of Illinois v. Industrial Comm'n,* 77 Ill.2d 482, 487 (1979). If the employee's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is upon the employee to establish by a preponderance of the evidence that he falls into the odd lot category, that is, one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. *Westin Hotel v. Workers' Compensation Comm'n*, 372 Ill. App 3d 527, 544 (2007).

An employee satisfies his burden of proving that he falls into the odd lot category by showing either (1) diligent but unsuccessful attempt to find work or (2) that because of his age, skills, training, and work history, he will not be regularly employed a well-known branch of the labor market. *Id.* at 544.

Once the employee establishes that he falls into the odd lot category the burden shifts to the employer to prove that some type of regular and continuous employment is available to the employee. *City of Chicago v. Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1091.

Applying the applicable law to the facts before the Commission, the Arbitrator finds that the Petitioner failed to meet its burden of proof to establish that he was permanently and totally disabled. The Arbitrator finds that While on the surface he appeared to be diligent and compliant with the vocational services and recommendations, the evidence clearly shows that the Petitioner had very specific recommendations for salary expectations. Based on the foregoing, the Arbitrator finds that the Petitioner failed to make a threshold showing that he was unable to find work. To the contrary, the Arbitrator find that the Petitioner was able to successfully secure employment with two separate entities and but for his own effort to undermined and sabotage his employment he would have then offered a job. Therefore, the Arbitrator does not need to determine whether or not the Respondent can show that there is a stable labor market with some type of regular and continuous employment available to the claimant. The Petitioner established that on his own.

Section 8(d)1 of the Act provides in pertinent part:

> If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment he shall, . . . receive compensation for the duration of his disability . . . equal to 66 2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or *is able to earn in some suitable employment or business after the accident*. . . . For accidental injuries that occur on or after September 1, 2011, an award for wage differential under this subsection shall be effective only until the employee reaches the age of 67 or 5 years from the date the award becomes final whichever is later. (emphasis added)

The Arbitrator finds that Petitioner sustained his burden of proof to establish benefits under a wage differential analysis. It was established via Respondent's vocational expert that Petitioner turned down a job making $45,000.00 a year. The Arbitrator finds this to be a credible job offer based off the fact that Miss Weaver even expressed excitement with the prospects of hiring Petitioner because his background mirrored that of a recent hire and but for Petitioner's rejection of the salary offered, Ms. Weaver would have offered Petitioner the job. This is corroborated by Petitioner's own testimony on direct examination that he would only accept a minimum salary of $50,000.00. It Is further noted that at the time Petitioner was looking for employment he was receiving TTD/maintenance benefits of $1,146.93 a week which annualized comes to $59,640.36. While not dispositive on the issue, Petitioner's own testimony was that he spent two hours a day looking for employment.

Petitioner's salary on November 18, 2013 was $89,460.38. Having found that Petitioner was able to obtain suitable employment for $45,000.00 effective January 30, 2019. This creates a wage differential of $44,460.38 annually. Pursuant to section 8(d)1 of the Act, Petitioner shall receive 66 2/3% of that amount until the Petitioner reaches the age of 67 or 5 years from the date of the final award whichever is later.

Respondent shall pay Petitioner permanent partial disability benefits, commencing January 31, 2019, of $570.29/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

[M] Should penalties or fees be imposed upon Respondent?

The Arbitrator finds Respondent acted in good faith at all times. Respondent's termination of indemnity benefits on March 1, 2019 was based on the evidence that Petitioner had subverted his own vocational placement.

The Arbitrator finds that based on the testimony of Ms. Aquino, all medical bills that were presented to the Respondent for payment had been paid pursuant to the appropriate fee schedule. The Petitioner failed to prove that he presented the outstanding medical balances to the Respondent prior to arbitration. Ms. Aquino testified that she has never denied any medical bills that have been presented to her for payment.

For the above reasons the Petition for penalties and fees 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

Lori Cesario-Farraj,
Petitioner,

vs.

UChicago Argonne LLC,
Respondent.

21IWCC0044

NO: 16 WC 19582

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical, temporary disability 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 November 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $48,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 1 - 2021
o12/17/20
BNF/rm
046

Barbara N. Flores

Marc Parker

DISSENT

I respectfully dissent from the Decision of the majority. I would have found that Petitioner failed to meet her burden of proving that repetitive typing activities caused her to develop De Quervain's tenosynovitis and a right trigger thumb.

No evidence was presented quantifying the amount of time Petitioner spent typing, except for the GSS Injury Report that indicated Petitioner's typing equated to only four pages at most per day from March 7, 2016 through April 1, 2016. Although it is not clear who specifically authored the GSS Injury Report, Petitioner testified that she had no idea how to estimate how much typing was required on her busier help desk days. When asked how long it would take to create a JIRA ticket and fill out its different fields, Petitioner responded that she had no idea and it would depend on the issue. Petitioner testified that she was constantly typing but failed to provide a number of minutes or hours that she typed on average. There was also no testimony quantifying the amount of time Petitioner spent performing her other work duties unrelated to her typing activities.

Dr. Michael Treister, the Section 12 examiner selected by Petitioner, also did not have knowledge as to the amount of time Petitioner spent typing. When asked if Petitioner told him if she was typing nonstop or doing other activities, Dr. Treister testified that he did not get into that with Petitioner and did not know. He also did not recall ever seeing a job description. Dr. Treister's lack of knowledge as to how much time Petitioner spent typing fatally weakens his opinion that Petitioner's conditions were causally related to her repetitive typing activities.

In addition to failing to quantify her typing activities, Petitioner also testified that she used a traditional keyboard and typed in a classic fashion. Although Petitioner suggested that she "slammed" her right thumb down on the keyboard's hard plastic strip, her description of forcefully slamming her right thumb down is logistically unclear.

For these reasons, I would have found that Petitioner failed to prove her right hand and thumb conditions were causally related to her alleged repetitive typing activities. As such, I would have reversed the Decision of the Arbitrator and accordingly denied all benefits.

DLS/met
46

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0044

CESARIO-FARRAJ, LORI
Employee/Petitioner

Case# **16WC019582**

UCHICAGO ARGONNE LLC
Employer/Respondent

On 11/12/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1315 DWORKIN AND MACIARIELLO
ANN-LOUISE KLEPER
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

2965 KEEFE CAMPBELL BIERY & ASSOC
JOHN P CAMPBELL
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

21 IWCC0044

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

Lori Cesario-Farraj
Employee/Petitioner

v.

UChicago Argonne, LLC
Employer/Respondent

Case # **16** WC **19582**

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 **Wheaton**, on **July 24, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 14, 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 **$78,403.52**; the average weekly wage was **$1,507.76**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

Respondent shall pay the bills of Palos Surgery Center and MidAmerica Orthopaedics/Dr. Anton Fakhouri in accordance with the provisions of Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,005.26/week for 6 4/7 weeks, commencing 06/27/2016 through 08/11/2016, as provided in Section 8(b) of the Act.

The Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 20% loss of use of the right hand pursuant to Section 8(e) of the Act. Respondent shall pay Petitioner permanent partial disability benefits of $755.22/week, as provided in Section 8(e) of the Act.

Respondent shall pay to Petitioner compensation that has accrued from March 14, 2017 through July 24, 2019 and shall pay the remainder of the award, if any, in weekly payments, as set forth in the Conclusions of Law attached hereto.

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

11/8/19
Date

21IWCC0044

PROCEDURAL HISTORY

This case was tried on July 24, 2019. The disputed issues were whether or not Petitioner sustained an accident that arose out of and in the course of her employment; whether or not Petitioner's current condition of ill-being is causally connected to her injury; whether or not Respondent is liable for certain unpaid medical bills; whether or not Respondent is liable to pay certain temporary total disability benefits; and the nature and extent of Petitioner's injury.

FINDINGS OF FACT

On March 14, 2016, Lori Cesario-Farraj, hereinafter "Petitioner," was employed by UChicago Argonne, LLC, hereinafter "Respondent," a Department of Energy laboratory which focused primarily on research, science and technology. She started working there in 1999, doing mechanical design work, and she held several different roles over the years (Tr. pg.9). In 2005, she was promoted to a GIS Analyst, doing background packages for Homeland Security, and in 2008 she was promoted to Data Management Specialist, still working on national security programs but in a different capacity. Petitioner was working in that position on March 14, 2016 (Tr. pg.9-10).

When she first became a data management specialist, Petitioner created and implemented training programs, provided support for the software engineering team and did software engineering tasks, such as use case scenarios, the primary foundation utilized by software engineers to build the logic behind programming and coding. She also provided technical support and documentation (Tr. pg.10).

As a data management specialist Petitioner worked at a help desk, as did everyone else on staff, two to three shifts per week, either in the morning or in the afternoon. A shift was four to five hours. The help desk provided technical support to ensure that all users, whether they were Federal employees or the end-users, who were non-Federal employees, could access the system. The technical assistance ranged from tasks as simple as resetting passwords to changing the designated administrator. Two service channels were used on the help desk, telephone and email (Tr. Pg.11-12).

Petitioner testified that, in the fall of 2015, her job duties significantly changed when she returned from FMLA leave. She was assigned to work on the help desk four days per week on both the morning and afternoon shifts. Previously she had worked

either the morning or the afternoon shift and never on consecutive days. She testified that Mondays and Tuesday were busier on the help desk than the other days of the week; they had a higher traffic flow. She was assigned to the desk on Mondays, Tuesdays, Wednesdays and Fridays (Tr. Pg.12-13).

In addition to spending more time at the help desk, the nature of the work she did there had changed in that the JIRA ticketing system had been implemented. For every contact that was made to the help desk, she had to create a JIRA ticket that was associated with that contact. It was a tool for tracking whether the contact was from a Federal employee or non-Federal user, which system the user needed to access, whether the contact was made by telephone or email, and the reason for the contact. It was valuable tool for tracking the metrics, but it created more work for the person staffing the help desk. Previously, a simple task, such as resetting a password, required only a single click of a button. Incorporating JIRA meant that after clicking the button to reset a password, it was necessary to also create a JRA ticket. What had been a single click became several steps to complete the same task. To create a new ticket, she had to type and hit the tab bar to go to and complete the required fields. According to Petitioner, when she used the space bar, she always used her right thumb (Tr. Pg.13-15).

Petitioner testified that in the beginning in the fall of 2015, in addition to working on the help desk both shifts, four days a week, she was also assigned the task of updating the user guides for all the systems, some of which had not been updated since 2013. The task involved constant typing. She explained that she was essentially starting from scratch, because the back end of the system design had changed significantly when it switched over to a sequel data base (Tr. Pgs. 15,41).

On March 14, 2016, a Personnel Security Investigation Survey was launched to ensure that all designated facility clearance officers had the proper credentials to be in their positions. A "blast" was sent to 12 or 15 thousand contractors to advise them that the requirement would have to be fulfilled within 30 days (Tr. Pg.16).

Prior to the launch of the PSI Survey, JIRA records, as posted by Petitioner in a system called BOX, reflected that the number of contacts to the help desk averaged 20-something per day. During the week before the "blast," for example, the average was 26.

On March 14, 2016, Petitioner personally resolved 61 contacts on the help desk (Tr. Pg. 16-18, PX5-p. 17-19).

On the afternoon of March 14, 2016, Petitioner testified that on her way to her car to go home she noticed soreness in her dominant right hand and that it was really hard for her to start the ignition in her vehicle (Tr. Pg.18-19). According to Petitioner she had never experienced any significant pain in her right thumb or right hand prior to that date. Petitioner testified that she had never before consulted a doctor or received treatment from any medical practitioner for problems with or pain in her right thumb or right hand (Tr. Pg.19).

Petitioner returned to work the next day and continued to experience a high volume of contacts. She noticed additional pain and swelling in her hand. The following day, March 16, she returned to work and experienced excruciating pain in her hand and noted that it was swollen like a balloon. She testified that she went to Argonne Medical and explained that there had been a significant increase in her work and keyboarding and that, as a result, her hand was swollen and that she was having tremendous pain (Tr. Pgs.20-21).

The notes of the Argonne Health and Employee Wellness Clinic confirm that Petitioner was seen on March 16, 2016, by Dr. Lisa Pocius, complaining of swelling and soreness of the right hand and base of the thumb, with no numbness or weakness, due to repetitive typing and writing. The clinical assessment was hand swelling and pain, likely tendonitis, consistent with the subjective description of what had occurred. A cool pack was applied with some relief and decrease in swelling, and Petitioner was given Ibuprofen. She was advised to rest her hand, and the doctor stated that she should remain/return to work with a job transfer or a restriction of no keyboarding or handwriting with the right hand until March 28. She was given a follow-up appointment of March 21, 2016 (PX1-p.2-4).

Petitioner testified that she returned to the company clinic on March 21, 2016, her first day back at work after scheduled time off, with reduced swelling but ongoing pain (p.21). Dr. Pocius' notes reflect that the edema in the hand had resolved but that the patient still complained of mild soreness in the base of the thumb and in the lateral aspect of the distal right forearm. Mild tenderness was still note to deep palpation along the

course of the extensor longus tendon. The doctor advised breaks from typing, ergonomic assessment of the workstation and Ibuprofen and/or cool pack if needed. Petitioner was instructed to take a break from keyboarding for three minutes every hour and to elevate the hand during that period (PX1-p.2-4).

On March 21, 2016, another e-mail reminder about the PSI survey was sent, resulting in what Petitioner recalled was an average of about 50 contacts per day rather than the normal 20 (p.22-23). According to Petitioner's weekly highlight in the BOX system, the sending of the reminder produced 267 issues resolved that week, an average of 53.4 per day (PX5-p.19).

Sometime after March 21, 2016, when Dr. Pocius recommended an ergonomic evaluation of Petitioner's workstation, such an assessment was performed by Respondent's ergonomic team. Petitioner testified that changes were made, including the substitution of a soft gel cushion palm rest for the hard plastic strip which had been there previously, which she stated made "a world of difference." Previously, she said, it felt as though every time she hit the space bar, her thumb slammed the hard plastic strip (Tr. Pg.23-24,51, PX4-p.3).

On March 24, 2016, Petitioner had a previously scheduled appointment with her primary care physician, Dr. Tom Kim, during which she showed him her hand. She testified that at that time she was having shooting pain up her forearm, as well. The doctor prescribed Celebrex and physical therapy and restricted her to no typing for 15 minutes each hour for two weeks. The next day Petitioner returned to see Dr. Pocius and provided her with the recommendations made by Dr. Kim (Tr. Pg.24-25). According to the doctor's notes, Petitioner was having pain in the right base of the thumb, near the eminence and lateral wrist, which she rated as five on a scale from one to ten, worse with prolonged keyboarding. The doctor observed no edema but found tenderness to palpation along the extensor halluces longus tendon from the thumb to the mid-forearm. Range of motion and strength of the thumb, fingers and wrist were normal, but the patient self-limited movement of the thumb due to pain. Dr. Pocius changed her diagnosis to tendonitis of the extensor tendons of the thumb, or de Quervain's. She adopted Dr. Kim's recommendations (PX1-p.2-4).

On April 4, 2016, Petitioner was evaluated at Respondent's Health and Employee Wellness Division/Physical Therapy Department (p.25-26, PX1-p.19). She gave a consistent history regarding the onset of pain and was noted to have swelling in the right thumb/forearm and tenderness to palpation at the extensor pollicis brevis tendon and muscle belly and abductor pollicus longus muscle. Grip and strength were much less on the right than the left, and Petitioner had difficulty with functional activities. She was issued a thumb splint to be worn while sleeping. (PX1-p.18-19). Therapy began on April 7, 2016 (PX1-p.20).

Petitioner returned to see Dr. Pocius on April 7, reporting that the pain in the right wrist and base of the right thumb continued. The swelling had lessened but returned in the hand and in the second and third fingers. The doctor advised Petitioner to continue with the current program, including restrictions (PX-p.6-8). At her next visit to Dr. Pocius, on April 12, 2016, Petitioner was again advised to follow the treatment plan, but the doctor reduced the restriction to no typing for 10 minutes each hour. She noted that Petitioner would be seeing Dr. Kim on May 13 (PX1-p.6-8).

Petitioner had additional follow-up visits with Dr. Pocius on April 26, May 10 and June 2, 2016. She reported slow improvement, but she continued to have pain in the thumb and wrist (Tr. Pg.27-28).

On May 13, 2016, Petitioner returned to see Dr. Kim, at which time he referred her to an orthopaedic surgeon, Dr. Anton Fakhouri, at Midwest Orthopaedics (p.28). Her first appointment with the doctor was on May 16, 2016. After examining her, the doctor's diagnoses were right thumb trigger and extensor tendinitis of the first dorsal compartment of the right wrist. He noted no specific history of trauma other than overuse. He prescribed a course of occupational therapy and said that Petitioner could return to her normal work duties with the exception of taking breaks every hour for five to ten minutes. The doctor suggested a cortisone injection which Petitioner wished to avoid (Tr. Pgs.28-29, PX2-p.19-20).

Petitioner attended physical therapy in Dr. Fakhouri's office but reported no improvement (Tr. Pgs. 29-30, PX2-p. 32-38). When she returned to see the doctor on June 6, 2016, they discussed treatment options including the possibility of surgery (Tr. Pg.30, PX2-p.21).

On June 27, 2016, Dr. Fakhouri performed a de Quervain's release of the first dorsal compartment of the right wrist and a right thumb A1 trigger release at the Palos Hills Surgicenter. (Tr. Pg.30, PX2-p.22-23).

Petitioner saw Dr. Fakhouri in follow-up on July 12 and on August 9, 2016 and received post-operative occupational therapy in his office through August 11. She testified that almost immediately after surgery the shooting pain she had been having in her right forearm disappeared, but that she still had soreness in her thumb. She was released to return to work for the first time after surgery as of August 11. (Tr. Pg.30-32, PX2-24-27, 39-62).

Petitioner did not return to work for Respondent but started a new job in September 2016. She testified that she continues to use a computer but spends less time keyboarding than she did previously. She still feels the soreness in her thumb and is unable to perform certain day-to-day activities, such as use a manual can opener or twist open a jar, and she has trouble pulling up socks or zippers (Tr. Pgs.31,33).

According to Petitioner she was diagnosed with diabetes and took Metformin, before becoming pregnant with her children in 2005, through approximately 2010. She was diagnosed with a thyroid condition but no longer takes medication for it. (Tr. Pgs.33-34).

On March 8, 2017, at the request of Respondent, Petitioner was examined by Dr. Charles Carroll, IV, a Board certified orthopaedic and hand surgeon (RX2-p.5,7,16). He reported a normal examination of the right upper arm, elbow and wrist, with grip strength of 30 pounds on the right and 40 pounds on the left (RX2-p.10-11). He testified that she had no subjective complaints, and that her symptoms had completely resolved with surgery (RX2-p.11-12). He opined that based upon his review of her records, personal factors and the ergonomic evaluation, her work neither caused nor aggravated her de Quervain's tensosynovitis or trigger thumb. He stated that the reason for his opinion was that her work was repetitive but not heavy or forceful and that typing is not typically a cause for de Quervain's. He said that typical causes for de Quervain's are activities which are forceful in nature and have repetition involved in radial and ulnar deviation of the wrist. With regard to the trigger thumb, he said that it would typically be caused by more

forceful grasping. He attributed Petitioner's trigger thumb to her age, sex and weight (RX2 p.13-15).

Petitioner was examined by Dr. Michael R. Treister, also a Board certified orthopaedic and hand surgeon, at the request of Petitioner's attorney on April 5, 2017 (PX6-p.4-6, PX7). He noted that her subjective ongoing complaints were residual weakness in the grasp of the right hand and occasional aching on the volar aspect of the metacarpophalangeal joint, that is, the volar base of the right thumb where the tendon was released, particularly in bad weather (PX6-p.19). Upon examination, he said that his findings were similar to those of Dr. Carroll. He found a diminution in hand grasp, finger pinch and prehension in the right hand compared to the left, although Petitioner is right-handed (PX6-p.19-20).

Dr. Treister testified that Petitioner's conditions of ill-being, de Quervain's disease and trigger thumb were causally related to her employment (PX6-p.27). He explained that both conditions are caused by stenosing tenosynovitis, which is the result of inflammation of the synovial tissue on the interior aspect of the tendons sheaths. Irritation of the synovial tissue can result from repetitive movements of the tendons within their respective tendon sheaths and/or from contusions to those sheaths. It is possible to have a subclinical degree of synovial tissue irritation which is provoked by repetitive activities and/or contusions so as to become highly symptomatic. Once the synovial inflammation causes thickening of the synovial tissue within the tendon sheath, the space available for tendon movement can become constricted, causing pain. Swelling of the adjacent soft tissue outside the tendon sheath often occurs. Frequently swelling on the radial aspect of the distal forearm irritates the terminal portion of the radial nerve causing pain to radiate proximally on the radial forearm in the course of the radial nerve (PX6-p.21-26; PX7-p.5).

According to Dr. Treister, Petitioner was susceptible to developing tenosynovitis on at least three if not more bases, being female, heavyset and diabetic, but that the trigger that started the conditions was using her hand for data entry, typing and writing and the thumb to hit the space bar. The repetitive activities he said, led to an overuse syndrome of the tendons, which started an inflammatory process and resulted in the conditions (PX6-p.27). Dr. Treister, disagreeing with Dr. Carroll, noted that the Mayo

Clinic reports that "although the exact cause of DeQuervain's tenosynovitis isn't known, any activity that relies on repetitive hand or wrist movement … can make it worse," and that the American Academy of Orthopaedic Surgeons states: "De Quervain's tendinosis may be caused by overuse" (PX7-p.5-6).

Dr. Treister testified that it is not unusual to see isolated de Quervain's disease or isolated trigger finger in the thumb, but that having both conditions occur at the same time is further strong evidence of causal connection, because it indicates that all the forces were at the base of the thumb. Finally, the fact that the onset of the new problems occurred at exactly the same time that Petitioner's work activities changed, requiring extra use of the hand, he said, also supported a finding of causal relationship (PX6-p.27-28).

The most logical explanation for Petitioner's conditions of ill-being, opined Dr. Treister, is that she had a degree of subclinical tenosynovitis in her right thumb and distal radial forearm and that the repetitive movements of using the space key during the period of suddenly increased keyboarding irritated both the primary thumb flexor and the thumb abductor/extensors of the first dorsal compartment (PX7-p.5, PX6-p.47-48)

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).

WITH RESPECT TO ISSUES (C) DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, AND ISSUE (F) IS PETITIONER'S CURRENT CONDITION OF ILL-BEING 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 the testimony and the evidence and concludes that Petitioner has proven by the preponderance of the evidence that an accident arising out of and in the course of her employment by Respondent occurred and that her current condition of ill-being is causally related to the injury.

Petitioner' uncontroverted testimony was that in the fall of 2015, when she returned to work for Respondent after FMLA leave, her job duties changed significantly in a number of ways. Whereas she previously worked on the help desk two or three mornings or afternoons per week, not on consecutive days, she was assigned to work mornings and afternoons, four days per week, including Mondays and Tuesdays when the traffic flow was usually higher. In addition to spending more time at the help desk, each call she received while on the desk required more use of the keyboard because of the implementation of the JIRA ticketing system. A JIRA ticket had to be created for each task and the required fields had to be completed. She was also doing more typing in order to update user manuals. When using the keyboard she always used her right thumb to hit the space bar, and each time she did, she felt her thumb hitting the rigid, unpadded plastic wrist rest attached to her computer.

On March 14, 2016, an e-blast was sent to 12 or 15 thousand recipients, advising them of action they had to take within 30 days. On that day Petitioner resolved 61 contacts on the help desk which was more than double the volume that was typical for her. By the end of the day she had soreness in her right hand that made it difficult for her to start the ignition in her car. The next day the volume remained high and experienced additional pain and swelling in her hand. By March 16, the pain and swelling were so

concerning that she went to Respondent's Health and Employee Wellness Clinic where the history recorded was of repetitive typing. She improved after being off work, but when she returned to work, her symptoms worsened.

The Arbitrator finds it significant that the Respondent produced no witness to contradict any of Petitioner's testimony. Petitioner testified that she had no prior symptoms with her right thumb or hand and her symptoms manifested with the onset the e-blast and resulting increased volume of calls to be particularly compelling.

The Arbitrator notes that Dr. Treister agreed with the treatment, diagnoses and opinions of Dr. Fakhouri. Dr. Treister noted that Petitioner reported experiencing discomfort when her workload suddenly increased, and her symptoms continued to increase with the increase level of data entry work Petitioner was performing and the symptoms accompanied swelling. Dr. Treister testified that Petitioner's condition is more common in diabetics, women and people who are heaver, but the causative factor was the vigorous repetitive use of the tendon or forceful use of the tendons. Dr. Treister further testified that Petitioner may have been more susceptible to develop her condition but the trigger that started her condition was her using her hand performing data entering and picking up the phone which was documented in the ergometric study. Dr. Treister also testified that the repetitive use of the thumb operating the space bar and typing with her dominate hand caused an overuse syndrome of those tendons which started the inflammatory process. (PX 6, pgs. 21-27).

The Arbitrator found the opinions of Drs. Treister and Fakhouri more persuasive than the opinions of Dr. Carroll who opined that Petitioner's condition was not caused or aggravated by Petitioner's work activities. The Arbitrator finds that the onset of Petitioner's symptoms, which manifested with a significant increase in the amount of data entry work Petitioner was performing, supports the opinions of Dr. Treister. The Arbitrator notes that Dr. Carroll based his opinion upon the existence or requirement of force to cause de Quervains regardless of the amount or type of repetitive work performed. The Arbitrator further notes that Dr. Carroll did not cite to any medical authority that repetitive activity without heavy force can not cause de Quervains.

WITH RESPECT TO (J), HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES

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).

Respondent does not dispute that Petitioner's treatment was unreasonable or unnecessary. Respondent denied the treatment based upon liability. Based upon the above finding, the Arbitrator further finds that Petitioner's treatment was reasonable, necessary causally related to an accident arising out of and in the scope of Petitioner's employment that was necessary to diagnose or relieve Petitioner from the effects of her injury. As such, Arbitrator's find that Respondent is liable to pay the bills of Dr. Fakhouri and the Palos Hills Surgery Center in accordance with the provisions of Sections 8(a) and 8.2 of the Act.

WITH RESPECT TO (K), WHAT TEMPORARY BENEFITS ARE IN DISPUTE

"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).

It appears that the only dispute regarding temporary benefits Respondent's liability for TTD. In view of the Arbitrator's conclusion that an accident occurred arising out of and in the course of Petitioner's employment by Respondent and that her condition of ill-being is related thereto, and based upon the records of Dr. Fakhouri, the Arbitrator concludes that Petitioner is entitled to 6-4/7 weeks of TTD, from June 27, 2016, through August 11, 2016, a period of 6-4/7 weeks, in the weekly amount of $705.17.

WITH RESPECT TO (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY

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 Arbitrator notes that neither party has offered into evidence a permanent partial disability impairment report and therefore gives no weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the Arbitrator has considered Petitioner's occupation, which requires her to use a computer and have the full use of her hands and therefore gives greater weight to this factor.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 50 years old at the time of her accident and could expect to work for another 17 years or more and therefore gives greater weight to this factor.

With regard to subsection (iv) of Section 8.1b (b), Petitioner's future earning capacity, the Arbitrator notes no evidence of impairment and therefore gives no weight to this factor.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the testimony of the examining doctors for both parties. Dr. Treister testified that Petitioner has some hypersensitivity on the volar side of the metacarpophalangeal joint of the right thumb, which he said is not unusual following surgery such as she had, and which is probably because the digital nerves to the thumb run right past that area. She also has permanent weakness in her dominant right hand, which is diffuse rather than focal. The weakness is manifest in grasp, that is, when using all the fingers to grab something, and in pinch and in prehension, that is, when pushing the thumb against the index finger to pick up objects. While Dr. Carroll measured the diminished grip strength as being 25 percent less on the dominant side than on the non-dominant, Dr. Treister testified that the dominant side is usually 25 to 50 percent stronger than the non-dominant side. In other words, Petitioner's right hand is much more than 25 percent weaker than the left (PX6-p.29-31). The medical testimony corroborates Petitioner's testimony that she still has aching in the thumb and is

unable to perform such activities as using a manual can opener and twisting open the lid of a jar, and that she has trouble pulling up socks and zippers.

Based upon the above factors and the record taken as a whole, the Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of 20 percent of the right hand pursuant to Section 8(e) and is entitled to permanent partial disability benefits of $755.22/week for 41 weeks, commencing August 12, 2016, as provided in Section 8(e) of the Act.

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

Lisa Blacker,
Petitioner,

21IWCC0045

vs.

NO: 15 WC 38891

Fox Developmental Center,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of permanent disability, wages and rate 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 18, 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: FEB 1 - 2021
o1/21/21
DLS/rm
046

Deborah L. Simpson

Barbara N. Flores

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0045

BLACKER, LISA
Employee/Petitioner

Case# 15WC038891

FOX DEVELOPMENTAL CENTER
Employer/Respondent

On 12/18/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.55% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5709 STROW LAW LLC
THOMAS M STROW
628 COLUMBUS ST SUITE 501
OTTAWA, IL 61350

6298 ASSISTANT ATTORNEY GENERAL
THOMAS GRAYDON OWEN
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 18 2019

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

21IWCC0045

STATE OF ILLINOIS)
)SS.
COUNTY OF Kankakee)

- [ ] 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

Lisa Blacker
Employee/Petitioner

v.

Fox Developmental Center
Employer/Respondent

Case # **15** WC **38891**

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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **Kankakee, Illinois**, on **10/16/2019**. 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. [x] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [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

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

In the year preceding the injury, Petitioner earned $40,656.72; the average weekly wage was $781.86.

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 credit of $47,538.23 for TTD, $0 for TPD, $28,794.95 credit for maintenance, and $0 or for other benefits.

ORDER

Respondent shall pay Petitioner combined temporary total disability benefits and maintenance benefits of $521.24/week for 173-3/7weeks, commencing 11/18/15 - 1/24/16, 2/4/16 - 9/20/17, 4/13/18 - 8/13/18 as provided in Section 8(b) of the Act, and the period of 8/14/18 - 10/16/19 being the maintenance period as provided in section 8(a), for a total of $90,398.13. Respondent shall receive a credit of $76,333.20 for temporary total disability and maintenance benefits paid, with Petitioner to receive an additional payment of $14,064.93.

Respondent shall pay reasonable and necessary medical services of $71,039.54, as provided in Sections 8(a) and 8.2 of the Act, pursuant to PX1. Respondent shall receive credit for any balances paid prior to the date of hearing. Respondent shall further reimburse Petitioner in the amount of $30.00 representing out-of-pocket payments made for her medical care.

Respondent shall pay Petitioner permanent partial disability benefits of $469.12/week for 237.5 weeks, because the injuries sustained caused the 47-1/2% loss of the person as a whole, as provided in Section 8(d)2 of the Act, as Petitioner has lost access to her occupations as a housekeeper and bus driver.

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

12/16/19
Date

DEC 18 2019

21IWCC0045

Findings of Fact:

Petitioner, Lisa Blacker, became employed by Respondent, Fox Developmental Center, on November 1, 2015 as a support service worker, which Petitioner described as basically being a housekeeper. Petitioner testified she had irregularly worked as a housekeeper for elderly clients over many years prior to obtaining work with Respondent. Her primary, previous employment had been as a school bus or motor coach driver and she believed she had obtained her CDL in 1991. She was working for Illinois Central School Bus at the time of injury and testified Respondent was aware of her concurrent employment. (PX22) Respondent offered no contradictory evidence at trial.

Within a few weeks of her hire for Respondent, on November 18, 2015, Petitioner suffered an undisputed accident during her on-the-job training. (RX3, AX1) She was attempting to move a large housekeeping cart through a large fire door when the heavy door struck her right foot, causing pain.

Petitioner's ensuing treatment can be found in both parties' voluminous supporting exhibits at the time of trial, including medical records, four IME reports, wage records and employment-related correspondence, deposition transcripts and a labor market survey. Petitioner also provided the testimony of Michelle Lunacek, who works for Spare Wheels Transportation, a bus-driving company that used to employ Petitioner and been hoping to again.

At trial, Respondent disputed that Petitioner's current condition of ill-being was related to her undisputed accident. (AX1) If there was a legitimate dispute, the Arbitrator would find it necessary to document in this Statement of Facts the entire course of treatment, step-by-step. However, having reviewed the Record, the Arbitrator finds there is no actual basis for a causal dispute. Respondent's own Independent Medical Examiners (IME), Dr. Nirain D'Souza first for an orthopedic evaluation, and Dr. Howard Konowitz three later times for pain management evaluations, supported both that Petitioner's current condition was related to her workplace accident and that all of her treatment over the years, including therapy, injections, etc. was all reasonable and necessary. (RX10, RX13, RX 15) Nothing in both IME's subsequent evidence depositions altered those fundamental facts regarding their opinions. (RX8, pp.27-30, RX11, pp. 35-38) Therefore, the Arbitrator does not find it necessary to summarize Petitioner's lengthy treatment records as those are found in the Record.

Nor is the complete medical history overly relevant to the primary issue in this case: the nature-and-extend of Petitioner's injuries. It is the end result of Petitioner's medical care, not the path in getting there, that is most relevant to permanent partial disability under the law. And, in reality, there is little dispute as to Petitioner's permanent restrictions or their validity. Petitioner last underwent a valid Functional Capacity Evaluation on June 24, 2018 that placed her at permanent medium duty. (PX 24) Dr. Scott O'Connor, Petitioner's treating podiatrist, thought she needed primarily sedentary work, and Respondent's IME, Dr. Konowitz, testified he thought Petitioner's permanent, safe limitations would be light-to-medium duty. (RX11 at 44-45) All agreed Petitioner had valid restrictions that kept her from full-duty work and that those restrictions had a connection to the work accident.

The dispute on Petitioner's disability was her ability to continue driving a school bus. Dr. O'Connor testified it was unsafe for Petitioner to do so and Michelle Lunacek testified Spare Wheels Transportation did not feel comfortable hiring her with her condition. (PX21, PX23 at 15-18) Dr. Konowitz, Respondent's IME, on the other hand thought there was no reason she could not drive a school bus. (RX15, RX11 53-58)

The parties also disputed at what point Petitioner transitioned from her entitlement from Temporary Total Disability (TTD) benefits to maintenance benefits, though her entitlement to the over-all stated periods was not disputed. (AX1) On that issue, the Arbitrator notes Dr. Scott O'Connor declared the final MMI in the Record on August 13, 2018. The Arbitrator was unable to locate any other evidence that suggested a different final MMI date than the one stated by Dr. O'Connor.

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

At trial, Respondent disputed that Petitioner's current condition of ill-being was causally related to her undisputed workplace accident. (AX1) However, as stated above, the Arbitrator finds there is no actual basis for the dispute in this case. Respondent had four IME's performed during the course of Petitioner's care, one with an orthopedic, Dr. D'Souza, and three with a pain doctor, Dr. Konowitz. Both doctors not only supported that all of Petitioner's treatment was reasonable and necessary, but that such treatment was causally related to her workplace injury. (RX10, RX13-15)

The only real dispute is what to call Petitioner's current nerve condition. Petitioner's treating doctors diagnosed Petitioner with Complex Regional Pain Syndrome, whereas Dr. Konowitz called it saphenous nerve, sural nerve dysesthesias with or without sympathetic instability. (RX 13-15) But no matter what it is called, there is no dispute to the existence of a work-related condition that causes Petitioner to have permanent work restrictions. Therefore, the Arbitrator finds Petitioner's current condition – by whatever name – is causally related to her workplace injury.

With respect to (G.) What were Petitioner's earnings, the Arbitrator finds as follows:

Petitioner testified that when she was hired – and then injured – at Fox Developmental Center she had concurrent employment with Illinois Central School Bus. Petitioner stated she filled out "hiring" paperwork with Shelly in Human Resources that specifically pertained to her second job at the bus company. Petitioner testified in the affirmative that Respondent was made aware of her concurrent work in writing.

As the Arbitrator finds Petitioner to be a credible witness, with no evidence offered in opposition to her testimony, the Arbitrator finds Petitioner was concurrently employed within the meaning of the law at the time of her accident.

Petitioner offered Exhibit 22, which consisted of wage records from Illinois Central School Bus covering the date period of 11/18/13 through 11/18/14, totaling $8,375.12 in gross wages. (PX22) Adding that to the agreed AWW for Petitioner's work with Respondent, or the equivalent of $32,281.60 per year, equates to combined yearly earnings of $40,656.72, or an Average Weekly Wage of $781.86. (RX4)

With respect to (J.) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Petitioner has submitted total medical bills totaling $71,039.54. (PX1) Petitioner alleged at the time of trial that Respondent had paid $22,550.94, with $21,983.93 outstanding. Respondent offered RX5, purporting to show total payments made by TriStar of $32,782.97. The Arbitrator has reviewed the submitted bills and corresponding records and finds the treatment to be reasonable, necessary and related treatment for Petitioner's accident. Respondent's own IMEs, Drs. D'Souza and Konowitz supported that the totality of Petitioner's treatment had been reasonable, necessary and related to the accident. (RX10, RX13-15)

Therefore, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services of $71,039.54, as provided in Sections 8(a) and 8.2 of the Act, pursuant to PX1. Petitioner proffered that any bills that may have been made by Respondent, but not yet reflected on PX1, would be payment for which Respondent receives credit. Respondent shall further reimburse Petitioner in the amount of $30.00 representing out-of-pocket payments made for her medical care.

With respect to (K.) What temporary benefits (TTD and maintenance periods) are in dispute, the Arbitrator finds as follows:

At trial, the parties did not dispute that Petitioner was entitled to either TTD benefits or maintenance benefits for the periods of 11/18/15-1/24/16, 2/4/16-9/20/17, 4/13/18-10/16/19. The only question in dispute was when Petitioner's entitlement to TTD ended and when maintenance benefits began. Petitioner alleged on the Request for Hearing that TTD ended on 8/13/19, with Respondent alleging an ending date of 8/31/18. The Arbitrator finds neither party is correct and that Petitioner's entitlement to TTD ended on 8/13/18, when Dr. O'Connor declared final MMI.

Maintenance benefits therefore began on 8/14/2018 and ran through the date of hearing, or 10/16/2019. The total amount of combined benefits owing during the agreed periods, at Petitioner's revised AWW, is $90,398.13, or 173-3/7 weeks at $521.24 per week. Respondent shall receive a credit of $76,333.20 for temporary total disability and maintenance benefits already paid, with Petitioner to receive an additional payment of $14,064.93 as reimbursement for Respondent's underpayment of benefits due to its incorrect AWW calculation.

With respect to (L.) What is the Nature and Extent of the injury, the Arbitrator finds as follows:

Section 820 ILCS 305/8.1b(b) of the Illinois Workers' Compensation Act provides that any award of permanent partial disability is to be determined using five enumerated factors:

> 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.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the Illinois Appellate Court found in Corn Belt Energy Corp. v. Illinois Workers' Compensation Comm'n, 2016 IL App (3d) 150311WC that neither party is required to submit a written impairment report as part of a final hearing. The Arbitrator finds no permanent partial disability impairment report and/or opinion was submitted into evidence by either party in this matter. 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 Petitioner was employed by Respondent as a housekeeper, or "support service worker." Petitioner testified she had irregularly worked as a housekeeper for elderly clients over many years prior to obtaining work with Respondent. Her primary, previous employment had been as a school bus or motor coach driver and she believed she had obtained her CDL in 1991. Petitioner underwent two valid Functional Capacity Evaluations, the last one occurring on 6/25/18. (PX24). That evaluation showed Petitioner's inability to perform all of the essential functions of a support service worker, which supports that Petitioner has lost full access to that occupation. (PX24 at 5) Petitioner also provided the opinion of Dr. O'Connor, Petitioner's podiatrist, that she was unable to safely return to driving a school bus on a permanent basis due to her work-related injury (PX21, PX23 at 15-18), which was an opinion disputed by Respondent's IME, Dr. Konowitz.

(RX15). Petitioner further provided the testimony of Michele Lunacek, who worked for one of Petitioner's prior bus employers, Spare Wheels Transportation, and was in on the hiring process. Ms. Lunacek testified that she would have liked Petitioner to return to work at Spare Wheels Transportation, but that ultimately Petitioner was not hired due to their belief she would not pass a DOT physical. It is also true Petitioner had concurrent employment as a bus driver at the time of her work-related injury and never returned to work again in that occupation following the accident. (PX22). The Arbitrator finding that Petitioner, Ms. Lunacek and Dr. O'Connor are credible witnesses and that it was not unreasonable to specifically restrict driving commercial vehicles. Coupled with Petitioner's permanent restrictions from the FCE, the Arbitrator further finds that Petitioner has lost access to not just one, but two occupations as a result of the workplace injury. The Arbitrator therefore gives great weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 52 years old at the time of the onset of her work-related injuries. Petitioner is still well before normal retirement age, but had also been in her occupations for decades leading up to her accident which she can no longer perform. Petitioner must live with any ongoing symptoms, the existence of which was corroborated by Respondent's IME, Dr. Konowitz, for a significant period, including presumably many years of further employment in some capacity. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, Petitioner provided proof she had lost access to two separate occupations. She was looking for work as of the date of hearing and had not been offered permanent light-duty work by Respondent. Respondent offered a Labor Market Survey that suggested Petitioner could earn between $23,583.00 and $41,881.00 in alternative capacities. (RX7) Petitioner's calculated gross earnings for this case between her two prior jobs was $40,656.72, per the Arbitrator's previously findings on Petitioner's AWW, which is approximately at the high mark for her alternate earning capacities. There is no evidence vocational services were provided to Petitioner and the Labor Market Survey suggests many alternative occupations may, in fact, pay less than her customary wages. Therefore, the Arbitrator gives some weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, Petitioner testified to her continued symptoms and limits to daily activities. The Arbitrator finds Petitioner is a credible historian and witness and does place some weight on her self-reported recurrent symptomatology, corroborated by the medical records and FCE findings. Respondent's own IME, Dr. Konowitz, actually placed Petitioner at a more restrictive permanent level – light-to-medium duty – than did the last FCE. (RX11 at 44-45) Therefore, the Arbitrator 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 47-1/2% loss of Petitioner's person-as-a-whole pursuant to §8(d)2 of the Illinois Worker's Compensation Act, as she lost access to both her occupations as a housekeeper and her long-standing career as a school bus driver.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anthony Donato,

Petitioner,

21IWCC0046

vs.

NO: 17 WC 29615

HD Plumbing & Heating,

Respondent.

DECISION AND OPINION ON REVIEW

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

I. FINDINGS OF FACT

A. Background

Petitioner testified that he was employed by Respondent as a new construction Plumber working in brand new homes and buildings. He explained that he uses blueprints to drill out locations where plumbing will be installed, then installs plumbing that will later be hidden by walls and ceilings. At the time of trial, Petitioner had been a licensed Plumber for 20 years.

Previously, Petitioner suffered a left shoulder injury around 2007 that resulted in a rotator cuff surgery. A workers' compensation claim was filed, and the claim was eventually settled. Petitioner was released back to full duty and testified that after a year or so he felt he was back to 100 percent.

In October of 2017 Petitioner had been working for Respondent for six months installing

21IWCC0046

plumbing in a subdivision where the homes were "cookie cutter," so he knew exactly where the plumbing was to be installed in each home. He had recently received a raise of $1.50/hr. in July of 2017.

B. Accident

On October 9, 2017, Petitioner testified he was at work with two co-workers and his foreman. Petitioner walked into the "really small" duplex he was to work on, which was a unit 24x24 in size. Petitioner testified that the studs, floors, roof, and wrap were all up, but the drywall and siding was not. At one point, the foreman told Petitioner to go upstairs and start drilling. After drilling everything out for 45 minutes, Petitioner cleaned up the debris and began pipe installation. At that time, Petitioner testified that his two co-workers had been told to retrieve a gas machine, thus he was unaware of their location at the time.

Petitioner was running three-inch pipe through the second-floor unit into the attic. He was standing on a six-foot ladder with a ladder caddy on the side that held his primer, glue, and Sawz-all. He climbed up into the attic to make his markings. As he bent down to grab the Sawz-all, he testified that the ladder kicked out to the right and he fell down. When Petitioner fell, his left arm was hanging on the attic joists and got stuck, as there was only 14.5 inches between the joist bases, and Petitioner is not a small man. As he fell, his arm stayed up in the joist for a second before he scraped it as he fell.

Petitioner testified that he hit the ground and noticed his left shoulder was bleeding and there was clearly blood on his shirt. At that moment the foreman came upstairs and asked what was going on. Petitioner informed him of his ladder kicking out. The foreman said "[y]ou are too F-ing old for this type of work, you better go find an F-ing new job." Petitioner testified that he got up and got in the foreman's face and "called him an F-ing maggot and told him to get the F out of my face and he left."

Petitioner testified that at that point he wanted to see if he was able to continue working, so he picked up his fallen items and was going to perform some work that did not require ladder climbing. At that moment Respondent's owner, Jesus Hernandez, came upstairs and terminated Petitioner, stating "You cannot talk to my Foreman the way you talk to them." Petitioner asked: 'What about what he said to me?" The owner replied: "Nobody heard that," and walked away.

Petitioner testified he then grabbed his things and left. He got in his truck and phoned his wife. After speaking with her, he decided to visit the Sherman Hospital emergency room ("ER") in Elgin, Illinois.

C. Medical Treatment

The emergency room record reflects that Petitioner arrived at 10:23 a.m. on October 9, 2017. He was evaluated by a physician who noted at 10:45 a.m. that Petitioner was "[a] 61 y/o male presents iwth [sic] left shoulder pain s/p fall off of a 6ft ladder, he is a painter and the ladder slipped, he fell to the ground, heft [sic] left arm when flailing [sic]." Petitioner was noted to be "angry because they then fired him. Has some tingling down left arm into 2nd and 3rd

finger. No blood thinners." The first nurse's note at 10:45 a.m. reads:

> Pt to ED rm16 w/ wife in wheelchair from triage. Pt c/o fall from about 5 ft up on a 6ft ladder. Pt states ladder collapsed and he fell with it arm above head. Arm scraped on wood boards on way down. Pt denies head injury or LOC. Pt c/o Lt shoulder pain with tingling down arm. Sensation intact. Pt has abrasion to inner/medial Lt upper and lower arm. Bleeding controlled. YSS.

A subsequent nurse's note at 11:12 a.m. indicates that Petitioner was given a tetanus shot. The emergency room records reflect that Petitioner's abrasions were treated and he underwent chest and neck x-rays, which were negative. The ER doctor suspected a rotator cuff injury, diagnosed a left shoulder injury, and referred Petitioner to Dr. Cannestra, an orthopedist. However, Petitioner returned to treat with Dr. Ketterling, who had performed his prior rotator cuff surgery.

In the interim, Petitioner treated with his primary care physician ("PCP") Dr. McGuire. On October 12, 2017, Dr. McGuire noted a similar mechanism of injury with Petitioner falling off a ladder and injuring his left shoulder after it had gotten caught over and behind his head. The record also states Petitioner was fired right before he left and went to the ER. Petitioner was diagnosed with an unspecified acute rotator cuff injury and was taken off work.

On October 30, 2017, Petitioner still had left shoulder pain, worse at night, as well as numbness in his 2nd, 3rd and 4th fingers. He was diagnosed with strains of muscles and tendons in left shoulder and kept off work.

Eventually, Petitioner began treating with Dr. Ketterling under his group insurance. On December 4, 2017, Petitioner saw Dr. Ketterling and provided a similar injury history. He complained of pain, swelling, soreness, decreased range of motion ("ROM"), decreased strength, some cracking and popping and occasional numbness in his hands since the injury. Petitioner was placed on light duty with no use of the left arm.

An MRI was recommended and performed on December 12, 2017. The radiologist found a full thickness, complete tearing of the supraspinatus and infraspinatus tendons. He also found moderate to high-grade partial thickness bursal-sided tearing of the upper subscapularis tendon, laterally.

On December 14, 2017, Dr. Ketterling reviewed the MRI and confirmed a rotator cuff tear and impingement, biceps tendinitis with biceps tendon subluxation, and degeneration of labrum. Petitioner had minimal muscle atrophy, which Dr. Ketterling indicated spoke to the acute nature of his injury. Dr. Ketterling stated that portions of the infraspinatus tear appeared chronic, while the majority of the supraspinatus tear was acute. Surgery was recommended. Dr. Ketterling noted Petitioner's previous left shoulder surgery, which appeared to consist largely of a distal clavicle resection.

Petitioner underwent surgery on January 24, 2018 consisting of diagnostic video arthroscopy, arthroscopic subacromial decompression, and soft tissue biceps tenodesis with limited open revision rotator cuff repair of the left shoulder. The post-operative diagnosis was

impingement syndrome with re-tear of the rotator cuff, and biceps tendinitis with subluxation of the left shoulder. The operative report reflects Dr. Ketterling's finding that the tear at the front of the supraspinatus appeared to be relatively chronic and a re-tear of his previous repair, while the posterior aspect of the tear extending through the infraspinatus appeared to be acute with avulsion of the tendon from its footprint and the greater tuberosity. Dr. Ketterling stated that the latter was torn with his recent fall.

Petitioner underwent postoperative physical therapy and remained off work until he requested a release on May 25, 2018, his final visit with Dr. Ketterling. Petitioner wanted to return to work for financial reasons, and also stated that work was his therapy. He believed he was physically capable of work.

Petitioner underwent an impairment rating evaluation at Respondent's request with Dr. Cole on October 11, 2018. Dr. Cole noted a consistent mechanism of injury, as well as Petitioner's contemporaneous and significant left shoulder pain, along with left second, third and fourth digit numbness. Dr. Cole reviewed the December 12, 2017 MRI report as well as Dr. Ketterling's review of the MRI, noting a full thickness tear of the infraspinatus and supraspinatus tendons, partial thickness bursa-side tearing of the upper scapularis, superior humeral head subluxation and loss of the subacromial space with high-grade cartilage loss of the superolateral humeral head. Dr. Cole also reviewed the operative report, subsequent physical therapy records and the May 25, 2018 record of Dr. Ketterling releasing Petitioner to full duty.

Dr. Cole noted that Petitioner's left upper extremity QuickDASH score was 22.7. Petitioner noted that his pain was an intermittent 2/10 and interfered with sleep. Petitioner took Ibuprofen, described his overall impairment as "mild" and noted slight pain with activity.

Using the 6th Edition Guidelines ("the Guidelines") for impairment, Dr. Cole found that Petitioner's principal diagnosis was a full thickness rotator cuff tear, which is a Class 1 category in Table 15.5 on page 403 of the Guidelines. Petitioner had mild residual functional loss but with essentially normal motion. He then assessed grade modifiers for the purposes of a net adjustment. Based on his QuickDASH score, his symptoms with strenuous activity, ability to perform independent self-care and his occasional Ibuprofen use, Petitioner falls into the grade 1 modifier category of functional history adjustment in Table 15.7 on page 406.

Dr. Cole also found Petitioner qualified for the grade 1 modifier for physical exam adjustment in Table 15-8 on page 408. He has 0.5cm atrophy in his left biceps versus right, along with minimal ROM, strength deficit and palpatory findings, but Dr. Cole stopped short of finding these results "normal." Dr. Cole found that Petitioner's diagnosis qualified as a "very severe problem" and thus a grade modifier four for the clinical studies adjustment in Table 15-9 on page 410.

According to the net adjustment formula on page 411: $(1^1) + (1\text{-}1) + (4\text{-}1) = O + O + 3=3$. The net adjustment of 3 defaults to a grade of "E." The corresponding left upper extremity impairment rating in Table 15-5 on page 403 is 7%. Finally, Table 15-11 converts this impairment to a 4% whole person impairment.

D. Additional Testimony

i. Robb Swanson

Respondent called Robb Swanson (Mr. Swanson) as a witness. At the time of arbitration, Mr. Swanson had been Respondent's Plumber Foreman for five years. He testified that on the date in question, he was on the first floor of a duplex marking floors and cutting pipes. Petitioner was above him working on the second floor. Mr. Swanson stated that around 8:00 a.m. a piece of three-inch PVC pipe fell through the ceiling and hit Mr. Swanson in the shoulder. Mr. Swanson testified that he yelled out some profanities at Petitioner and another employee, Jason Reyes, came downstairs to see what happened. Mr. Swanson testified that he asked them what happened and Petitioner said he must have bumped the pipe. Mr. Swanson testified that Petitioner and Mr. Reyes asked Mr. Swanson if he was ok, which he confirmed he was. Mr. Swanson then requested to be left alone so he could cool off. Petitioner and Mr. Reyes then went back upstairs to work.

Mr. Swanson then testified that he phoned Respondent's owner to report the occurrence and file an Accident Report, having had three prior shoulder surgeries. Mr. Swanson denies that at any point that day Petitioner informed him of an injury. Mr. Swanson also denies observing an accident or blood on Petitioner's shirt. Mr. Swanson did not recall a ladder falling that day and denies going upstairs to speak with Petitioner. Mr. Swanson testified that, at around 10:00 a.m. on October 9, 2017, Respondent's owner arrived at the duplex. The owner had a conversation with Petitioner, and within 30 minutes Petitioner gathered his tools and left the job site.

Mr. Swanson testified to having previous discussions with Petitioner regarding Petitioner's work quality, which were documented. He testified that company policy is to notify a supervisor of any injury on the job. Mr. Swanson testified that he and Petitioner periodically joked about how nice it was to have apprentices do underground digging, as both of them had a history of shoulder and back issues.

On cross-examination, Mr. Swanson acknowledged that he did not discuss the occurrences of the day in question with anyone other than Respondent's Counsel. Mr. Swanson also acknowledged that the driving distance from the jobsite to the city of Elgin, IL is about 15-20 minutes.

ii. Jason Reyes

Respondent called Jason Reyes (Mr. Reyes) as a witness. Mr. Reyes has been a Plumber for two-and-a-half years and is currently employed by Respondent. He is a former co-worker of Petitioner's. He testified that company policy is to notify a supervisor of any injury on the job.

Mr. Reyes testified that on the date in question he was working on the second floor of a duplex when he heard a pipe fall and the foreman scream. He testified that only he and Petitioner were on the second floor at the time. The pipe fell from Petitioner's work area. Mr. Reyes and Petitioner went down to check on the foreman, who said the pipe fell on his shoulder,

but that he was ok. Mr. Reyes and Petitioner went back to working. Mr. Reyes testified he was working 10 to 20 feet away from Petitioner. The workday then proceeded as normal.

Mr. Reyes testified that he did not see Petitioner injure himself, nor did he notice any blood on Petitioner. Petitioner did not inform him of any injury. At one point, Respondent's owner did show up, and Mr. Reyes became aware that Petitioner had been terminated. Mr. Reyes testified that six weeks later he, another co-worker named Anthony, and the foreman were asked by the owner to write a statement about the events on October 9, 2017. Mr. Reyes denied having any discussions amongst the group regarding what to write.

On cross-examination, Mr. Reyes acknowledged that he has previously installed faulty plumbing, but neither the owner nor the foreman ever approached him about the mistakes.

iii. Jesus Hernandez

Respondent called Jesus Hernandez (Mr. Hernandez) as a witness. He testified that he had been Respondent's owner for eight years at the time of arbitration. Mr. Hernandez usually works out of his office as opposed to being at the job sites. He corroborated the testimony of Mr. Swanson and Mr. Reyes regarding on-the-job-injury notification procedure.

Mr. Hernandez testified that, at approximately 8:30 a.m. on October 9, 2017, Mr. Swanson called him and reported that a piece of pipe had fallen on his shoulder. Mr. Hernandez then went to the job site to check on Mr. Swanson. Mr. Hernandez testified he then went upstairs and saw Mr. Reyes, Petitioner, and Petitioner's upright ladder. Mr. Hernandez then told Petitioner to pack up his belongings because he was being terminated. Mr. Hernandez testified that Petitioner indicated he saw this coming.

Mr. Hernandez denied having any conversation about Petitioner being too old for this work, or telling Petitioner that he could not talk to his foreman that way. Mr. Hernandez testified that this occurred just after 10:00 a.m. Petitioner then went into the garage to grab his tools and lifted them into the cab of his truck, then went back to climb a ladder, and grabbed some other belongings. He shook Mr. Reyes' hand and left. Mr. Hernandez testified that at no point did Petitioner indicate a work injury to him, nor did Mr. Hernandez observe any indices that Petitioner was injured. Two days later, Respondent's Human Resources ("HR") Director, Erin Mains, informed Mr. Hernandez that Respondent had been notified by Petitioner's wife that Petitioner had been injured in the field. On October 12, 2017, three days after the alleged accident, the HR Director drafted a Form 45.

Mr. Hernandez testified that he had previously had discussions with Petitioner regarding his performance, as Petitioner was not installing some piping in compliance with Illinois state code. He testified that he previously terminated Petitioner's employment, but Petitioner requested a second chance as he was going through a family situation, so Mr. Hernandez obliged.

Mr. Hernandez denied discussing the contents of the written statements with his employees prior to arbitration.

iv. Sharon Donato

Petitioner called Sharon Donato (Mrs. Donato) as a witness. She testified that she is Petitioner's wife and she met him at the Sherman Hospital ER after he left work on October 9, 2017. Mrs. Donato testified that Petitioner had several scrapes on his left arm and was bleeding. She later took pictures of his arm on her cell phone when they returned home. These photographs were admitted into evidence as Petitioner's Exhibit 11.

E. Additional Information

In rebuttal to the testimony offered by Mr. Swanson and Mr. Reyes, Petitioner testified that he was unaware of any pipe falling from the second floor to the first floor on October 9, 2017. He does not know if Mr. Swanson was struck by any pipe and denies running downstairs after any pipe fell. Petitioner did not notify anyone of his accident and does not know the company policy of giving notice, although he did sign the company handbook acknowledgment form.

Petitioner acknowledged an incident one month before the accident where he and fellow coworkers were written up by the foreman for starting work late. However, Petitioner had no recollection of installing faulty plumbing on several instances during his time with Respondent. He denied having a conversation with Mr. Hernandez regarding these issues, as he only spoke with Mr. Hernandez three times in the six months he worked for Respondent. Petitioner acknowledged, however, that it was possible he missed a vent connection in an attic on Jul 24, 2017, as well as a few basement leaks during that time period.

Petitioner was hired by US South Plumbing beginning July 16, 2018. However, he only worked there one week before being hired by Behm Plumbing, which is where he was employed at the time of the arbitration hearing. Currently, his left shoulder is worse than it was before the instant accident. He has pain, numbness, cracking, "crickles," and states that his shoulder falls asleep. Petitioner testified that his shoulder cracks every time he lifts his arm and he has pain all the time while working although it is not excruciating. He can perform overhead work, but not overhead drilling. His drill weighs 25 pounds and he cannot lift it overhead anymore.

Petitioner tends to a large yard at home, cleans his gutters, works on storm doors and restores old cars as a hobby. He has not treated for his left shoulder since being released by Dr. Ketterling. He is not on medication.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found that Petitioner failed to prove that he was injured in an accident arising out of and in the course of his employment with Respondent. In brief conclusions, after noting that Petitioner was argumentative and not believable, the Arbitrator discussed the discrepancies in testimony between Petitioner, Mr. Reyes, and Respondent's owner, Mr. Hernandez. Though not explicitly, the Arbitrator ultimately found Mr. Hernandez's testimony

persuasive that, shortly after being terminated, Petitioner left the jobsite without showing any physical injury to Mr. Hernandez. The Arbitrator determined that all other issues were moot.

In reviewing the record, the Commission is not similarly persuaded. In so finding, the Commission notes that the arbitration decision is devoid of reference to uncontroverted, objective medical evidence of an acute injury to the shoulder evident shortly after Petitioner's alleged injury corroborating his testimony.

The witnesses are in agreement that Petitioner was terminated by Mr. Hernandez. Mr. Hernandez testified that this occurred shortly after 10:00 a.m. on October 9, 2017, at which time Petitioner loaded his truck with his belongings and left the jobsite. Respondent's foreman, Mr. Swanson, acknowledged that the jobsite is located 15-20 minutes away from the city of Elgin, which is the locale of the Sherman Hospital emergency room that Petitioner visited. The earliest time noted in the emergency room record is time-stamped at approximately 10:23 a.m. The record indicates a mechanism of injury consistent with Petitioner's testimony. Notably, when Petitioner presented to the emergency room, both a physician and a nurse documented Petitioner's left arm abrasions and bleeding. Petitioner was also provided with a tetanus shot. Moreover, the emergency room doctor suspected a rotator cuff injury, diagnosed a left shoulder injury, and referred Petitioner to an orthopedist.

The foregoing evidence of acute trauma to the left arm consistent with Petitioner's described mechanism of injury, which involved his arm hanging on the attic joists and getting stuck, was noted by emergency room personnel less than an hour after Petitioner left the jobsite and within hours of his alleged fall from a ladder at work. The Commission declines to string together the version of events of Mr. Swanson, Mr. Reyes, and Mr. Hernandez to conclude that Petitioner is not credible in light of this objective evidence.

In addition to contemporaneous medical records, the sole medical opinion in the record regarding causation was provided by Petitioner's treating physician, Dr. Ketterling, and it supports Petitioner's claim as well. Dr. Ketterling found evidence intraoperatively of acute trauma to the left arm in addition to the relatively chronic finding at the front of the supraspinatus and the re-tear of his previous repair.

It is within 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 (1984). The Commission cannot disregard the objective evidence of acute trauma to Petitioner's left arm as documented by emergency room personnel shortly after the alleged accident in sole preference for a credibility assessment among witnesses discussing a soured employment relationship and what they did not see. To do so, the Commission would have to believe that Petitioner left the jobsite in good health—albeit angry about losing his employment—and that he then suffered a left arm injury causing abrasions and bleeding during a 15-20 minute drive to the emergency room. With contemporaneous medical evidence corroborating Petitioner's recitation of the facts, the record supports the conclusion that Petitioner's injuries occurred during a work-related accident as claimed.

In consideration of the record as a whole, the Commission finds that Petitioner offered

credible testimony of his mechanism of injury, which was corroborated by contemporaneous, objective medical evidence as well as the sole medical opinion offered by Dr. Ketterling. Although Respondent presented unified testimony to the contrary, it cannot be reconciled with the foregoing objective evidence. Thus, the Commission finds that Petitioner has established that he sustained an accident arising out of and occurring in the course of his employment with Respondent. The Commission reverses the Arbitrator's decision and finds that Petitioner has proven by a preponderance of evidence that he sustained an accident under the meaning of the Act on October 9, 2017.

B. Causal Connection

In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Recovery will depend on the employee's ability to show that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of a preexisting condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003). "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* at 205.

Our supreme court has held that "medical evidence is not an essential ingredient to support the conclusion of the [Commission] that an industrial accident has caused the disability," but rather, "[a] chain of events which demonstrates a previous condition of good health, an accident, and subsequent injury resulting in a disability" may be sufficient to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982). It is well established that proof of prior good health and change immediately following after an injury may establish that an impaired condition was due to the injury. *Navistar International Transportation Corp.*, 315 Ill. App. 3d 1197, 1206 (2000). A causal connection between work duties and a condition may be established by a chain of events, including a claimant's ability to perform duties prior to the accident and inability to do the same following the accident. *Id.*

In this case, the Commission concludes that the evidence supports a finding that Petitioner has met his burden of proving causal connection to his current condition by a preponderance of evidence. On the date in question, Petitioner suffered a left shoulder rotator cuff injury. Petitioner acknowledged a prior left rotator cuff repair, but testified that it eventually healed and he felt as if he had returned to 100 percent approximately nine years prior to the instant accident date. The record is devoid of any pre-accident left shoulder treatment within more than a decade, and it is only after the accident that Petitioner's left shoulder became symptomatic. Moreover, Petitioner had worked for Respondent as a Plumber for six months without seeking treatment for left shoulder pain. After the accident Petitioner exhibited immediate left shoulder pain which deteriorated to a state of disability.

Although causal connection has been sufficiently proven under the 'chain of events' analysis above, the Commission notes that its' causal connection ruling is also corroborated by medical opinion. After diagnosing Petitioner, Dr. Ketterling performed left shoulder surgery on

January 24, 2018. Subsequently, he opined that the posterior part of the surgically repaired rotator cuff tear extending through the infraspinatus appeared to be acute and was related to the instant accident. Causal relationship can be 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).

In total, the Commission finds that the chain of events regarding Petitioner's left shoulder injury are well documented. Petitioner had no prior left shoulder treatment before suffering a work accident, which was followed by consistent left shoulder complaints and treatment which lead to surgical intervention. Based on the above, the Commission finds that Petitioner has established a causal connection between his accident and current left shoulder condition.

C. Medical Expenses

Under the provisions of §8(a) of the Act, an employer is required to pay for all necessary medical, surgical, and hospital services that are reasonably required to cure or relieve the effects of an accidental injury sustained by an employee and arising out of and in the course of her employment. 820 ILCS 305/8(a) (West 2006). An employer's liability under this section of the Act is continuous so long as the medical services are required to relieve the injured employee from the effects of the injury. *Second Judicial District Elmhurst Memorial Hospital v. Industrial Comm'n*, 323 Ill. App. 3d 758, 764 (2001) (citing *Efengee Electrical Supply Co. v. Industrial Comm'n*, 36 Ill. 2d 450, 453 (1967)).

The Commission has found that Petitioner has established causal connection between his left shoulder condition and accident at work as noted above. The record reflects that Petitioner's claimed medical expenses outlined in Petitioner's Exhibit 1 through Petitioner's Exhibit 10 were reasonable and necessary to alleviate him from the effects of his accident at work.

Thus, the Commission finds no basis to deny the claimed outstanding left shoulder medical expenses. Accordingly, the Commission concludes that the weight of the evidence supports finding these charges were reasonable and necessary, and awards Petitioner's claimed medical expenses, pursuant to §8(a) and 8.2 of the Act.

D. Temporary Total Disability

The dispositive test for awarding temporary total disability ("TTD") benefits is "whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement." *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759 (2003). Here, Petitioner was placed off work for his left shoulder condition by Dr. McGuire on October 12, 2017 and remained off work or on light duty with no left arm usage as ordered by either Dr. McGuire or Dr. Ketterling. Petitioner requested a release back to work on May 25, 2018 for financial reasons. Accordingly, the Commission awards TTD benefits of $926.67 per week for a period of 32 and 2/7ths week, from October 12, 2017 through May 25, 2018.

E. Permanent Partial Disability

As it pertains to permanent disability ("PPD"), the record reflects that Petitioner suffered

a work-related accident on October 9, 2017. Accordingly, a determination of permanent disability under §8.1b of the Act must follow. 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. Specifically, §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 Commission addresses the factors delineated in the Act for determining permanent partial disability as indicated below:

With regard to subsection (i) of §8.1b(b), the Commission notes that Respondent submitted an AMA impairment report by Dr. Cole, who noted that Petitioner's shoulder pain hinders his sleep and Petitioner rated his pain 2/10. Petitioner takes ibuprofen and stated that his impairment was "mild" with "slight pain during activity." His limitations are "mild" and he is still employed as a Plumber. Using the 6th Edition Guidelines for impairment, Dr. Cole found that Petitioner's principal diagnosis was a full thickness rotator cuff tear, which is a Class 1 category in Table 15.5 on page 403. Petitioner's QuickDASH score of 22.7 and ability to control and function with his symptoms equated to a grade 1 modifier for functional history adjustment. Dr. Cole's exam revealed minimal left sided findings, but that he would not categorize Petitioner's left shoulder as "normal," equating to a grade 1 modifier for physical exam

adjustment. Finally, referring to the clinical studies adjustment, Dr. Cole stated that Petitioner's injury qualifies as a "very severe problem" and a Grade 4 modifier based on radiographic studies. The resultant net adjustment formula on page 411 equaled "3", which defaults to a grade of E, which corresponds to a 7% impairment in Table 15.5, which Table 15-11 converts to a whole person impairment of 4%. Moderate weight is given to this factor.

With regard to subsection (ii) of §8.1b(b), Petitioner was and still is employed as a Plumber, now employed by Behm Plumbing. He underwent surgery but was eventually released to full duty. His duties likely still include frequent heavy lifting. However, although he can still perform overhead work, he cannot perform overhead drilling, as his drill weighs 25 pounds and he cannot lift it overhead. Petitioner has constant pain while working, although it is not excruciating. Greater weight is given to this factor.

With regard to subsection (iii) of §8.1b(b), Petitioner was 61 years old at the time of accident. He still works as a Plumber, but injuries at his age will have greater impact on his ability to perform than they would if he were younger. Some weight is given to this factor.

With regard to subsection (iv) of §8.1b(b), there was no evidence that the injury had any effect on Petitioner's future earning capacity. No weight is given to this factor.

With regard to subsection (v) of §8.1b(b), Petitioner testified that his left shoulder is worse than it was prior to the instant accident. He has pain, numbness, cracking, and "crickles" and stated that his shoulder falls asleep. His shoulder cracks every time he lifts his arm. He has constant pain while working, although it is not excruciating. He does not take medication for his condition and has not treated since being released by Dr. Ketterling. Greater weight is given to this factor.

Based on the above analysis, the Commission finds that the injuries sustained caused Petitioner a 15% loss of use of his person as a whole.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner has met his burden of proof by a preponderance of evidence that he suffered an accident arising out of and in the course of his employment with Respondent on the date in question.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner has met his burden of proof by a preponderance of evidence that a causal connection exists between his accident and his current condition of ill-being.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner is entitled to all reasonable and necessary medical expenses related to his left shoulder condition to be paid pursuant to the fee schedule and §8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $926.67 per week for the period of 32 and 2/7ths weeks, from October 12, 2017 through May 25, 2018, that being the period of temporary total incapacity for work under §8(b)

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of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to permanent partial disability benefits of $790.64 (maximum PPD rate) per week for 75 weeks, as Petitioner sustained a 15% loss of use of his person as a whole.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at $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: FEB 1 - 2021
o: 12/3/20
BNF/wde
45

Barbara N. Flores

Marc Parker

DISSENT

I respectfully dissent from the Decision of the majority and would have affirmed and adopted the well-reasoned Decision of the Arbitrator. The evidence supports a finding that Petitioner lacked credibility, because the testimony of Jason Reyes, Robb Swanson, and Jesus Hernandez all directly conflict with Petitioner's version of the alleged accident.

Mr. Reyes testified that he was working 10 to 20 feet from Petitioner at the time of the alleged accident; however, he never saw Petitioner fall, nor did he notice any blood on Petitioner. Despite working in close proximity, Mr. Reyes was not aware of any alleged injury involving Petitioner. Instead, Mr. Reyes testified that an entirely different accident had occurred when Respondent's foreman, Robb Swanson, was struck by a falling pipe while working on the first floor at the jobsite. Mr. Reyes testified that after he heard Mr. Swanson scream, he ran downstairs with Petitioner to see what had happened. Mr. Reyes testified that they were then informed by Mr. Swanson that he had been struck in the shoulder by the pipe. Mr. Reyes testified that after checking on Mr. Swanson, he and Petitioner returned upstairs and proceeded to work as normal.

At the hearing, Petitioner denied having knowledge of any pipe falling on Mr. Swanson. However, in corroboration with Mr. Reyes' testimony, Mr. Swanson also testified that the only accident that had occurred at the jobsite was when a pipe fell from Petitioner's work area and

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struck his shoulder. Mr. Swanson further testified that after he yelled out, Petitioner came downstairs with Mr. Reyes to inquire as to what had happened. Mr. Swanson testified that Petitioner then indicated that he must have bumped the pipe and caused it to fall. Similar to Mr. Reyes, Mr. Swanson also did not observe any accident involving Petitioner, nor see any blood on Petitioner's shirt. Despite working with Petitioner at the jobsite, neither Mr. Swanson nor Mr. Reyes were aware of any alleged injury to Petitioner.

Mr. Hernandez, Respondent's owner, also testified that he had received a report of the pipe falling on Mr. Swanson, which prompted him to go to the jobsite to terminate Petitioner. Mr. Hernandez testified that he had previously attempted to terminate Petitioner due to job performance issues. Therefore, Petitioner was aware that his employment was already in jeopardy on the alleged accident date. When Mr. Hernandez arrived on the scene, he saw no evidence of any injury to Petitioner and Petitioner did not indicate that he had sustained a work injury. According to Mr. Hernandez, Petitioner also did not exhibit any noticeable physical problems as he packed up and left the jobsite following his termination.

Despite being present on the jobsite on the alleged accident date, Mr. Reyes, Mr. Swanson, and Mr. Hernandez had no knowledge of Petitioner's alleged accident. Instead, their testimony concludes that an entirely different injury occurred to Mr. Swanson as opposed to Petitioner. Given that the testimony of these three witnesses substantially conflicts with Petitioner's version of the alleged accident, I would have found that Petitioner lacked credibility and therefore failed to prove that he sustained an accident arising out of and in the course of his employment on October 9, 2017.

Deborah L. Simpson

DLS/met
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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

WILFRED D. GEBO,

Petitioner,

vs.

NO: 18 WC 06706

STAIR ONE, INC.,

Respondent.

21IWCC0047

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2019 is hereby affirmed and adopted.

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

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 $11,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 2 - 2021
o- 12/8/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

DISSENT

I respectfully dissent. I believe Petitioner proved by the preponderance of the credible evidence that his ATFL tear and big toe condition were causally related to the 11/22/17 accident. More to the point, I believe the Arbitrator erred in relying on the opinions of Respondent's §12 examining physician Dr. Holmes over those of treating orthopedic surgeon Dr. Khan.

Dr. Khan persuasively opined that Petitioner's current conditions of ill-being with respect to his left foot, left ankle and left big toe were caused and/or aggravated by the mechanism of injury described by Mr. Gebo, and that there was evidence of a traumatic injury consistent with an inversion injury given areas of bone marrow edema. Indeed, the evidence shows that Petitioner suffered more than a minor ankle sprain, as opined by Dr. Holmes. The MRI of the left ankle performed on 12/6/17 revealed a ganglion cyst, a subacute/chronic tear of the anterior inferior tibiofibular ligament with complete disruption of the anterior talofibular ligament compatible with a chronic tear and degenerative changes in the mid and hind foot. While this study suggests a chronic component to Petitioner's condition, even Dr. Holmes agreed that the studies showed a complete tear of the ligament and that it was possible to have such a tear and be asymptomatic. Along these lines, Petitioner credibly testified that he had not suffered any injuries or accidents to his left ankle, left foot or left big toe or sought any treatment for same prior to the date of accident -- other than experiencing some numbness in his feet in 2008, which the Arbitrator rightly characterized as insignificant. Furthermore, Petitioner has continued to experience consistent

complaints of pain and has not sustained any new injuries to his left ankle, left foot or left big toe since the incident on 11/22/17.

As a result, I believe the Arbitrator erred by finding that Petitioner sustained nothing more than a sprain of his left ankle superimposed on several pre-existing conditions (hallux rigidus of the 1st MTP joint and a pre-existing tear of the ATFL), and would find that Petitioner proved by a preponderance of the credible evidence that the claimed conditions of ill-being were at the very least aggravated by the undisputed accident in question. I likewise believe the Arbitrator erred in finding that Petitioner had reached maximum medical improvement as of Dr. Holmes' examination and would find that Petitioner was entitled to ongoing medical expenses, temporary total disability benefits and prospective medical care and treatment as recommended by Dr. Kahn, including surgery.

Thomas J. Tyrrell

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

GEBO, WILFRED D
Employee/Petitioner

Case# **18WC006706**

STAIR ONE INC
Employer/Respondent

21IWCC0047

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

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

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

1987 RUBIN LAW GROUP LTD
CATHERINE KRENZ DOAN
20 S CLARK ST SUITE 1810
CHICAGO, IL 60603

1685 KOPKA PINKUS DOLIN PC
LYNN COMBS
100 LEXINGTON DR SUITE 100
BUFFALO GROVE, IL 60089

21IWCC0047

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)

Wilfred D. Gebo
Employee/Petitioner

v.

Stair One, Inc.
Employer/Respondent

Case # **18** WC **6706**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Geneva**, on **April 16, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **November 22, 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 in part*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$80,165.38**; the average weekly wage was **$1,927.05**.

On the date of accident, Petitioner was **48** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$26,012.03** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$26,012.03**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,284.70/week for 24 5/7 weeks, commencing November 24, 2017 through February 3, 2018, and commencing February 8, 2018 through May 19, 2018, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $26,012.03 for temporary total disability benefits that have been paid.

Petitioner's claims for unpaid medical bills and for prospective medical care are denied.

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

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

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

Signature of Arbitrator

June 5, 2019
Date

ICArbDec19(b)

JUN 6 - 2019

Statement of Facts

Petitioner Wilfred Gebo testified that he was employed by Respondent Stair One, Inc. on November 22, 2017 as an ornamental ironworker, working as a foreman. He had been employed by Respondent for more than 10 years. He was a member of Local 63 Ironworker's Union. He had been a member of the union for 18 years. Petitioner testified his job duties included lifting and installing stairs and railings. He would lift and carry stairs, materials and metal weighing up to 150 pounds. His job required climbing ladders, walking all day including on dirt piles and uneven surfaces, bending and squatting, pushing and pulling dry wall and carts of steel weighing up to 200 pounds, and operating welders and hand tools. Petitioner identified the job description for Local 63 Ironworkers (PX 8) which stated that the job duties included walking up and down stairs and on uneven surfaces, climbing ladders and scaffolding, kneeling, squatting, leaning, reaching, bending, twisting, climbing over objects, jumping into and out of trucks, carrying heavy and awkward objects, using hand tools, and lifting over 100 pounds (PX 8). Petitioner testified that he performed all of the activities set forth in the job description prior to November 22, 2017 without problem.

Petitioner testified that he worked 40 hours per week, 7:00 am to 3:30 pm daily. This was governed by the union contract. He was paid pursuant to the union pay scale which was $48.25 per hour from June 2016 to June 2017 and $49.25 per hour from June 2017 through November 2017. From November 21, 2016 through November 17, 2017, Petitioner testified that there were four weeks that he did not perform any work due to weather and materials not being ready. He testified that there were weeks from November 21, 2016 through November 17, 2017 where he did not work 40 hours due to weather and materials. Petitioner testified that he did not miss work due to personal reasons or vacation. Petitioner worked inside and outside. If he was working inside, he was subject to the weather. He worked on unfinished buildings that did not have roofs. The wage statement for Petitioner was admitted into evidence (PX 9, RX 10). The wage records documented Petitioner's hours and earnings for 53 weeks from November 14, 2016 through November 17, 2017. Petitioner agreed that the wage statement reflected his hours and earnings for Respondent.

Petitioner testified that prior to November 22, 2017, he had not received medical treatment for his left ankle, left foot and left big toe. He had not sustained any accidents or injuries involving his left ankle, left foot or left big toe. Prior to November 22, 2017, he did not notice anything about his left foot, ankle and big toe. Petitioner testified that in August 2008, he experienced numbness in his feet which resolved in November 2008. Since November 2008, he has not experienced any numbness in his feet.

The medical records of Dr. Bhavasar, Petitioner's primary care physician, were admitted into evidence (RX 3). On August 18, 2008, Petitioner complained of dizziness and tingling in his feet. He was noted to have carotid artery plaque and provided medication and recommendations for change of diet and exercise. On November 18, 2008, the paresthesia of Petitioner's feet had resolved (RX 3, p 77-83). Petitioner testified that a picture posted online on June 24, 2015 was his daughter's ankle (RX 12). Petitioner testified that she injured her ankle while playing basketball. He knew the picture was his daughter's ankle because the picture had shaved legs and nail polish. The comment stated, "Dad you got my nasty looking toes & prickly legs all out for the world to see lmao" (RX 12).

Petitioner testified that on November 22, 2017, he was performing his job duties for Respondent, installing stairs on the third floor on a courthouse or jail in DeKalb. There was no power, so Petitioner hung an extension cord over the railing to the second floor. He testified that as he was coming down the stairs, he reached for the cord and missed a step. He fell and twisted his left ankle. He heard a noise in his ankle and fell onto his left

side. He hit his left thumb. Petitioner testified that he noticed pain in his left ankle, foot and big toe. Petitioner continued to work.

Petitioner reported the accident to his boss, Brian Starver. He gave a recorded statement on November 30, 2017 (RX 11). Petitioner testified that he did not have any prior problems with his feet or ankles. Petitioner said he was coming down from the third floor to the second floor, misjudged a step and fell forward twisting his left ankle. He was not carrying anything at the time. The rails were up. There was temporary lighting. He reported that he injured his left ankle (RX 11). Petitioner testified that by left ankle he meant that he hurt his whole ankle, foot and toe. He believed that the ankle included the whole foot and that it was the same. Petitioner advised the adjuster that he underwent x-rays of his left foot at Working Well. He also stated that the nurse at Working Well was concerned about the ligament on the top of his foot and wanted an MRI (RX 11).

Petitioner was initially examined on November 24, 2017 at Working Well with the Franciscan Hammond Clinic. (PX 1, RX 5). Petitioner's chief complaint was left ankle pain. He had pain with ambulation. Physical exam noted edema and tenderness on the ankle with palpation. X-rays of the left ankle were negative. Petitioner was diagnosed with a moderate ankle sprain. He was given naproxen, an air cast and crutches (PX 1, p 2-5). On November 30, 2017, Petitioner located his pain over the lateral malleolus and dorsal foot over the cuboid bone. He was not able to perform single heel raises and walked with an extreme limp. X-rays of the left foot and ankle noted no fractures or dislocations. There was severe degenerative joint disease at the first metatarsophalangeal joint. The diagnosis remained left ankle sprain (PX 1, p 11-15). Petitioner was released to restricted work (PX 1, p 19).

On December 4, 2017, it was recommended that Petitioner undergo an MRI study of the left ankle (PX 1, p 21). The impression of the MRI study performed December 6, 2017 at Bone & Joint Specialists was a ganglion cyst adjacent to the flexor halluces longus muscle, subacute/chronic tear of the anterior/inferior tibiofibular ligament and a complete disruption of the anterior talofibular ligament compatible with a chronic tear, degenerative changes within the mid-foot and hind foot as detailed above (PX 2). On December 11, 2017, Petitioner still reported 5/10 pain. He was off work. Physical examination noted no edema or ecchymosis. There was tenderness to palpation over the anterior talofibular ligament. Muscle strength was 5/5. Drawer sign was negative. Petitioner was referred to an orthopedic surgeon (PX 1, p 22-24).

Petitioner saw Dr. Dedhia at Orthopedic Specialists of Northwest Indiana on December 14, 2017. His examination noted significant enlargement and tenderness around the great toe MTP joint and pain with range of motion. He had swelling and tenderness over the ATFL and CFL. X-rays of the foot showed advanced degenerative changes at the MTP joint. X-rays of the ankle were unremarkable. The MRI of the left ankle showed the tear of the ATFL and a ganglion cyst adjacent to the FHL. Dr. Dedhia recommended a CAM boot, a Medrol Dosepak and physical therapy (PX 3, p 1-2). Petitioner was released to seated work only (PX 3, p 7).

Petitioner began physical therapy at Athletico on December 20, 2017. The therapist noted that Petitioner stated Dr. Dedhia said he did not need surgery on his left ankle and his left great toe was arthritic. His function was limited due to ankle and great toe pain (PX 6, p 1). On December 28, 2017, Petitioner reported improvement. Dr. Dedhia noted no evidence of gross instability on the left side compared to the right. Swelling in the great toe also appeared improved. He recommended transition out of the CAM boot (PX 3, p 9). On January 18, 2018, Petitioner reported pain within the ankle. Examination noted no evidence of bruising or swelling. There was no evidence of gross instability (PX 3, p 11). Petitioner was discharged from therapy on January 30, 2018. Petitioner reported to his physical therapist that he performs his home exercise plan every

other day and goes to the gym every other day (PX 6, p 11). On February 1, 2018, Dr. Dedhia noted no swelling or bruising, Petitioner had mild tenderness over the ATFL. There was negative talar tilt and Drawer sign. He still had restricted range of motion and crepitation in the great toe. Dr. Dedhia released Petitioner to work without restrictions and stated he was at maximum medical improvement (PX 3, p14). Petitioner was scheduled for follow up with Dr. Dedhia in 4 weeks (PX 3, p 15).

Petitioner testified he returned to work for Respondent on February 3, 2018 as a foreman performing the same duties as before. He noticed that he was favoring his left foot and ankle. His great toe hurt. He returned to Dr. Dedhia on February 13, 2018. Petitioner reported that he noticed increased pain and swelling throughout his ankle which extended all the way to his big toe. Examination showed obvious swelling within the ankle with swelling extending into the midfoot as well as the great toe. Dr Dedhia recommended conservative care and work restrictions (PX 3, p 16-17). On February 27, 2018, Petitioner reported significant improvement. Dr. Dedhia noted Petitioner is not complaining of instability episodes. Examination noted swelling and bruising are significantly better. Petitioner still reports tenderness and pain. Dr. Dedhia referred Petitioner to a podiatrist, Dr. Arshad Khan (PX 3, p 18).

Petitioner saw Dr. Khan on March 6, 2018 (PX 4, RX 2). Petitioner complained of pain in the ankle and left great toe joint of the left foot. Physical examination noted a positive Tinel's sign, non-pitting edema with full foot range of motion and strength. Dr. Khan noted the head of the fibula bone is displaced anteriorly and laterally when compared with the contralateral side. There is decreased dorsiflexion and decreased ankle range of motion. He read Tib-Fib x-rays to show the left fibula displacement. On weigh bearing, the left fibular head is subluxed. He diagnosed Petitioner with a ruptured lateral ankle ligament; ankle instability; pain in the limb; subluxation of the fibula bone; acquired equinus deformity; edema; neuropraxia of the common peroneal nerve; and hallux limitus/rigidus. Dr. Khan recommended surgery, including a modified Bostrom lateral ankle stabilization with ankle arthroscopy and arthrodesis of the first metatarsal phalangeal joint with resection of the ganglion cyst and repair of the flexor halluces longus tendon. He restricted Petitioner to seated work only (PX 4, p 2-7).

On March 27, 2018, Petitioner reported to Dr. Khan that he had been to the emergency room because of severe pain and swelling (PX 4, p 9). On June 27, 2018, Dr. Khan documented that Petitioner continued to have swelling on the outside of the left ankle with instability, burning down the front of his left foot and down his big toe on the left side. His impression was chronic ankle instability/subluxation/dislocation of the fibula, compression of the common peroneal nerve with neuritis/neuropraxia and weakness of the anterior muscle group. Dr. Khan recommended surgery (PX 4, p 12-13).

Respondent offered surveillance video of Petitioner taken between March 6, 2018 and March 18, 2019 as RX 7 A-B. This video was viewed by Dr. Holmes. On March 6, 2019, 50 seconds of video depicts Petitioner walking in sneakers (RX 7A). Dr. Holmes noted a "little bit of an antalgic gait" (RX 1, Dep. Ex.3). On March 7, 2018, Petitioner is depicted initially wearing slip-on shoes. He moved a chair to the alley. He moved some cushions the alley. He moves a sofa with help of another person and a cart. The Arbitrator notes that on at least one occasion Petitioner went up an incline. On March 9, 2018, Petitioner drove his truck to a dog wash, gave his dog a bath, went to a post office, and to Jewel. He is wearing sneakers. Dr. Holmes notes that he walks with an essentially non-antalgic gait but may be related to some decreased flexion of his toe (RX 7A). On March 16, 2018, Petitioner was walking at a park and playing with a dog. He briefly jogs with the dog. Dr. Holmes notes he is walking with an essentially normal gait. Later he walked a different dog. On March 18, 2018, he was depicted standing at his front door in a one-minute video (RX 7B). Petitioner testified that on

March 7, 2018, the sofa he lifted weighed about 100 pounds. Petitioner had assistance lifting the sofa and used a cart. He testified that as an ironworker, he had to lift objects that were heavier than the sofa.

Respondent offered surveillance video of Petitioner taken between April 2, 2018 and April 20, 2018 as RX 7 C-D. The video depicts Petitioner walking and performing routine tasks. He is usually wearing sandals, flip flops or sneakers. On April 4, 2018, Petitioner loads his SUV by carrying a tote, water bottles, plastic drawers, suitcases, a laundry basket, 30-gallon bag, and a small storage box.

Petitioner attended a Section 12 examination at Respondent's request with Dr. George Holmes on April 19, 2018. Dr. Holmes diagnosed an ankle sprain with pre-existing degenerative conditions of hallux rigidus of the 1st MTP joint and a pre-existing tear of the ATFL. He opined that Petitioner did not need surgery, was at MMI and could return to work at the medium level (RX 1, Dep. Ex. 2). After viewing the March 2018 surveillance video, he opined that Petitioner could return to work without restriction (RX 1, Dep. Ex. 3)

Dr. Khan prepared a narrative report on July 7, 2018 summarizing Petitioner's subjective complaints, his objective findings and diagnosis as stated in his June 27, 2018 office notes. He opined that the surgery he was recommending was reasonable and necessary. He opined that the work accident might or could have caused or aggravated the Petitioner's condition of ill-being in the left ankle and foot. Petitioner could work with restrictions. He disagreed with Dr. Holmes diagnosis of a sprain based upon the MRI findings of a complete ligament tear and bone marrow edema (PX 5).

Dr. Khan testified by evidence deposition taken November 18, 2018 and February 18, 2019 (PX 7-I, PX 7-II). Dr. Khan testified that he is an osteopath. He is board certified in Podiatric Medicine as well as Foot and Ankle Surgery. He testified to his examination of Petitioner in accordance with his medical notes. He noted pain on palpation over the ATFL. He testified that the head of the fibula was displaced anteriorly and laterally. This was a clinical finding and on x-ray. On review of the MRI, he stated that the ganglion cyst shows there was some trauma. He testified to the surgeries he proposed, a modified Brostrom-Gould procedure, ankle arthroscopy and arthrodesis of the 1st metatarsal phalangeal joint. Dr. Khan recommended seated work only. Dr. Khan testified to his diagnoses and surgical recommendations based upon his clinical findings and the MRI findings. He stated that many physicians miss the finding that the fibula is subluxed proximally and pulling on the nerve. He opined that the mechanism of accident could most definitely create the type of traumatic symptoms as well as the objective findings. The condition of the great toe was aggravated by the injury. Dr. Khan disagreed with Dr. Holmes' opinions. He stated the great toe condition could have been exacerbated by the mechanism of injury. He disagreed with the diagnosis of an ankle sprain because there was a complete rupture of the ligament, marrow edema found on MRI, and Dr. Holmes did not identify anything with the proximal fibula nor the peroneal nerve. Dr. Khan testified that the report of the initial video showing an antalgic gait indicates guarding or it could be due to instability. The surveillance does not change his opinions (PX 7-I). Dr. Khan testified that he ordered compression stockings and a CAM boot on March 27, 2018. The CAM boot was to off load until Petitioner had his second opinion (PX 7-II).

Dr. Holmes testified by evidence deposition taken March 18, 2019 (RX 1). He testified that he is an associate professor of orthopedic surgery of the foot and ankle. He is board certified in Orthopedic Surgery. He testified that an inversion injury can injure or rupture the ATLF. It is the weakest of the three ligaments. It can be determined by MRI. There have to be other ligaments torn to cause instability. Subluxation of the fibula is not a term or diagnosis utilized by orthopedic surgeons. Dr. Holmes testified to the history provided to him and the treating medical records reviewed. He noted the initial x-ray finding of no dislocation. A dislocation would have

indicated the presence of a significant disruption of the ankle from a tear or a rupture. He testified that the MRI noted a ganglion cyst. These are fairly benign. This is not in the area of symptoms. Dr. Holmes opined that based on the natural history of ganglion cysts and that the MRI was obtained shortly after the injury and with the lack of being in the patient's area or injury, that the ganglion cyst was an incidental finding, not aggravated, nor was it caused by the injury. Petitioner did not require surgery for excision of the ganglion cyst as a result of the work injury (RX 1).

There is a chronic tear of the anterior inferior talofibular ligament. This is not an acute injury. There are degenerative changes in the midfoot and hindfoot consistent with arthritic changes. The presence of scar formation would indicate that the changes happened before November 22, 2017. Dr. Holmes testified that he reviewed the report and the actual MRI scan. He agreed with the radiologist's finding that the ligament had been disrupted. He testified the MRI did not demonstrate marrow edema. It did demonstrate arthritic change in the calcaneus, but no acute marrow edema. Dr. Holmes testified that the radiologist's finding that the anterior talofibular ligament was subacute/chronic meant it is not acute. Subacute and chronic were the same finding being used interchangeably. He opined that the tear pre-dated the injury (RX 1).

Dr. Holmes testified to his examination. He marked the areas of pain. These were noted on RX 1, Dep. Ex. 5 and 6. There was no evidence of calf atrophy from the left to the right which is indicative of utilization of both muscles equally. There was a minor amount of swelling. There was some initial guarding on range of motion, but with relaxation, eversion and inversion were symmetrical. Dr. Holmes performed the anterior Drawer test to determine ligamentous instability. He did not find any instability. Dr. Holmes testified that one can have feelings of instability without having objective findings of instability. We operate on objective findings. There is no objective structural instability on examination. Petitioner did not show any evidence of ligamentous instability (RX 1).

Dr. Holmes opined the criteria for a Brostrom procedure would be a patient failing conservative measures such as physical therapy demonstrating persistent instability in comparison to the contralateral or normal side. Dr. Holmes testified, with respect to the disruption of the ankle ligament, that there are many ankle ligaments, and having an ATFL disruption is not and in of itself a reason for surgery unless other various ligaments led to instability. Dr. Holmes performed instability Drawer tests. Guarding or pain was not present. The examination in comparison of the right and left lower extremities did not demonstrate any instability. The radiographic features of the MRI demonstrated isolated anterior talofibular ligament injury and no other ligaments that were injured that would have affected stability of the ankle. Isolated anterior talofibular ligament injury is quite common and generally does not lead to instability. He testified that subjective complaints would need to correlate to the findings. Clinical findings have to correlate with the MRI findings. There would be pain over the ATFL ligament, swelling in the ankle consistent with the recurrent instability of the ankle, and effusion of the ankle on the MRI. He took photographs of the foot and marked Petitioner's pain. The areas of pain did not correlate to the findings of the MRI of the ligament disruption. Dr. Holmes testified Petitioner's weight plays a role in his condition and co-morbidities can cause swelling in the ankles. The mere presence of a swollen ankle is not an indication, in and of itself, for surgery (RX 1).

Dr. Holmes did not diagnose an acute condition of the proximal fibula. He did not diagnose an acute condition of the peroneal nerve. He stated that subluxation of the fibula is a term utilized only by Dr. Khan who is a podiatrist. That is not a term or diagnosis that is common to orthopedic surgeons. Dr. Dedhia, on February 13, 2018, read X-rays that the talus was well-centered within the mortise. Dr. Holmes, referred to his drawing (Dep. Ex. 4) that confirmed the bones were well-situated on top of each other (RX 1).

From the X-rays, Dr. Holmes opined there was objective evidence of hallux rigidus deformity. He opined that hallux rigidus deformity was not related to the incident of November 22, 2017. It was a pre-existing, underlying arthritic changes in the dorsal aspect of his joint not related to the injury, and of long-standing duration. It was not instituted, accelerated or aggravated by the November 22, 2017 incident (RX 1).

Dr. Holmes further testified with respect to Dr. Khan's multiple recommended surgeries. He opined that the recommended surgical interventions are not appropriate and are unreasonable, unnecessary, and unrelated. Dr. Holmes opined Petitioner did not require ankle stabilization surgery, ligament repair surgery, or more specifically a Brostrom procedure. Only the rare patient requires a ligament reconstruction because this is not the most important ligament in the ankle. Based on Petitioner's lack of instability, lack of any asymmetry comparing the right and left lower extremities, the MRI scan which demonstrated no acute collateral damage to the ankle as a result of the sprain, as well as his comorbidities, and as well as two recent studies have shown that some 35 to 40 percent of normal patients with no preexisting history of trauma have pathology including anterior talofibular ligament tear, Dr. Holmes opined that Petitioner had a stable ankle and did not have any issue with regard to the findings of the MRI related to the injury. It was his opinion that Petitioner sustained a sprain of the ankle. The incident did not aggravate his ankle condition. He opined that if Petitioner did undergo surgery, it would not be related to November 22, 2017 (RX 1).

Dr. Holmes opined that based on his exam Petitioner could work at a medium duty level. Based on the review of additional data points including surveillance, he would be able to return to work in an unrestricted manner as an iron worker. Dr. Holmes was aware that Dr. Khan recommended Petitioner wear compression socks or the CAM walker boot. He did not see him wearing compression socks or a CAM walker boot in the video. He noted Petitioner was able to carry furniture both by himself and with another person. Dr. Holmes testified that an antalgic gait is a limp. If one cannot bend their toes secondary to arthritis, in this case secondary hallux rigidus, that will also affect your gait because you don't have the flexibility of the toe. He testified that was the reason forcing alteration in his gait. Dr. Holmes opined Petitioner had reached maximum medical improvement as of the date of the examination (RX 1).

Petitioner testified that he returned to work for Respondent as a foreman on May 28, 2018. Petitioner testified that when he returned to work, he did not put pressure on his left foot. He has not sustained any new accidents or injuries involving his left ankle, left foot or left big toe. Petitioner testified that he experiences pain in his left ankle and big toe. He tries to stay off his feet and ices his left ankle and foot. Petitioner testified that he walks with a limp. He does not always walk with a limp. He limps more when he is in pain or performs more activities. Petitioner testified that some days are better than other days. Petitioner testified that he used to participate in a men's league for basketball. He has not played in the league since November 22, 2017. Petitioner testified that he had not undergone the surgery recommended by Dr. Khan. He testified that he would like to undergo the 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). 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).

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). It is well established that 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).

There is no dispute that Petitioner suffered an injury to his left foot and ankle in the accident on November 22, 2017. The dispute centers on the nature of that injury, the diagnosis and course of treatment to be undertaken. Petitioner testified that he did not have any prior problems with his feet or ankles. While the medical records note some numbness in his feet in 2008, the Arbitrator does not find that significant.

Following the accident, Petitioner was examined on November 24, 2017 at Working Well. Petitioner's chief complaint was left ankle pain. Physical exam noted edema and tenderness on the ankle with palpation. X-rays of the left ankle were negative. Petitioner was diagnosed with a moderate ankle sprain. On November 30, 2017, Petitioner located his pain over the lateral malleolus and dorsal foot over the cuboid bone. X-rays of the left foot and ankle noted no fractures or dislocations. There was severe degenerative joint disease at the first metatarsophalangeal joint. The diagnosis remained left ankle sprain. The impression of the MRI study performed December 6, 2017 was a ganglion cyst adjacent to the flexor halluces longus muscle, subacute/chronic tear of the anterior/inferior tibiofibular ligament and a complete disruption of the anterior talofibular ligament compatible with a chronic tear, degenerative changes within the mid-foot and hind foot as detailed above. On December 11, 2017, examination noted no edema or ecchymosis. There was tenderness to palpation over the anterior talofibular ligament. Muscle strength was 5/5. Drawer sign was negative.

On December 14, 2017, Dr. Dedhia noted significant enlargement and tenderness around the great toe MTP joint and pain with range of motion and swelling and tenderness over the ATFL and CFL. X-rays of the foot showed advanced degenerative changes at the MTP joint. X-rays of the ankle were unremarkable. The MRI of the left ankle showed the tear of the ATFL and a ganglion cyst adjacent to the FHL. Dr. Dedhia recommended a CAM boot, a Medrol Dosepak and physical therapy. The Athletico therapist noted that Petitioner stated Dr. Dedhia said he did not need surgery on his left ankle and his left great toe was arthritic. On January 18, 2018,

examination noted no evidence of bruising or swelling. There was no evidence of gross instability. On February 1, 2018, Dr. Dedhia noted no swelling or bruising. There was negative talar tilt and Drawer sign. He still had restricted range of motion and crepitation in the great toe. Dr. Dedhia released Petitioner to work without restrictions and stated he was at maximum medical improvement. He returned to Dr. Dedhia on February 13, 2018 with increased pain and swelling throughout his ankle which extended all the way to his big toe. Examination showed obvious swelling within the ankle with swelling extending into the midfoot as well as the great toe. Dr Dedhia recommended conservative care and work restrictions. On February 27, 2018, Petitioner reported significant improvement. Dr. Dedhia noted Petitioner is not complaining of instability episodes. Examination noted swelling and bruising are significantly better. Dr. Dedhia referred Petitioner to Dr. Khan.

On March 6, 2018, Dr. Khan's examination noted a positive Tinel's sign, non-pitting edema with full foot range of motion and strength. Dr. Khan noted the head of the fibula bone is displaced anteriorly and laterally when compared with the contralateral side. There is decreased dorsiflexion and decreased ankle range of motion. He read Tib-Fib x-rays to show the left fibula displacement. On weigh bearing, the left fibular head is subluxed. He diagnosed Petitioner with a ruptured lateral ankle ligament; ankle instability; pain in the limb; subluxation of the fibula bone; acquired equinus deformity; edema; neuropraxia of the common peroneal nerve; and hallux limitus/rigidus. Dr. Khan recommended surgery, including a modified Bostrom lateral ankle stabilization with ankle arthroscopy and arthrodesis of the first metatarsal phalangeal joint with resection of the ganglion cyst and repair of the flexor halluces longus tendon. On June 27, 2018, Dr. Khan documented continued swelling on the outside of the left ankle with instability, burning down the front of his left foot and down his big toe on the left side. His impression was chronic ankle instability/subluxation/dislocation of the fibula, compression of the common peroneal nerve with neuritis/neuropraxia and weakness of the anterior muscle group. Dr. Khan recommended surgery.

Dr. Holmes diagnosed an ankle sprain with pre-existing degenerative conditions of hallux rigidus of the 1st MTP joint and a pre-existing tear of the ATFL. He opined that Petitioner did not need surgery, was at MMI and could return to work without restriction. Dr. Holmes testified that an inversion injury can injure or rupture the ATLF. It is the weakest of the three ligaments. There have to be other ligaments torn to cause instability. He noted the initial x-ray finding of no dislocation. A dislocation would have indicated the presence of a significant disruption of the ankle from a tear or a rupture. Dr. Holmes opined that based on the natural history of ganglion cysts and that the MRI was obtained shortly after the injury and with the lack of being in the patient's area or injury, that the ganglion cyst was an incidental finding, not aggravated, nor was it caused by the injury. Petitioner did not require surgery for excision of the ganglion cyst as a result of the work injury. There is a chronic tear of the anterior inferior talofibular ligament. This is not an acute injury. The presence of scar formation would indicate that the changes happened before November 22, 2017. Dr. Holmes performed the anterior Drawer test to determine ligamentous instability. Petitioner did not show any evidence of ligamentous instability. He testified the MRI did not demonstrate marrow edema. It did demonstrate arthritic change in the calcaneus, but no acute marrow edema. He opined that the tear pre-dated the injury. He opined that hallux rigidus deformity was not related to the incident of November 22, 2017. It was a pre-existing, underlying arthritic changes in the dorsal aspect of his joint not related to the injury, and of long-standing duration. It was not instituted, accelerated or aggravated by the November 22, 2017 incident.

Dr. Holmes did not diagnose an acute condition of the proximal fibula. He did not diagnose an acute condition of the peroneal nerve. He stated that subluxation of the fibula is not a term or diagnosis that is common to orthopedic surgeons. He noted the initial x-ray finding of no dislocation. Dr. Dedhia, on February 13, 2018,

read X-rays that the talus was well-centered within the mortise. Dr. Holmes that confirmed the bones were well-situated on top of each other.

Dr. Holmes opined that the recommended surgical interventions are not appropriate and are unreasonable, unnecessary, and unrelated. Dr. Holmes opined Petitioner did not require ankle stabilization surgery, ligament repair surgery, or more specifically a Brostrom procedure. Based on Petitioner's lack of instability, lack of any asymmetry comparing the right and left lower extremities, the MRI scan which demonstrated no acute collateral damage to the ankle as a result of the sprain, as well as his comorbidities, Dr. Holmes opined that Petitioner had a stable ankle and did not have any issue with regard to the findings of the MRI related to the injury. The incident did not aggravate his ankle condition. He opined that if Petitioner did undergo surgery, it would not be related to November 22, 2017.

Dr. Khan testified that many physicians miss the finding that the fibula is subluxed proximally and pulling on the nerve. He opined that the mechanism of accident could most definitely create the type of traumatic symptoms as well as the objective findings. The condition of the great toe was aggravated by the injury. Dr. Khan disagreed with Dr. Holmes' opinions. He stated the great toe condition could have been exacerbated by the mechanism of injury. He disagreed with the diagnosis of an ankle sprain because there was a complete rupture of the ligament, marrow edema found on MRI, and Dr. Holmes did not identify anything with the proximal fibula nor the peroneal nerve. Dr. Khan testified that the report of the initial video showing an antalgic gait indicates guarding or it could be due to instability.

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.

The Arbitrator has reviewed the medical evidence submitted and video surveillance, and heard Petitioner's testimony, and finds the opinions of Dr. Holmes more persuasive than those of Dr. Khan. The Arbitrator has considered the credentials and qualifications of the experts. The Arbitrator finds the underlying basis of Dr. Holmes analysis better reasoned and supported by the greater weight of the objective evidence and medical records. The Arbitrator notes that Petitioner made no initial complaints in his great toe. His initial histories raise complaints only in the ankle. In his recorded statement, he only refers to his ankle. His testimony that he meant the entire foot and toe is unpersuasive. Both Working Well and Dr. Dedhia diagnosed an ankle sprain. Petitioner told his therapist that Dr. Dedhia did not find him a surgical candidate. No x-rays were performed initially anywhere other than the ankle. Even after the subsequent x-rays and MRI noted the degenerative

condition of the first metatarsal, the diagnosis remained ankle sprain. The Arbitrator also notes that all of the physical examinations by Working Well and Dr. Dedhia record a negative Drawer test and no gross instability and note Petitioner did not complain of instability in his ankle. The radiologist reports of x-rays taken do not note any subluxation of the distal fibula and specifically note no dislocations. The Arbitrator finds Dr. Khan's explanation that this finding is often missed unpersuasive.

The Arbitrator also finds that the Petitioner failed to establish causation based upon a chain of events. The credible and persuasive evidence does not establish an ongoing condition of ill-being disabling the Petitioner. Petitioner was initially diagnosed with an ankle sprain. Dr. Dedhia released him to full duty and at maximum medical improvement in February 2018. Thereafter, he complained of addition complaints and was treated by Dr. Khan. The Arbitrator notes that Dr. Khan instructed Petitioner to use a CAM walker and compression hose, but the video clearly demonstrates that he was not doing so and was able to walk with little, if any, abnormality. The Arbitrator notes that Dr. Khan restricted Petitioner to seated work only. While the video may not demonstrate Petitioner performing physical activity at the level of his regular job, he clearly is far more capable that Dr. Khan believed and was performing activities well beyond the recommended level including moving heavy furniture, walking and occasionally jogging on uneven ground and inclines. The Arbitrator notes that Dr. Khan did not view the surveillance video himself, but rather appears to have reviewed Dr. Holmes written summary. His speculation concerning the brief antalgic gait described in also unpersuasive. Dr. Holmes opinion is more reasonable and is based upon actual viewing of the video itself. The Arbitrator also notes that, despite Dr. Khan's continued restrictions, Petitioner returned to his regular job with Respondent on May 28, 2018 and had been performing those duties for almost a year as of the time of the hearing.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that as a result of the accidental injury sustained on November 22, 2017, he sustained injury to his left ankle and foot. Said injury was a sprain of the ankle superimposed on pre-existing degenerative conditions consisting of hallux rigidus of the 1st MTP joint and a pre-existing tear of the ATFL. Said condition of ill-being reached maximum medical improvement as of Dr. Holmes examination.

In support of the Arbitrator's decision with respect to (G) Average Weekly Wage, the Arbitrator finds as follows:

Section 10 of the Act provides that compensation shall be computed on the basis of the 'Average weekly wage' which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness, or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted.

The parties submitted Petitioner's wage statement for the 53-week period from November 14, 2016 through November 17, 2017 (RX 10). The 53-week total is calculated at $82,095.38. Excluding the week of November 14-18, 2016 ($1,930.00) and the overtime earnings, Petitioner earned $80,165.38 during the 52 weeks preceding the accident (as opposed to the calculation by the parties of $80,120.88). The wage statement confirms that Petitioner did not always work a 40-hour workweek.

The Illinois Supreme Court interpreted Section 10 in *Sylvester v. Industrial Commission*, 197 Ill.2d 255, 756 N.E.2d 822 (2001). In *Sylvester*, the claimant testified that he was available to work forty hours per week, year-round. A full week was eight hours a day, five days per week. The court applied the second method of calculating average weekly wage, which provides that if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. The court noted that to determine average weekly wage, it was necessary to factor out all days lost through no fault of the claimant. The court calculated the average weekly wage by counting the number of days the Petitioner worked and dividing that number by the number of days in the workweek.

The facts of the instant case are similar to the facts of *Sylvester*. Petitioner testified that a full work week was eight hours per day, five days per week, governed by the union contract. He testified that there were some weeks that he did not work 40 hours and some weeks that he did not work at all due to weather and materials not being ready. He testified that he did not miss work due to personal reasons or vacation. Based on the testimony and documentation admitted at trial, the Arbitrator finds that the appropriate calculation of Petitioner's average weekly wage is the method as applied in *Sylvester*.

However, unlike in *Sylvester*, no evidence was submitted as to the number of days worked per week. The Arbitrator finds the Commission decision in *Blust v. Prairie Material Sales*, 01 IIC 0461, 96 WC 36818 provides the most reasonable method for performing the calculation in this matter in light of Petitioner's testimony that his regular work day was 8 hours. In that case, the Commission calculated the work days as one for every 8 hours, and any additional hours above resulting in an additional fraction of a day was also calculated as a day. Using this calculation, Petitioner missed 4 full weeks and 32 additional days. He therefore worked 48 weeks – 6.4 (32/5) weeks for a total of 41.6 weeks. His average weekly wage would be $80,165.38/41.6 or $1,927.05 per week.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that his average weekly wage was $1,927.05 per week.

In support of the Arbitrator's decision with respect to (J) Medical and (K) Prospective 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 claimed the $157.00 unpaid bill for Dr. Khan's June 27, 2018 office visit and is seeking prospective medical to undergo the surgical procedures outlined by Dr. Khan.

Based upon the Arbitrator's finding with respect to Causal Connection including the finding that Dr. Holmes opinions that the Petitioner's causally related condition was an ankle sprain, that the surgical procedures recommended are not reasonable, necessary or causally related to the accident, and that Petitioner had reached maximum medical improvement as of the date of Dr. Holmes examination, the unpaid bill and the additional treatment sought would not be reasonable, necessary or causally related.

Based upon the record as a whole and the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he is entitled to payment for any additional medical bills. Petitioner has failed to prove by a preponderance of the evidence that he is entitled to any additional prospective medical care causally related to the accidental injury sustained.

In support of the Arbitrator's decision with respect to (L) Temporary Compensation, the Arbitrator finds as follows:

Temporary compensation is provided for in Section 8(b) of the Workers' Compensation Act, which provides, weekly compensation shall be paid as long as the total temporary incapacity lasts, which has interpreted to mean that an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. 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.

The parties stipulated that Respondent paid $26,012.03 in TTD for the periods of commencing November 24, 2017 through February 3, 2018 and February 8, 2018 through May 19, 2018, a period of 24 5/7 weeks (Arb. Ex. 1). Based upon the Arbitrator's finding that the opinions of Dr. Holmes are persuasive, including his opinion that Petitioner reached maximum medical improvement as of the date of his examination, the Arbitrator find Respondent is not liable for TTD benefits after May 19, 2018, the date Respondent last paid TTD. As of that date, Petitioner was at MMI and could return to work at full duty. He has, in fact done so as of May 28, 2018.

Respondent paid benefits for this period at $1,052.51 per week. Pursuant to the Arbitrator's finding with respect to Average Weekly Wage, the Petitioner's correct rate would be $1,284.70.

Based upon the record as a whole and the Arbitrator's findings with respect to Causal Connection and Average Weekly Wage, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that he is entitled to 24 5/7 weeks of temporary total compensation for the periods commencing November 24, 2017 through February 3, 2018 and February 8, 2018 through May 19, 2018 at a rate of $1,284.70 per week. Respondent is entitled to a credit of $26,012.03 for TTD paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Illinois Workers' Compensation Commission,
Insurance Compliance Division,
Petitioner,

vs.

No. 15 INC 00032,
20 WC 005523

LEE ANN PIM, Individually and d/b/a PIMCO RECOVERY and JUSTIN J. PIM, Individually and d/b/a PIMCO RECOVERY,
Respondents.

21IWCC0048

DECISION AND OPINION RE: INSURANCE NON-COMPLIANCE

Petitioner, the Illinois Workers' Compensation Commission, Insurance Compliance Division, brings this action, by and through the Office of the Illinois Attorney General, against the above-captioned Respondents, alleging violations of Section 4(a) of the Illinois Workers' Compensation Act for failure to procure mandatory workers' compensation insurance. Petitioner alleges that Respondents knowingly and willfully lacked workers' compensation insurance for 1,066 days. Petitioner set a compliance hearing for September 14, 2020. Petitioner appeared by phone. The Respondents failed to appear. The compliance hearing was then set for trial and held in Collinsville before Commissioner Parker on September 21, 2020. Petitioner was represented by the Office of the Illinois Attorney General. Respondents did not appear in person or through counsel. A record was taken.

The Commission sought the maximum fine allowed under the Act, $500.00 per day for each day Lee Ann and Justin Pim did business individually and as Pimco Recovery and failed to provide coverage for their employees (1,066 days x $500.00 = $533,000.00), plus $10,777.26 in unpaid insurance premiums, for a total of $543,777.26.

The Commission, after considering the record in its entirety and being advised of the applicable law, finds that Respondents Lee Ann Pim, individually and d/b/a as Pimco Recovery and Justin J. Pim, individually and d/b/a Pimco Recovery, knowingly and willfully violated Section 4(a) of the Act during the period in question. As a result, Respondents shall be held liable for non-compliance with the Act and shall pay a penalty in accordance with Section 4(d) of the

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Act. The Commission hereby assesses the maximum penalty of $500.00 per day for 1,066 days, plus $10,777.26 in unpaid premiums, for a total of $543,777.26.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Investigator Cummins testified he began an investigation of Lee Ann Pim and Justin J. Pim, individually and d/b/a Pimco Recovery, as a result of two workers' compensation claims filed against the Injured Workers' Benefit Fund by Jeremy Hagene. *Jeremy Hagene v. Lee Ann Pim and Justin Pim,* 14 WC 015492 and 14 WC 015500.

2. Investigator Cummins testified he searched several databases that document an employer's insurance history, including the National Council on Compensation Insurance ("NCCI") website. Petitioner's Exhibit 3 is a certified letter from NCCI verifying that Respondents did not have a workers' compensation policy from January 5, 2012 through February 3, 2015. Investigator Cummins concluded that Pimco was operating for an extended period of time in violation of the Illinois Workers' Compensation Act.

3. Commission Rule 9100.90(c)(1) provides that Notice of Non-Compliance shall be given to the employer, along with a certificate of service, at his last known address or to the employer's representative.

4. Commission Rule 9100.90(c)(3) provides that when a Notice of Non-Compliance has been sent, the Commission shall, at the request of the employer or its attorney or on its own initiative, schedule the matter for an informal conference in an attempt to resolve the matter. In this instance, no informal conference regarding Respondent's alleged non-compliance was requested.

5. Investigator Cummins testified that he sent a Notice of Non-compliance to Respondents Lee Ann Pim and Justin J. Pim, individually and d/b/a Pimco Recovery, by certified mail on October 12, 2016. PX1. When he received no response from Respondent, a hearing date was set.

6. Commission Rule 9100.90(d)(1)(A) states in pertinent part as follows:

> A matter under this Section is commenced by the Commission by service of a Notice of Hearing upon the employer at least 30 days prior to the time fixed for hearing. If service cannot be made by personal service, service of the Notice shall be by United States registered or certified mail addressed to the employer at the last known address or to the employer's representative.

7. Investigator Cummins testified that he attempted personal service of the July 27, 2020 Notice of Insurance Compliance Hearing on Respondents Lee Ann and Justin Pim at their

residence on July 28, 2020. The hearing date set in that notice was September 14, 2020. No one answered the door at the residence, and the Investigator left a copy of the Notice of Hearing attached to the front door. His affidavit of service and photographs of Respondents' residence were admitted as Petitioner's Exhibits 1-2.

8. Investigator Cummins testified that, upon failure of his attempted personal service, the Notice of Hearing dated July 27, 2020 with a hearing date of September 14, 2020 was sent to Respondents by certified and regular mail to their last known address.

9. Petitioner offered as its Exhibit 11 the certified mail receipt showing that Investigator Cummins mailed the Notice of Hearing to Respondents. The USPS Tracking sheet indicates that the item was returned to the Marissa, Illinois Post Office on August 8, 2020 and remained unclaimed at the time of the hearing. Petitioner Exhibit 11. Investigator Cummins testified that the copy of the Notice sent by regular mail was not returned to his office as undeliverable.

10. The Notice mailed to Respondents complies with Commission Rule 9100.90(d)(1)(A) and contains the admonition that Respondents' failure to appear at the hearing

> shall constitute a default and shall result in a finding that there has been a knowing and willful failure to insure your liability to pay compensation in accordance with Section 4(a) of the Workers' Compensation Act and an assessment of civil penalties under Section 4(d) of the Act.

11. Investigator Cummins testified that Petitioner is seeking non-compliance penalties of $500.00 per day for 1,066 days from August 12, 2012 through February 3, 2015, the period of non-compliance.

12. In addition to the fine for non-compliance, Petitioner seeks unpaid insurance premiums. Investigator Cummins testified that he estimated what Respondents would have paid had they purchased workers' compensation insurance as required under the Act. The estimate is based upon the Respondents' most recent workers' compensation policy with a daily rate of $10.11.

Pursuant to Section 3 of the Act, certain employers and their employees are automatically subject to the provisions of the Act if they engage in specific businesses including

> 3. Carriage by land, water or aerial service and loading or unloading in connection therewith, including the distribution of any commodity by horsedrawn or motor vehicle where the employer employees more than 2 employees in the enterprise or business.
> ***
> 16. Any business or enterprise in which electric, gasoline or other power driven equipment is used in the operation thereof.

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820 ILCS 305/3(3, 16).

The Commission finds, pursuant to Section 3 of the Act, that the work Respondents engaged in automatically subjected them to the provisions of the Illinois Workers' Compensation Act and required them to carry workers' compensation insurance.

Regarding the issue of penalties for failure to maintain workers' compensation insurance coverage, Section 4(d) of the Act states in part:

> "Upon a finding by the Commission, after reasonable notice and hearing, of the knowing and willful failure or refusal of an employer to comply with any of the provisions of paragraph (a) of this section or the failure or refusal to comply with any order of the Illinois Workers' Compensation Commission pursuant to paragraph (c) of this Section disqualifying him or her to operate as a self insurer and requiring him or her to insure his or her liability, the Commission may assess a civil penalty of up to $500.00 per day for each day of such failure or refusal after the effective date of this amendatory Act of 1989. The minimum penalty under this Section shall be the sum of $10,000.00. Each day of such failure or refusal shall constitute a separate offense." *820 ILCS 305/4(d).*

Here the certification from NCCI shows that Respondent was without workers' compensation insurance from January 5, 2012 through February 3, 2015.

The Commission finds that Petitioner has met its burden of proving that Respondents were operating a business in Illinois, were properly served with notice, and were legally required to maintain workers' compensation insurance but failed to do so for 1,066 days. Respondents' failure to appear at the compliance hearing results in a finding that their failure to obtain workers' compensation insurance was knowing and willful. Accordingly, the Commission finds that Respondents are liable for a penalty for failure to comply with Section 4(a) of the Act. The Commission hereby assesses against Respondents a fine of $533,000.00 for the period Respondents were without workers' compensation insurance and $10,777.26 for unpaid premiums, for a total of $543,777.26 in civil penalties under Section 4(d) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondents, Lee Ann Pim and Justin J. Pim, individually and d/b/a Pimco Recovery, shall pay fines to the Illinois Workers' Compensation Commission in the amount of $543,777.26, as provided in Section 4(d) of the Act.

Pursuant to Commission Rule 9100.90, once the Commission assesses a penalty against an employer in accordance with Section 4(d) of the Act, payment shall be made according to the following procedure: 1) payment of the penalty shall be made by certified check or money order made payable to the Commission; 2) payment shall be mailed or presented within thirty (30) days of the final order of the Commission or the order of the court of review after final adjudication to

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Workers' Compensation Commission
Insurance Compliance Division
100 West Randolph Street, Suite 8-328
Chicago, IL 60601

3) or as otherwise directed by www.iwcc.il.gov.

Bond for the removal of this cause to the Circuit Court by Respondents 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: FEB 2 - 2021

Marc Parker

Deborah L. Simpson

Barbara N. Flores

MP/dak
r-9/21/20

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Claudio Marchese,
Petitioner,

vs. No. 11 WC 020577

21IWCC0049

City of Chicago,
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 the reasonableness of medical expenses, the duration of temporary disability, and the nature and extent of the 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.

I. FINDINGS OF FACT

Petitioner, a 56-year-old foreman lineman was employed by Respondent in the Department of Streets and Sanitation, installing and repairing streetlights, for almost 29 years. On June 18, 2010, as he pried off a 200-pound manhole cover, he felt a stabbing pain in his upper extremities, including his neck and shoulders. He completed the assigned job and reported his accident. He was examined and treated conservatively with medications and physical therapy at MercyWorks Clinic in June and July 2010. He was discharged to full duty on August 4, 2010 and continued to work without restrictions until he retired on January 31, 2011. Petitioner testified that he worked with pain and that it was one of the reasons he decided to retire. His pain continued to increase after his retirement. In September 2013, he underwent a right shoulder arthroscopy, rotator cuff repair, and subacromial decompression, and in February 2014, he underwent a discectomy and interbody fusion at C4-5. He also received injections and physical therapy for his left shoulder complaints through December 2014. He declined further injections and left shoulder surgery. He now works through his union hall and treats any residual aches and pains with ibuprofen.

21IWCC0049

The hearing was held on December 12, 2018 in Chicago on the issues of causal connection, medical expenses, temporary total disability, and nature and extent of his permanent disability. The Arbitrator found that Petitioner had proved that his current condition of ill-being was causally related to his June 18, 2010 work accident but declined to award an outstanding medical bill for $1,680.00 from Ridge Orthopedics and temporary total disability, finding that Petitioner had voluntarily removed himself from the workforce by retiring. The Arbitrator concluded that Petitioner was permanently partially disabled at 20% loss of use of the person-as-a-whole.

On appeal to the Commission, Petitioner seeks 33 weeks of temporary total disability, payment of the outstanding Ridge Orthopedics medical bill, and an increase in the permanency awarded by the Arbitrator. For the following reasons, the Commission awards Petitioner payment of the 33 weeks of temporary total disability claimed and the $1,680.00 outstanding medical bill from Ridge Orthopedics. The Commission further increases the permanent partial disability awarded to 20% loss of use of the person-as-a-whole for Petitioner's cervical injury, 15% loss of use of the person-as-a-whole for his right shoulder torn rotator cuff, and 5% loss of use of the person-as-a-whole for Petitioner's left shoulder injury, for a total of 40% loss of use of the person-as-a-whole.

II. CONCLUSIONS OF LAW

A. Temporary Total Disability

At hearing, Petitioner claimed to be entitled to 54 weeks of temporary total disability, from May 6, 2013 through May 20, 2014. The Arbitrator noted that the entire period for which Petitioner claimed he was totally disabled occurred *after* his voluntary retirement on January 31, 2011. The Arbitrator denied Petitioner's claim for temporary total disability, concluding that Petitioner had voluntarily removed himself from the workforce by retiring.

Respondent urges the Commission to affirm the Arbitrator's denial of benefits, on the ground that Petitioner voluntarily withdrew himself from the workforce by retiring when he had no physical restrictions. Petitioner testified that he retired because it was difficult for him to continue performing his job after the accident.

In *Land & Lakes v. Industrial Comm'n*, the Commission awarded the claimant TTD for a post-retirement period, finding that the claimant had not retired by choice but because he was unable to work and he needed the income from his pension and social security benefits to survive. 359 Ill. App. 3d 582, 594-95 (2005). Similar to the claimant in *Land & Lakes*, Petitioner here testified that, despite his full duty release by MercyWorks, he continued to suffer bilateral shoulder pain and was no longer physically able to perform his job for Respondent. That inability contributed to his decision to retire.

The facts here are distinguishable from cases in which the Appellate Court has upheld Commission decisions to deny TTD benefits after finding that a claimant voluntarily ceased working. *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090-91 (1996) (TTD denied beyond the date claimant took a disability retirement where there was no evidence that he

could not return to light-duty work); *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 887 (1990) (three physicians released claimant to return to light duty work, and no medical evidence supported her testimony that she could not work the light duty position employer offered). In *City of Granite City* and *Gallentine*, the Commission relied on evidence that the claimant could have worked but chose not to work. Such facts are not evident in this record.

The Commission observes that on appeal Petitioner is seeking temporary total disability benefits only for those periods during which his treating physicians/surgeons took him off work completely, from May 6, 2013 through October 8, 2013 and again from February 5, 2014 through April 22, 2014, for a total of 33 weeks. Petitioner's treating physicians placed him on light duty and off work completely for extended periods during which he underwent a right shoulder surgical repair, left shoulder injection, and a cervical discectomy and injections. Petitioner was unable to continue working, and he returned to the workforce only after his surgeries and injections improved his condition sufficiently to allow him to return to lighter duty work. Although he could no longer perform his job for Respondent, he looked for and was able to find suitable employment through the union hall, where he was able to pick and choose jobs that did not require heavy physical capability.

The Commission finds the facts in this case more similar to those in *Land & Lakes* where withdrawal from the workforce was not voluntary. 359 Ill. App. 3d at 594-95. Thus, the Commission finds that Petitioner is entitled to TTD benefits from May 6, 2013 through October 8, 2013 and again from February 5, 2014 through April 22, 2014 for a total of 33 weeks, as claimed.

B. Medical Expenses (Ridge Orthopedics)

At hearing, Petitioner sought payment of an outstanding balance of $1,680.00 which he alleged was due Ridge Orthopedics. The Arbitrator noted that the patient ledger for Ridge Orthopedics (PX11) indicated a zero balance due from the patient. However, the patient ledger reflects an outstanding *insurance* balance of $1,680.00 for physical therapy from October 4, 2013 through November 12, 2013. Respondent made payments to Ridge Orthopedics for medical services provided for both earlier and later dates of service. Respondent does not argue that the services provided for that period were not reasonable and necessary. Thus, the Commission finds that the $1680.00 Ridge Orthopedics charge was reasonable and necessary and orders Respondent to pay said bill pursuant to Sections 8a and 8.2 of the Act.

C. Permanent Partial Disability

The Arbitrator reviewed Petitioner's medical treatment, his right shoulder surgery and cervical fusion and his left shoulder injections and concluded that his permanent partial disability was 20% loss of use of the person as a whole. The Commission notes that the Arbitrator set forth facts relevant to a determination of permanent partial disability, pursuant to §8.1b of the Act.

(i) Disability impairment rating: *no weight,* because neither party offered an AMA impairment rating.

(ii) Employee's occupation: *no weight.* Although Petitioner had worked as a foreman of a street repair crew, he retired seven months after returning to work following this accident.

(iii) Employee's age: *some weight.* Petitioner was 55 at the time of this accident.

(iv) Future earning capacity: *no weight,* as no evidence on this issue was presented, and Petitioner testified that he had retired shortly after his accident, although he continued to work out of his union hall at the time of arbitration.

(v) Evidence of disability corroborated by the treating records: *some weight.* Petitioner testified that he has a stiff neck and shoulders and cannot do heavy lifting or play as much golf as he had before his accident, as activity brought more pain. Petitioner had no current medical records to support his subjective complaints.

Based on the foregoing factors, the Arbitrator concluded that Petitioner sustained a 20% loss of use of the person-as-a-whole for his cervical and bilateral shoulder injuries. However, the Commission views the evidence differently.

The Commission finds that Petitioner's occupation is entitled to significant weight. He had worked as a foreman electrician for Respondent for nearly 30 years, primarily directing other laborers but also performing heavy duty lifting and pulling, as needed to perform his crew's assigned tasks. After his accident, he was restricted to medium duty physical tasks.

The Commission also accords Petitioner's evidence of disability corroborated by medical evidence significant weight. Since his retirement, Petitioner has undergone two surgeries, extensive physical therapy and work conditioning, and several injections to both shoulders and cervical spine. Additional invasive treatment in the form of injections and additional surgery has been recommended and declined by Petitioner.

After considering each of the factors listed in §8.1b, the Commission finds that Petitioner suffered 20% loss of use of the person-as-a-whole for his cervical injury, 15% loss of use of the person-as-a-whole for his right shoulder injury, and 5% loss of use of the person-as-a-whole for his left shoulder injury, for a total loss of 40% loss of use of the person-as-a-whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay, according to the fee schedule, the outstanding Ridge Orthopedics medical bill of $1,680.00 to Petitioner, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the denial of temporary total disability benefits is reversed. Respondent shall pay Petitioner temporary total disability benefits of $1238.13 per week for 33 weeks, commencing on May 6, 2013 through October 8, 2013 and again from February 5, 2014 through April 22, 2014, as provided by §8(b) of the Act.

21IWCC0049

IT IS FURTHER ORDERED BY THE COMMISSION that the award of permanent partial disability is increased from 20% loss of use of the person-as-a-whole to 20% loss of use of the person-as-a-whole for Petitioner's cervical injury, 15% loss of use of the person-as-a-whole for his right shoulder injury, and 5% loss of use of the person-as-a-whole for his left shoulder injury, for a total loss of 40% loss of use of 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 the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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: FEB 2 - 2021

o-12/17/20
mp/dak
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MARCHESE, CLAUDIO
Employee/Petitioner

Case# **11WC020577**

CITY OF CHICAGO
Employer/Respondent

21IWCC0049

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

If the Commission reviews this award, interest of 2.45% 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:

4642 O'CONNOR & NAKOS
STEPHEN CUMMINGS
120 N LASALLE ST 35TH FL
CHICAGO, IL 60602

0010 CITY OF CHICAGO WRK'S COMP DIV
D TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

21IWCC0049

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

Claudio Marchese
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **11** WC **20577**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the city of **Chicago**, on **December 18, 2018**. 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 _____

 21IWCC0049

FINDINGS

On **June 18, 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 $**96,574.40**; the average weekly wage was $**1857.20**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of $**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 $**13,168.61** under Section 8(j) of the Act.

ORDER

Permanent Partial Disability

BASED ON THE FACTORS IN SECTION 8.1B(B), AND THE RECORD TAKEN AS A WHOLE, THIS ARBITRATOR FINDS PETITIONER SUSTAINED PERMANENT PARTIAL DISABILITY TO THE EXTENT OF 20% (100 WEEKS) LOSS OF A PERSON AS A WHOLE, PURSUANT TO 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

March 1, 2019
Date

MAR 1 - 2019

Claudio C. Marchese v. City of Chicago, No. 11 WC 20577

Preface

The parties proceeded to hearing December 18, 2018 on Request for Hearing indicating the following disputed issues: whether Petitioner's current condition of ill-being is causally connected to an accidental injury that arose out of and in the course of employment; whether Respondent is liable for certain unpaid medical bills; whether Petitioner is entitled to TTD from May 6, 2013 through May 20, 2014; and what is the nature and extent of the injury. Arbitrator's Exhibit 1.

Findings of Fact

Claudio Marchese (Petitioner), a 56 year old male, testifies that on June 18, 2010, he was working for the City of Chicago (Respondent) in the Department of Streets and Sanitation, repairing and installing City street lights near Jackson and Lake Shore Drive. He tried to pry the lid of a 200 pound manhole cover off. He felt a stabbing pain in his upper extremities, including his neck and shoulders. He finished his job, feeling increasing pain. Petitioner reported his injury and was examined and treated at Mercyworks Clinic June and July of 2010. He treated conservatively with medication and physical therapy and was discharged to full duty August 4, 2010. Petitioner's Exhibit 10 at 3.

Petitioner continued to work until his retirement January 31, 2011. He testified he worked with some pain. Subsequent to his retirement, Petitioner's pain continued to increase, and he sought medical treatment for his neck and shoulders. Petitioner underwent a right shoulder arthroscopy, rotator cuff repair and subacromial decompression in September 2013. In February 2014, Petitioner underwent surgery to his neck, a discectomy and interbody fusion at C4-C5. Petitioner continued to treat through December 2014, declining injections and additional surgery.

Petitioner testified he now works through his union hall. Any paid or stiffness he encounters is treated with Ibuprofen.

Conclusions of Law

Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. This Arbitrator finds as a conclusion of law, it is.

I rely on the Independent Medical Examination conducted by Dr. Wesley Yapor on January 29, 2013, where in Dr. Yapor states he feels there is a correlation between Petitioner's

documented injury and the onset of his symptoms with no prior history of similar symptomatology. Petitioner's Exhibit 3 at 3.

Disputed issue **J** is whether Respondent is liable for certain unpaid medical bills of $1,680.00 to Ridge Orthopedics and $13,168.61 to Ingalls Memorial Hospital.

Petitioner testified he did not know if any balance due to Ridge Orthopedics had been paid. There was no evidence or testimony Petitioner is liable to pay any amount to Ridge Orthopedics, nor that the changes were reasonable or necessary. In fact, the patient ledger – detailed, contained in Petitioner's Exhibit 11, indicates a zero patient balance. Respondent payment listing in Respondent Exhibit 1 indicates it has paid $35,488.63. The amount is irreconcilable with the patient ledger of Ridge Orthopedics. It is Petitioner's obligation to prove all elements of his case by a preponderance of the evidence, and here, he has not done so. Respondent is not liable for these unpaid medical bills to Ridge Orthopedics.

Petitioner testified he did not know if Respondent paid the bills to Ingalls Hospital. However, the parties have stipulated Respondent paid that amount through its group medical plan and is allowed a credit. Respondent is not liable for those medical bills to Ingalls Hospital.

Disputed issue **K** is whether Petitioner is due temporary total disability benefits. To be entitled to a temporary disability award under the Act, an injured worker must prove not only did he not work, but that he was unable to work. Ingalls Memorial Hospital v. Industrial Commission, 241 Ill. App. 3d 710 (1993).

Petitioner was discharged from medical care by Mercyworks Occupational Medicine, August 4, 2010, by Dr. Jayant Sheth, who found Petitioner fit for full duty. Petitioner's Exhibit 10 at 3. Petitioner testified that since the accident, June 18, 2010, he worked through his pain. He had his 30 years in and voluntarily retired January 31, 2011. Petitioner testified he lost no time from work.

I find as a conclusion of law, Petitioner is not entitled to any period of temporary total disability because he voluntarily retired, without having any medical or physical restrictions at the time of retirement, by choice. See Granite City v. Industrial Commission, 279 Ill. App. 3d 1087, 1090-91 (1996)

Disputed issue **L** is, what is the nature and extent of the injury. The injury suffered by Petitioner, to his neck and shoulders aggravated persistent, asymptomatic cervical degenerative disc disease and degenerative arthritis. He underwent several surgeries and has declined further additional treatment.

Any permanent partial disability is established using the criteria found in 820 ILCS 305/8.1b. As to the level of permanent partial disability, this Arbitrator finds as follows.

With regard to subsection (i) of Section 8.1b(b), this Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. I note Dr. Jeffrey Coe offers an unquantified ". . . permanent disability to both upper extremities with additional disability to the person as a whole." Petitioner's Exhibit 2 at 12. I also note a

functional capacity evaluation conducted by Ridge Rehabilitation February 4, 2014, which put Petitioner's work at the medium level. He had not worked in three years. The evaluation, by a physical therapist, would return Petitioner to work in a limited duty as outlined by the evaluation. There is nothing in the evaluation which outlines that limited duty. Petitioner's Exhibit 8 at 94-96. Petitioner did not testify to any specific restrictions. Because of this, I give this factor no weight in determining the level of disability.

Regarding subsection (ii) of Section 8.1b(b), the occupation of the employee, I note at the time of the injury, Petitioner was a foreman of a repair crew for the Department of Streets and Sanitation. He went back to work for about seven months before voluntarily retiring. I give his factor no weight in determining the level of disability.

Regarding subsection (iii) of Section 8.1b(b), this Arbitrator notes Petitioner was 55 years old at the time of the accident. Because of that age, I give it some weight in determining the level of disability.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings, this Arbitrator notes absolutely no evidence was offered on any effect to Petitioner's future earnings. Immediately, there was none, as he worked about seven months before retiring. He testified he currently works through his union hall, presumably that is Local 9, IBEW. No evidence on wages was offered. Because of that, I give this factor no weight in determining the level of disability.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, I note Petitioner testified he has a stiff neck and shoulders, cannot do heavy lifting, or play as much as golf. He said activity brings pain. There are no reasonably current treating medical records that corroborate Petitioner's testimony. I do note, however, the surgeries performed on Petitioner and subsequent rehabilitation. I give this factor some weight in determining the level of disability.

Based on the above factors, and my reading and consideration of the records as a whole, this Arbitrator finds Petitioner sustained permanent partial disability to the extent of 20% (100 weeks) loss of a person as a whole pursuant to Section 8(d)2 of the Act.

Howard L. Ch

Arbitrator

3/1/15

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Regina Damm,

Petitioner,

vs.

21IWCC0050
NO: 18 WC 6363

State of IL / Chester Mental Health,

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 causal connection, medical expenses, prospective medical treatment, and temporary total disability ("TTD") benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator. The Commission reverses the Arbitrator's conclusion that Petitioner's current condition of ill-being regarding her cervical spine is related to the work accident. The Commission vacates the award of prospective medical treatment in the form of the four-level cervical disc replacement surgery recommended by Dr. Gornet. The Commission also clarifies the amount of temporary total disability benefits awarded by the Arbitrator. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Findings of Facts

Petitioner works for Respondent as a security therapy aide. Petitioner testified that her primary duties in this position are "...to make sure the patients are secure and safe, to make sure that my coworkers and myself are in safe hands." (Tr. at 15). She has worked in this position for six years. On February 11, 2018, Petitioner tried to prevent a patient from leaving his room. Petitioner testified that she first tried to redirect the patient back to his room. She testified that another coworker arrived and together they tried to "retain him into his room and he started fighting so he drop kicked me across the room, I hit my head, my elbow and my back..." (Tr. at 15).

Petitioner went to the ER that same day and reported being attacked at work by a patient. (PX 3). The ER doctor wrote that Petitioner stated, "...'he kicked me so hard I flew back against

a wall,' striking post head, neck and upper back, and left elbow against the wall. She complained of head pain, neck pain, upper back pain, and left arm pain." *Id.* The examination revealed head, neck, back, and left arm tenderness. Petitioner was diagnosed with a left elbow contusion, head trauma, a back contusion, and upper back and neck contusions. CT scans of the cervical spine showed no acute spinal fracture, but they did reveal degenerative spondylosis and spinal stenosis particularly at C5-C6 and C6-C7. CT scans of the thoracic spine revealed a mild compression fracture at L2 with no acute bony injury identified within the thoracic spine.

Dr. Hidalgo examined Petitioner on February 13, 2018. (PX 4). Petitioner complained of pain in the left shoulder, left elbow, and neck. Petitioner also complained of low back pain radiating to the buttocks and legs and reported her earlier back pain worsened after her recent work incident. The doctor noted that Petitioner was already taking narcotics and referred Petitioner to pain management and physical therapy. Dr. Gornet first examined Petitioner on February 16, 2018. (PX 5). Petitioner reported her primary complaint was central low back pain up to her mid-back radiating down to her right buttock, right hip, and down the right leg to the calf with numbness and tingling. She also complained of neck pain, headaches, and left shoulder and upper arm pain. Dr. Gornet wrote: "She readily admits to a history of what she feels is arthritic pain that dates back many years. She feels this is totally different and much more severe. She saw Dr. Tolentino in October of 2017 and MRIs were ordered. He felt that there was no significant treatment needed. She did not receive any other treatment." *Id.* Dr. Gornet also wrote, "I do believe her current symptoms, at least in its level of severity, are causally connected to her work injury." He also took Petitioner off work.

A February 16, 2018, lumbar MRI revealed: 1) a disc herniation at L1-L2 with extruded components behind L1 without free fragment, with no definite foraminal involvement though there were some endplate signal change that could reflect a minimal endplate compression fracture; and 2) a right sided disc herniation at L4-L5 with annular fissure lying near the right L4 root. (PX 6). A cervical MRI taken that same day revealed: 1) multilevel disc herniations from C2-C3 through C6-C7 creating central stenosis, particularly at C4-C5, C5-C6, and C6-C7, with what appeared to be mild cord deformity at C5-C6 but no abnormal cord signal; and 2) foraminal involvement at multiple levels. A March 1, 2018, lumbar CT scan revealed: 1) an L2 upper endplate compression fracture with minimal left sided vertebral body height loss and sclerotic change beneath the compressed upper endplate to the left of midline; 2) an L4-L5 circumferential disc bulge with a superimposed right foraminal protrusion resulting in right greater than left foraminal stenosis but no central canal stenosis; and 3) circumferential disc bulges L2-L3 and L3-L4 resulting in dural displacement and mild bilateral foraminal stenosis but no central canal stenosis. (PX 7).

On May 30, 2018, Petitioner complained of left shoulder pain to Dr. Paletta. (PX 7). Dr. Paletta noted that the left elbow was improving. Petitioner complained of pain in the shoulder and neck and numbness radiating down her arm into the hand. A left shoulder MRI taken that day revealed: 1) anterior supraspinatus thinning and tendinopathy without evidence for definite full thickness tear; and 2) posterior supraspinatus-upper infraspinatus junction bursal-sided edematous signal with associated thinning likely a bursal-sided partial tear. (PX 6). On June 12, 2018, Dr. Paletta performed an injection into the left subacromial space. Later that month, Petitioner complained of continued right buttock, right hip, and right leg pain. (PX 5). Dr. Gornet continued to express concern regarding the amount of narcotics Petitioner was taking daily. He interpreted

the February 2018 lumbar MRI as showing a large annular tear and herniation at L4-L5 on the right. He referred Petitioner to Dr. Blake for a transforaminal ESI at right L4-L5 and an ESI at right L1-L2. Dr. Blake performed a right L4-L5 TFESI on July 17, 2018. (PX 10). She performed a L1-L2 ILESI on July 31, 2018. In early August 2018, Petitioner reported to Dr. Paletta that the shoulder injection provided no relief. Dr. Paletta believed her left shoulder pain was likely of cervical origin with atypical radiculopathy.

On September 17, 2018, Petitioner told Dr. Gornet that her primary issues were right buttock and leg pain. After noting Petitioner's additional complaints of neck pain, headaches, and left shoulder pain, Dr. Gornet wrote that he was concerned about treating Petitioner because he believed her physical dependence on narcotics would lead to poor results. He told Petitioner that he would not provide any further treatment until she was slowly weaned off narcotics. Dr. Gornet placed treatment for her cervical complaints on hold and noted that Dr. Paletta believed most of Petitioner's left shoulder complaints emanated from her neck. Dr. Gornet decided to proceed with a discogram at L4-L5 and L5-S1 after Petitioner had been weaned off narcotics. In October 2018, Dr. Blake began to work on weaning Petitioner off narcotics over the next several months. Dr. Blake continued to provide medication management for Petitioner up to the date of arbitration hearing.

Petitioner visited the ER on January 28, 2019, with complaints of severe low back pain radiating into her right buttock and chest pain. (PX 3). She reported the pain increased after she bent over to pick up a piece of paper. Petitioner was diagnosed with acute chest wall pain and was sent home with Tylenol. A few days later Dr. Gornet examined Petitioner and noted that she was still taking narcotics, but at lower dosages. Dr. Gornet believed her recent ER visit was due to referred pain from Petitioner's neck.

On April 29, 2019, Dr. Gornet wrote that Petitioner was completely weaned off narcotics. He reviewed the December 2018 Section 12 Examination report by Dr. Chabot and disagreed with that doctor's opinions. He wrote:

> "He felt that there was no need for surgical intervention in her cervical or lumbar spine as it relates to the injury of 2/11/18. He did not explain why an assault such as the one described causing a fracture and herniation would not account for her continued low back, right buttock and hip pain. He did not explain why an assault such as the one described could not injure her cervical spine, particularly if she is a 60-year-old with some preexisting degeneration. H[e] felt her complaints were consistent with fibromyalgia. He did not explain that if she did have a chronic condition, why her symptoms increased in severity warranting this treatment."

A June 27, 2019, cervical MRI revealed: 1) circumferential disc bulges at C3-C4, C4-C5, C5-C6, and C6-C7 with a superimposed right foraminal soft disc protrusion at C3-C4 and left foraminal protrusion at C6-C7, midline hyperintense zones, likely midline annular tears, at all four levels, mild central canal stenosis is present at C5-C6 and C6-C7 and bilateral foraminal stenosis present

at all levels; and 2) C2-C3 facet ankylosis on the left. (PX 6). The lumbar MRI taken that day revealed: 1) a right foraminal lateral annular tear and protrusion at L4-L5 resulting in mild right foraminal stenosis but no central canal stenosis: 2) left lateral recess signal hyperintensity at L5-S1, likely an annular tear, but without focal disc protrusion; and 3) a left paracentral cranially extruded disc fragment at L1-L2 resulting in dural displacement but no central canal stenosis or foraminal stenosis. In late June 2019, Petitioner continued to complain of significant symptoms relating to her neck and back. (PX 5). Dr. Gornet reviewed the recent lumbar and cervical MRIs. He decided to focus treatment on her neck first and recommended surgery involving cervical disc replacements at C3-C4, C4-C5, C5-C6, and C6-C7. In July 2019, Petitioner continued to complain of increasing low back pain with radiation. In September 2019, Dr. Gornet continued to recommend Petitioner undergo cervical disc replacement surgery. He wrote that Petitioner continued to suffer from axial neck pain with headaches more to the left trapezius and left shoulder.

Prior Complaints and Treatment

Petitioner testified that she has suffered from neck and back pain since at least 2009. Petitioner testified that she had undergone cervical spine MRIs in the years prior to the work accident. Under cross-examination, Petitioner agreed that she had undergone a lot of treatment throughout the years for both her neck and back. Petitioner also testified that she had been taking narcotics for her chronic neck and back pain for approximately five years before this work accident. Petitioner testified that her symptoms changed and/or worsened after the February 11, 2018, work accident. For example, Petitioner testified that her neck now constantly "cracks." Petitioner also testified that after the work accident her lumbar pain changed and intensified. Petitioner testified that she is now unable to lift her right leg without using her hands to hold up the leg.

A January 17, 2017, cervical MRI revealed: 1) multilevel degenerative disease and facet joint arthropathy with mild to moderate spinal canal narrowing greatest at C5-C6 and C6-C7 with no significant interval change from the earlier 2014 exam; and 2) multilevel bilateral neural foraminal stenosis at least moderate severity. (RX 6). On October 18, 2017, Petitioner was examined by PA Bowers in Dr. Tolentino's office. Petitioner's chief complaint was quoted as, "To explain in my terms what is wrong, & can it be fixed; tired of all the pain." PA Bowers recorded the following history:

> "At today's appointment, she reports that since approximately 2009 she has experienced progressive neck and low back pain. She describes her neck pain as a stabbing type sensation in the posterior cervical region with a diffuse burning throughout the bilateral trapezius and interscapular area. She reports a pins and needles and numbness-type sensation involving her hands bilaterally, left greater than right. She notes occasional nocturnal paresthesias. She describes frequent headaches which occur daily and occasional electric shock sensations that will extend from her neck into her upper extremities in a multi dermatomal pattern. She describes her low back pain as a diffuse aching type sensation in the lumbosacral region with stabbing over the right sacroiliac joint. She reports

> bilateral foot burning and numbness. Otherwise, she denies any lower extremity symptoms. She reports that sitting, standing, bending, and lifting will exacerbate her symptoms. She has recently undergone physical therapy for her neck and performed aquatic therapy for her lumbar spine pain in early 2017. She has undergone chiropractic care for years. She has previously undergone a pain management evaluation and treatment which included numerous injections. She is taking cyclobenzaprine, Norco 7.5/325, Lyrica, and acetaminophen for her symptoms. Current pain rated as 7.10…"

(RX 6). During the hearing Petitioner did not dispute the accuracy of this history. After examining Petitioner and reviewing the January 2017 cervical MRI, PA Bowers diagnosed: 1) left C2-C3 facet ankylosis; C3-C4 spondylosis with moderate foraminal stenosis; C4-C5 spondylosis with mild to moderate bilateral foraminal stenosis; C6-C7 spondylosis with moderate left greater than right foraminal stenosis; C6-C7 spondylosis with moderate bilateral foraminal stenosis; 2) bilateral hand paresthesias; and 3) low back pain. He ordered cervical and lumbar x-rays and MRIs as well as an upper extremity EMG/NCV.

That day, Dr. Tolentino reviewed earlier radiographic images and wrote an additional note. The doctor referenced a January 7, 2016, office visit note from Dr. Kumar indicating Petitioner had participated in physical therapy, was prescribed various pain medications, and had undergone trigger point injections. Dr. Tolentino wrote that Dr. Kumar also discussed possibly performing facet area injections. Dr. Tolentino also wrote that Petitioner complained of primarily neck pain and her back pain was secondary. He wrote: "Since early 2016 the patient's neck pain is associated with episodic electric shock sensation in the neck and upper extremities. The patient's secondary back pain is associated with bilateral foot burning and numbness."

An October 31, 2017, lumbar MRI revealed: 1) a small right L4-L5 foraminal disc protrusion contacts the exiting right L4 nerve root causing mild foraminal stenosis with associated T2 hyperintense right posterolateral annular fissure; 2) no significant central spinal canal stenosis; and 3) mild multilevel facet hypertrophy. (RX 6). The cervical spine MRI taken that day revealed: 1) multilevel degenerative spondylosis, mild-moderate C5-C6 and mild C6-C7 central spinal canal stenosis secondary to broad-based posterior disc/osteophyte complexes, minor cord flattening at C5-C6; 2) multilevel foraminal stenosis; 3) straightening of the usual cervical lordosis, minor lower cervical dextroscoliosis, trace 1 mm anterolisthesis of C7 on T1; and 4) multilevel hypertrophic facet arthropathy, with left C2-C3 facet ankylosis. Petitioner underwent an EMG/NCS of her bilateral upper extremities on October 31, 2017, as well. The doctor performing the study recorded the following history: "She reports that she is having severe headaches, muscles spasms into her bilateral shoulder blades with electric shocks that occur throughout her neck and into her head. She also reports that she had numbness and tingling into her BUE." The study was normal and revealed no electrodiagnostic evidence of any median nerve entrapment, ulnar nerve entrapment, generalized peripheral neuropathy or a cervical radiculopathy in either upper extremity.

Petitioner returned to Dr. Tolentino's office on December 13, 2017, and was examined by PA Bowers, with Dr. Tolentino providing an analysis of the recent diagnostic studies. Petitioner

again complained of significant neck pain with a stabbing sensation, numbness extending into the bilateral trapezius region left greater than right, and frequent headaches. She also complained of a numbness-type sensation involving her bilateral forearm and hands, right greater than left, as well as frequent tremor-type activity involving her bilateral upper extremities. Petitioner complained of a diffuse burning type sensation in the lumbosacral region, primarily over the right SI joint as well as numbness and the sensation of pins and needles extending into the proximal right thigh. She complained of bilateral foot burning and numbness and reported visiting the ER three times in the prior month due to her ongoing pain. Mild right L4-L5 disc disease without significant stenosis was added to her prior diagnoses. Dr. Tolentino did not recommend surgery for either the neck or back based on Petitioner's recent diagnostic studies and symptoms.

Expert Opinions

Dr. Matthew Gornet — Treating Physician

Dr. Gornet testified via evidence deposition on behalf of Petitioner on September 19, 2010. (PX 13). He is a board-certified orthopedic surgeon specializing in spine surgery. His testimony was consistent with his medical records. Dr. Gornet testified:

> "I believe it's irrefutable that her endplate fracture and, obviously, her disc herniation at L1-2 are caused by the accident. I believe that the herniations—because of the objective findings on MRI. The herniations at C5-6 and C6-7 I believe were caused—I believe she aggravated her underlying condition of degeneration there. I believe she actually caused the smaller protrusions at C3-4 and C4-5 and L5-S1."

(PX 13 at 9). When asked why he believed Petitioner requires the recommended cervical surgery, Dr. Gornet testified:

> "That's the only way that we will be able to adequately cure and relieve the effects of her work injury. She has a significant amount of axial neck pain. She has disc protrusions/herniations at each level. Those are fairly classic of disc injuries. We know in treating patients who have predominant axial neck pain that they would benefit from this...we feel very confident that if we treat this problem in that way she will substantially improve as far as her neck pain, her headaches, pain into her traps, shoulders, pain between her shoulder blades—all of those things."

(PX 13 at 14-15).

Under cross-examination, Dr. Gornet testified that he received and reviewed the pre-accident records from Dr. Tolentino. He reviewed the October 2017 cervical MRI and testified that the findings were consistent with disc pathology. However, Dr. Gornet testified that he could not determine whether any annular tears were present on the MRI without reviewing the actual

films. He testified that he only reviewed the reports. Dr. Gornet testified that the machine used to perform the October 2017 cervical MRI is less powerful than the machine he used. He testified, "Again, if they don't run all the views that I run, then it is obviously possible that they missed something that we picked up on also." (PX 13 at 23). After reviewing records from October 2017 and December 2017, regarding Petitioner's complaints about her chronic neck pain, Dr. Gornet testified that Petitioner's pain changed after the work accident. He testified:

> "Well, what I believe is different, clearly she had neck and back pain. So those aspects are different, but just because you have neck and back pain doesn't mean that there are not differences. Particularly, her symptoms in her right buttock, her right hip, and right leg I think are different. The pain in her midback is different, where she localizes it. Her pain diagram from her Health History Form that I have is different than the pain diagram of the form from Dr. Tolentino…"

(PX 13 at 27-28).

Dr. Michael Chabot — Respondent Section 12 Examiner

Dr. Chabot examined Petitioner at Respondent's request on December 13, 2018. (RX 2). Petitioner complained of severe, sharp, aching, and burning pain radiating into the right leg. She also described the pain as similar to an electrical shock at times. Petitioner complained that she could not sit for long periods and could only walk two blocks before having to rest. After examining Petitioner and reviewing the diagnostic studies and medical records, Dr. Chabot diagnosed Petitioner with a history of minor L2 vertebral compression fracture, back pain, a neck contusion/strain, a shoulder contusion/strain, a history of chronic musculoskeletal complaints with a history of fibromyalgia, and chronic narcotic use predating injury. He opined:

> "It is my opinion that the patient sustained contusions to the C-spine, shoulder and L-spine as a result of her injury. Her physical examination today is devoid of objective physical findings to suggest that she has residual abnormalities to the C-spine or L-spine that could be directly associated with her injury of 2/11/2018. She appears to have a chronic history of musculoskeletal complaints, which is poorly described in the supplied medical records."

He further opined that Petitioner required no further treatment relating to the work incident and had reached maximum medical improvement ("MMI"). He wrote:

> "Based on her physical examination, it is my opinion that there is no evidence of active radiculopathy involving the upper extremities. It is my opinion that the tissue changes involving the C-spine and T-spine are most likely chronic soft tissue changes associated with underlying fibromyalgia, which is diffuse and bilateral as noted on her physical examination."

Dr. Chabot did not believe Petitioner was a candidate for cervical or lumbar surgical intervention.

Dr. Chabot authored an addendum report after reviewing additional records and diagnostic studies on June 7, 2019. (RX 3). These records and studies included pre-accident treatment Petitioner underwent in 2017. He opined that the findings of the January 2017 cervical MRI "...are not too dissimilar to the MRI findings on the study from 2/16/2018." He also wrote:

> "These additional medical records clearly document that Ms. Damm had a history of chronic neck and back pain complaints dating back to at least 2009 with neck pain radiating into the shoulders and arms, bilateral hand paresthesias, electric shocking-type sensations in the neck and upper extremities and a chronic history of back pain complaints. The conclusions I derived in my report dated 12/13/2018 remain unchanged."

The doctor testified via evidence deposition on Respondent's behalf on July 26, 2019. (RX 4). Dr. Chabot is a board-certified orthopedic surgeon and specializes in the spine. He testified that based on the initial ER visit and subsequent records, he believed the only injuries causally related to the work accident are a head contusion, neck contusion, neck strain, shoulder contusion, shoulder strain, and an injury to the left elbow. He testified that the additional records he requested and reviewed revealed a long-established history of chronic neck and back complaints going back as far as 2009. The doctor testified that Dr. Tolentino's records established Petitioner had a long history of diffuse symptoms involving the neck into the shoulders and arm and back complaints. (RX 4 at 17). He testified that a note from 2016 revealed Petitioner had undergone substantial past treatment for her chronic complaints including trigger point injections, physical therapy, and pain management. Dr. Chabot testified that by 2016 Petitioner had already seen one neurosurgeon and he believed Dr. Tolentino was the second neurosurgeon to examine Petitioner. Dr. Chabot further testified that the pre-accident records established that Petitioner had a history of complaining of pain rating as high as 7/10 and was using a variety of medications to moderate her symptoms.

Under cross-examination, Dr. Chabot testified that neither the unknown neurosurgeon who examined Petitioner before January 2016 nor Dr. Tolentino believed Petitioner was a candidate for surgery before the work accident. Dr. Chabot testified that patients using narcotics long term before spinal surgery have poorer outcomes not only due to the dependency which might lead them to seek drugs with reports of pain, but also because there is an altered perception of pain that occurs with chronic use. Dr. Chabot did not review the June 2019 cervical MRI.

Conclusions of Law

Petitioner bears the burden of proving each element of her case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). When a claimant suffers from a preexisting condition, the claimant must show that a work-related accidental injury aggravated or accelerated the preexisting condition "...such that the [claimant'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." *Id.* at 204. The

Commission agrees with the Arbitrator's conclusion that Petitioner's current condition of ill-being regarding her lumbar spine is causally related to the February 11, 2018, work accident. However, the Commission finds Petitioner failed to meet her burden of proving her cervical spine complaints are causally related to the work accident.

The Commission affirms the Arbitrator's conclusion that Petitioner met her burden of proving her lumbar spine condition is causally related to the February 11, 2018, work accident. There is ample evidence in the medical records that corroborates Petitioner's testimony that her low back symptoms noticeably changed after the work accident. Petitioner admittedly suffered from significant low back and neck complaints since at least 2009. A review of the medical records shows that Petitioner was actively treating with Dr. Tolentino for her chronic neck and back complaints just a few months before the work accident. In December 2017, Petitioner complained of a diffuse burning sensation in the lumbosacral region, primarily over the right SI joint. She also complained of numbness and the sensation of pins and needles extending into her right thigh. Finally, she complained of bilateral foot burning and numbness. Petitioner credibly testified that after her work accident, her low back symptoms changed and significantly increased. Petitioner testified that following injury, the pain radiated down her back into her right hip and leg. She also testified that she is unable to raise her right leg without using her hands. Additionally, there is a marked difference between the results of the October 2017 lumbar MRI and the lumbar MRI performed in February 2018. The most obvious change is the compression fracture at L1-L2 first seen in the February 2018 study. Finally, Dr. Gornet credibly testified that the work accident caused Petitioner's pre-existing lumbar spine condition to worsen. Dr. Gornet's testimony regarding Petitioner's current lumbar condition compared to her pre-accident condition was detailed and well-reasoned.

After carefully considering the totality of the evidence, the Commission reverses the Arbitrator's conclusion that Petitioner met her burden of proving her cervical spine condition is causally related to the work accident. The Commission finds the totality of the evidence supports a finding that the work accident did not permanently aggravate or worsen Petitioner's significant and chronic pre-accident cervical spine complaints. Petitioner's cervical complaints were so severe that she underwent two cervical MRIs in 2017. The most recent pre-accident cervical MRI was performed approximately three months before the work accident. Both of the 2017 cervical MRIs revealed significant multilevel degenerative findings. Additionally, the Commission finds Petitioner's complaints regarding her cervical spine did not significantly change following the work accident. The medical records that predate the date of accident reveal Petitioner's cervical complaints were significant and were her primary concern. For example, in October 2017 Petitioner complained of neck pain described as a stabbing sensation with diffuse burning throughout the bilateral trapezius and interscapular area that was worst on the left side. Petitioner also complained of radiation of various symptoms down her arms as well as frequent headaches. These symptoms are very similar to Petitioner's post-accident symptoms. Petitioner testified that she took narcotics primarily for her neck pain for five years prior to the work accident. Notably, in October 2017 Petitioner rated her pain at 7/10 even with her use of narcotics.

During his deposition, Dr. Gornet could not identify specifically how Petitioner's cervical condition worsened or changed following the work accident. His inability to articulate specific differences regarding the cervical spine complaints stands in stark contrast to the specificity with

which he detailed the post-accident changes to Petitioner's lumbar spine complaints. Dr. Gornet testified that he believed the herniations at C5-C6 and C6-C7 were aggravated by the work accident. Similarly, he believed the work accident caused the protrusions seen at C3-C4, C4-C5, and L5-S1. However, Dr. Gornet admitted that without reviewing the actual films from the previous cervical MRIs, he could not confirm that the smaller protrusions were not present in 2017. He also admitted that the MRI machine he used is stronger than the machine used in 2017. This casts further doubt on his testimony that the work accident caused the smaller protrusions at C3-C4, C4-C5, and L5-S1. Given Petitioner's protracted history of severe cervical spine complaints with radiation into the upper extremities as well as headaches, the Commission is also skeptical of Dr. Gornet's testimony that the larger herniations at C5-C6 and C6-C7 were aggravated by the work accident. After all, this is not a case where a claimant was asymptomatic prior to a work incident. Instead, Petitioner's cervical spine was in such poor condition that she was actively treating for her complaints two months before the work accident. She also was taking a steady dosage of narcotics to treat this chronic pain.

While there is no evidence that a doctor recommended cervical spine surgery to treat Petitioner's chronic complaints prior to the work accident, the evidence does show that Petitioner had exhausted conservative treatment for her cervical symptoms. By the date of accident, Petitioner had already participated in physical therapy and extensive chiropractic care. Petitioner also had already undergone numerous injections and was taking extensive pain medication to manage her symptoms. It is clear that none of this extensive conservative treatment provided any real relief to Petitioner.

After closely reviewing the evidence, the Commission finds the February 11, 2018, work accident did not permanently aggravate or worsen Petitioner's preexisting cervical spine condition. The Commission finds the totality of the evidence shows Petitioner at most sustained a temporary aggravation in the form of a cervical strain or contusion due to the work accident. Petitioner's ongoing cervical complaints and her need for the recommended cervical disc replacement surgery are related to her underlying pre-existing cervical spine condition. Therefore, the Commission finds Petitioner's current condition of ill-being regarding her cervical spine is not causally related to the work accident.

Due to the Commission's finding that Petitioner's current condition of ill-being regarding her cervical spine is not causally related to the work accident, the Commission must also reverse the Arbitrator's award of prospective medical care in the form of the cervical disc replacement surgery recommended by Dr. Gornet. The Commission further finds that Respondent is not liable for medical expenses relating to treatment for the cervical spine after September 9, 2019—the final date of treatment with Dr. Gornet before the arbitration hearing. As the Commission finds the current condition of ill-being regarding Petitioner's lumbar spine is causally related to the work accident, Respondent remains liable for any medical expenses that are reasonable, necessary, and related to the Petitioner's lumbar spine condition.

Finally, the Commission notes that its finding that Petitioner's cervical condition is not causally related to the work accident does not affect Petitioner's entitlement to TTD benefits. After all, Petitioner remains off work due to her ongoing lumbar spine complaints and has not been placed at maximum medical improvement ("MMI") by any of her treating doctors. However, the

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Commission must clarify the award of TTD benefits. Although Petitioner sought TTD benefits from February 12, 2018, through November 14, 2019, the parties stipulated that Respondent paid all TTD benefits to Petitioner for the period of February 12, 2018, through June 21, 2019. Thus, the only disputed period of TTD benefits is from June 22, 2019, through November 14, 2019, for a total of 21 weeks. The Arbitrator Decision awards the full period of TTD, but does not state that Petitioner is entitled to a credit for the TTD benefits paid from February 12, 2018, through June 21, 2019. Thus, the Commission amends the Decision and clarifies that Respondent is entitled to a credit for all TTD benefits previously paid.

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 January 2, 2020, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being relating to her lumbar spine is causally related to the February 11, 2018, work accident. The Commission finds Petitioner's cervical spine condition is not causally related to the work accident.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner temporary total disability benefits of $**595.73**/week for **91-5/7** weeks, commencing **February 12, 2018,** through **November 14, 2019**, as provided in Section 8(b) of the Act. Pursuant to the stipulation by the parties, Respondent has paid all TTD benefits from February 12, 2018, through June 21, 2019. Respondent shall be given a credit for temporary total disability benefits previously paid to Petitioner.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges, as provided in Sections 8(a) and 8.2 of the Act. Respondent is not liable for any expenses for treatment relating to Petitioner's cervical spine provided after September 9, 2019.

IT IS FURTHER ORDERED that the Commission hereby vacates the award by the Arbitrator of prospective medical treatment in the form of the cervical spine surgery recommended by Dr. Gornet.

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

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

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

DATED: FEB 3 - 2021

o: 12/8/20
TJT/jds
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Maria Elena Portela
Maria E. Portela

Kathryn A. Doerries
Kathryn A. Doerries

DISSENT

I respectfully dissent from the opinion of the majority and would affirm the Decision of the Arbitrator in its entirety. After carefully considering the totality of the evidence, I believe Petitioner met her burden of proving by a preponderance of the evidence that her current condition of ill-being regarding her cervical spine is causally related to the February 11, 2018, work accident. Additionally, I believe Petitioner met her burden of proving the recommended cervical disc replacement surgery is reasonable, necessary, and causally related to the accident.

Petitioner suffered a traumatic assault on the date of accident and injured multiple body parts including her neck and low back. Petitioner readily admitted that she had a long history of suffering from both neck and back pain. It is also undisputed that Petitioner sought treatment primarily for her chronic neck pain in October and December 2017. Contrary to the majority, I believe Petitioner and Dr. Gornet testified credibly regarding the differences in her pre-accident neck pain compared to the pain she experienced after the work accident. During the hearing, Petitioner testified that before the work accident, her pain felt more like electric nerves going through her body. She testified that it felt more like arthritic pain. Petitioner testified after the accident, her neck feels "…like when you break a chicken bone, the cracking sound…" There is no evidence that Petitioner suffered from this "cracking" sensation in her neck prior to the work accident. Furthermore, before the work accident Petitioner reported experiencing a "pins and needles and numbness-type sensation" involving her hands, on the left greater than the right. She suffered from daily frequent headaches and occasional electric shock sensations extending from her neck into her bilateral upper extremities. On one occasion, Petitioner reported experiencing muscle spasms into her bilateral shoulder blades.

Her cervical complaints following the work accident are different. Following the work accident, Petitioner's complaints centered primarily on her neck pain radiating down to the left shoulder and down the left arm. Petitioner no longer had complaints of bilateral pain. In fact, her left shoulder complaints were so significant that her doctor ordered an MRI of the shoulder and even performed an injection into the left subacromial space. Before the accident, there is no evidence that Petitioner's cervical pain radiated into her left shoulder with the same intensity. Dr.

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Gornet also credibly testified that Petitioner's neck pain changed after the work accident. He testified that her pain became more severe due to the accident. He also testified that the work accident caused the smaller protrusions at C3-C4 and C4-C5. There is no evidence that these smaller protrusions existed before the work accident. I believe the credible evidence clearly supports a finding that Petitioner's work accident worsened and even changed her pre-existing degenerative cervical spine condition. Given the totality of the credible evidence, I believe Petitioner met her burden of proving her current condition of ill-being regarding her cervical spine is causally related to the work accident. As such, I would award the recommended cervical disc replacement surgery.

For the forgoing reasons, I would affirm the Decision of the Arbitrator in its entirety. Petitioner clearly met her burden of proving her ongoing cervical complaints are related to the February 11, 2018, work accident. Furthermore, Petitioner met her burden of proving the cervical disc replacement surgery recommended by Dr. Gornet is reasonable, necessary, and causally related to the work accident.

Thomas J. Tyrrell

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

DAMM, REGINA
Employee/Petitioner

Case# **18WC006363**

21IWCC0050

STATE OF IL/CHESTER MENTAL HEALTH
Employer/Respondent

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:

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

JAN 2 - 2020

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

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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)

Regina Damm
Employee/Petitioner

Case # 18 WC 06363

v.

Consolidated cases: n/a

State of IL/Chester Mental Health Ctr.
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 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. ☐ 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 _____

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FINDINGS

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

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $46,467.35; the average weekly wage was $893.60.

On the date of accident, Petitioner was 59 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 $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 amounts had been paid to June 21, 2019.

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 four level cervical fusion recommended by Dr. Matthew Gornet.

Respondent shall pay Petitioner temporary total disability benefits of $595.73 per week for 91 5/7 weeks commencing February 12, 2018, through November 14, 2019, as provided in Section 8(b) of the Act.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

December 28, 2019
Date

JAN 2 - 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 February 11, 2018. According to the Application, Petitioner was "Attacked by patient" and sustained an injury to her "Left shoulder and elbow, head, back, body as whole" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. In regard to temporary total disability benefits, Petitioner claimed she was entitled to temporary total disability benefits of 91 5/7 weeks, commencing February 12, 2018, through November 14, 2019, (date of trial). Respondent paid Petitioner temporary total disability benefits to June 21, 2019. 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 Security Therapy Aide. On February 11, 2018, a patient attempted to leave his room and Petitioner tried to restrain him. The patient became violent and attacked Petitioner, kicking her in the left side of her body which caused Petitioner to hit a brick wall. At the time of the accident, Petitioner complained of left shoulder/elbow and neck pain (Petitioner's Exhibit 12).

Following the accident, Petitioner sought medical treatment at Chester Memorial Hospital on February 11, 2018. At that time, Petitioner complained of head, neck, upper back and left upper extremity pain. A CT scan of Petitioner's thoracic spine was obtained which revealed a compression fracture of L2 (Petitioner's Exhibit 3).

On February 13, 2018, Petitioner was seen by Dr. Armida Hidalgo, her family physician. At that time, Petitioner complained of pain in the left shoulder/elbow, neck and back. Dr. Hidalgo noted Petitioner had sustained a compression fracture of L2 and she was already on narcotic pain medications. Dr. Hidalgo ordered physical therapy and pain management (Petitioner's Exhibit 4).

At trial, Petitioner testified she had been treated for back pain prior to the accident by Dr. Paul Tolentino, a neurosurgeon. Petitioner stated Dr. Tolentino treated her for arthritic back pain. Petitioner described the pain she experienced prior to the accident as being like "electric nerves" going through her body. After the accident, Petitioner said the pain changed significantly and she now experiences a cracking sound in her neck as well as low back pain that goes into her right hip/leg.

Dr. Tolentino's medical records were received into evidence at trial. Dr. Tolentino treated Petitioner from October through December, 2017. And MRI of Petitioner's cervical spine was previously obtained on January 17, 2017. According to the radiologist, the MRI revealed disc bulges at C2-C3 and C3-C4 as well as desiccated disks at C4-C5, C5-C6, C6-C7 and C7-T1 (Respondent's Exhibit 6).

When Dr. Tolentino evaluated Petitioner on October 18, 2017, she complained of neck and low back pain, burning in the bilateral trapezius/interscapular areas and an occasional "electric shock" extending from her neck into both upper extremities. Dr. Tolentino reviewed the MRI of

January 17, 2017, and ordered MRIs of Petitioner's cervical and lumbar spine (Respondent's Exhibit 6).

An MRI of Petitioner's cervical spine was obtained on October 31, 2017. According to the radiologist, the MRI revealed multilevel degenerative spondylosis and disc/osteophyte complexes at C5-C6 and C6-C7 (Respondent's Exhibit 6).

An MRI of Petitioner's lumbar spine was obtained on October 31, 2017. According to the radiologist, it revealed a disc protrusion at L4-L5 and disc bulges at L2-L3, L3-L4 and L5-S1 (Respondent's Exhibit 6).

Dr. Tolentino saw Petitioner on December 13, 2017, and noted Petitioner had experienced neck and low back pain since 2009. He reviewed the diagnostic studies and opined "...no neurosurgical intervention is recommended at this time." He treated Petitioner with pain medication and suggested a pain management evaluation (Respondent's Exhibit 6).

Petitioner sought treatment from Dr. Matthew Gornet, an orthopedic surgeon, on February 16, 2018. When seen by Dr. Gornet, Petitioner complained of low back pain referable to both sides, but primarily in her right buttock/hip and down her right leg. Petitioner also complained of neck, left trapezius/shoulder and left arm pain. Petitioner informed Dr. Gornet of the accident of February 11, 2018, as well as the fact she had arthritic pain for many years and had been treated by Dr. Tolentino in October, 2017. Dr. Gornet informed Petitioner that the assault she sustained could have aggravated an underlying condition and that her current symptoms, at least at the current level of severity, were related to the accident. He authorized Petitioner to be off work and ordered MRI scans of Petitioner's lumbar and cervical spine as well as physical therapy (Petitioner's Exhibit 5).

The MRI of Petitioner's lumbar spine was performed on February 16, 2018. According to the radiologist, the MRI revealed a disc herniation at L1-L2 and a minimal compression fracture, a small disk protrusion at L4-L5 and a minimal disc bulge at L5-S1 (Petitioner's Exhibit 6).

The MRI of Petitioner's cervical spine was performed on February 16, 2018. According to the radiologist, there were disc herniations at C3-C4, C4-C5 and C5-C6 as well as disc protrusions at C2-C3 and C6-C7 (Petitioner's Exhibit 6).

Dr. Gornet saw Petitioner on March 1, 2018, and ordered a back brace because of her L2 vertebral fracture. He noted Petitioner was taking a lot of Hydrocodone and recommended she decrease her use of it. He continued to authorize Petitioner to remain off work (Petitioner's Exhibit 5).

Because of Petitioner's ongoing complaints of left upper extremity symptoms, Dr. Gornet referred Petitioner to Dr. George Paletta, an orthopedic surgeon. Dr. Paletta evaluated Petitioner on April 11, 2018. At that time, Petitioner complained of left elbow pain. Dr. Paletta opined Petitioner had post traumatic lateral epicondylitis of the left elbow. He ordered an MRI scan (Petitioner's Exhibit 8).

The MRI of Petitioner's left elbow was performed on April 11, 2018. According to the radiologist, there were minimal degenerative changes, but no evidence of a tendon tear (Petitioner's Exhibit 6).

On April 13, 2018, Dr. Paletta reviewed the MRI scan. His reading of the MRI was consistent with the radiologist. His impression was radiocapitellar arthrosis for which he recommended an injection in the glenohumeral joint (Petitioner's Exhibit 8).

Dr. Gornet saw Petitioner on April 26, 2018, and noted she was continuing to take Hydrocodone. He ordered physical therapy for her neck and back symptoms and continued to authorize Petitioner to remain off work (Petitioner's Exhibit 5).

Petitioner was again seen by Dr. Paletta on May 30, 2018, and her left elbow symptoms had improved; however, Petitioner had complaints of left shoulder pain in addition to her ongoing neck pain. The range of motion of the left shoulder was limited and Dr. Paletta's impression was left shoulder impingement versus referral pain from her cervical issues. He opined Petitioner had a "very complicated situation" because her shoulder/upper extremity pain could be coming from the neck. He ordered an MRI scan to determine if there was any left shoulder pathology (Petitioner's Exhibit 8).

An MRI arthrogram was performed on May 30, 2018. According to the radiologist, the study revealed supraspinatus thinning and tendinopathy, but no rotator cuff tear (Petitioner's Exhibit 6).

Dr. Paletta saw Petitioner on June 6, and June 12, 2018, for her elbow/shoulder symptoms. He reviewed the MRI arthrogram and opined it revealed rotator cuff tendinopathy. He recommended Petitioner undergo an injection in the subacromial space and to follow-up with medication and physical therapy (Petitioner's Exhibit 8).

Dr. Gornet saw Petitioner on June 25, 2018, and Petitioner's primary complaints were low back, right buttock/hip and right leg pain. He referred Petitioner to Dr. Helen Blake for steroid injections (Petitioner's Exhibit 5).

Dr. Blake saw Petitioner on July 17, and July 31, 2018. On those occasions, Dr. Blake administered steroid injections at L4-L5 and L5-S1, respectively (Petitioner's Exhibit 10).

Dr. Paletta saw Petitioner on August 6, 2018, and Petitioner continued to complain of left shoulder/arm symptoms. Dr. Paletta reviewed the MRI of Petitioner's cervical spine and noted there were significant findings at multiple levels. Dr. Paletta opined there was not significant shoulder pathology and Petitioner's left shoulder/arm symptoms were of cervical origin. He recommended Petitioner follow-up with Dr. Gornet (Petitioner's Exhibit 8).

Dr. Gornet saw Petitioner on September 17, 2018, and Petitioner continued to have low back and neck symptoms. Dr. Gornet noted Petitioner continued to take Hydrocodone and opined Petitioner was physically dependent upon narcotics. He recommended Petitioner undergo a discogram at L4-L5 and L5-S1, but would not perform the studies until Petitioner was weaned

completely off narcotics. He referred Petitioner back to Dr. Blake for that purpose (Petitioner's Exhibit 5).

Dr. Blake again saw Petitioner on October 4, 2018, and treated Petitioner through September 9, 2019. Dr. Blake's treatment consisted primarily of management of Petitioner's medications with the goal of weaning Petitioner off of narcotics. When Dr. Blake saw Petitioner on June 13, 2019, she noted Petitioner had successfully weaned completely off narcotic medications (Petitioner's Exhibit 11).

At the direction of Respondent, Petitioner was examined by Dr. Michael Chabot, an orthopedic surgeon, on December 13, 2018. In connection with his examination of Petitioner, Dr. Chabot reviewed medical records and diagnostic studies provided to him by Respondent for medical treatment provided to Petitioner subsequent to the accident of February 11, 2018. Dr. Chabot opined Petitioner had a history of an L2 compression fracture, back pain, neck contusions/strain, shoulder contusion/strain, history of chronic musculoskeletal complaints with history of fibromyalgia, chronic narcotic use predating the accident of February 11, 2018, and tobacco dependency. He opined there were no objective physical findings to suggest the abnormalities in the cervical or lumbar spine were associated with the accident of February 11, 2018. He opined Petitioner did not require any further medical treatment and was at MMI. However, he also opined Petitioner could return to work, so long as her work duties did not involve "...client physical control." Dr. Chabot also noted he wanted to review Petitioner's medical records for treatment she received prior to the accident of February 11, 2018 (Respondent's Exhibit 2).

Dr. Gornet saw Petitioner on April 29, 2019, and noted Petitioner was completely off narcotics. He also reviewed Dr. Chabot's report of December 13, 2018. Among other things, Dr. Gornet noted that Dr. Chabot did not explain why an assault sustained by Petitioner which caused a fractured vertebrae would not also cause low back, right buttock/hip and cervical spine symptoms. Because Petitioner was off narcotics, Dr. Gornet ordered new MRIs of Petitioner's lumbar and cervical spine (Petitioner's Exhibit 5).

Dr. Chabot reviewed medical records for treatment Petitioner received prior to February 11, 2018, as well as medical records for treatment Petitioner had received subsequent to his examination of December 13, 2018. Dr. Chabot opined Petitioner had a history of chronic neck and back complaints dating back to 2009. He indicated that conclusions in his report of December 13, 2018, remain unchanged (Respondent's Exhibit 3).

An MRI of Petitioner's cervical spine was performed on June 27, 2019. According to the radiologist, the MRI revealed disc bulges at C3-C4, C4-C5, C5-C6 and C6-C7 as well as a left foraminal protrusion at C2-C3 (Petitioner's Exhibit 6).

An MRI of Petitioner's lumbar spine was performed on June 27, 2019. According to the radiologist, the MRI revealed a lateral annular tear and protrusion at L4-L5 and left lateral signal intensity L5-S1, likely an annular tear (Petitioner's Exhibit 6).

Dr. Gornet saw Petitioner on June 27, 2019, and reviewed both MRIs. He indicated he would focus his treatment on the cervical spine and recommended Petitioner undergo disc replacement surgery at C3-C4, C4-C5, C5-C6 and C6-C7 (Petitioner's Exhibit 5).

Dr. Gornet saw Petitioner on July 11, July 22 and September 9, 2019. Petitioner continued to have low back and neck pain. Dr. Gornet renewed his recommendation Petitioner undergo cervical disc replacement surgery (Petitioner's Exhibit 5).

Dr. Chabot was deposed on July 26, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Chabot's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. Specifically, Dr. Chabot testified Petitioner could return to work so long as her job duties did not require "physical restraint" of patients (Respondent's Exhibit 4; p 20).

On cross-examination, Dr. Chabot agreed that there was not a surgical recommendation made by anyone prior to the accident of February 11, 2018. He testified the limitations he imposed on Petitioner from restraining patients was based upon her age and "multiple co-morbidities" and history of chronic complaints. He did not attribute the restrictions to the accident Petitioner sustained (Respondent's Exhibit 4; pp 24, 31-33).

Dr. Gornet was deposed on September 19, 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, Dr. Gornet testified Petitioner's lumbar and cervical spine complaints were caused/aggravated by the accident of February 11, 2018. He also stated Petitioner should undergo disc replacement surgery at C3-C4, C4-C5, C5-C6 and C6-C7, because of the disc pathology he diagnosed at those levels and it was the only way to cure and relieve the effects of the work injury Petitioner had sustained (Petitioner's Exhibit 13; pp 9-14).

On cross-examination, Dr. Gornet agreed Petitioner had neck and low back symptoms which predated the accident of February 11, 2018. However, Dr. Gornet stated Petitioner had different symptoms after the accident, specifically, pain in the right buttock/hip and right leg as well as the location of pain indicated by Petitioner in pain diagrams completed by her before and after the accident (Petitioner's Exhibit 13; pp 21-22, 26-28).

At trial, Petitioner acknowledged she had neck and low back pain prior to the accident of February 11, 2018, which required medical treatment for which she took narcotic medication. However, she testified the pain symptoms significantly increased following the injury at work. Petitioner has not been able to work since the accident and wants to proceed with the treatment recommended by Dr. Gornet, specifically, the four level cervical disc replacement surgery.

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 cervical and lumbar spine is causally related to the accident of February 11, 2018.

In support of this conclusion the Arbitrator notes the following:

There was to dispute Petitioner sustained a work-related accident on February 11, 2018, when she was assaulted by a patient she was attempting to restrain.

Petitioner had a pre-existing condition in her lumbar and cervical spine which required medical treatment and was taking narcotic pain medication. However, Petitioner was able to work full duty up until she sustained the accident on February 11, 2018, but has not been able to work since that time.

Prior to the accident of February 11, 2018, Petitioner was treated by Dr. Tolentino, a neurosurgeon, who ordered MRIs of Petitioner's cervical spine performed which revealed abnormalities at multiple levels of the cervical spine. However, Dr. Tolentino specifically opined that "...no neurosurgical intervention is recommended at this time."

At trial, Petitioner credibly testified that her neck and low back symptoms worsened subsequent to the accident of February 11, 2018.

Respondent's Section 12 examiner, Dr. Chabot, opined Petitioner had a history of chronic neck and low back complaints dating back to 2009 and there were no objective physical findings to support the claim that the abnormalities in the cervical and lumbar spine were related to the accident. However, he opined Petitioner was at MMI and could return to work, but should not be required to work where she would have to physically restrain patients.

Petitioner's primary treating physician, Dr. Gornet, agreed Petitioner had neck and low back symptoms which preexisted the accident of February 11, 2018, but that her symptoms were worsened by the accident of February 11, 2018.

Dr. Chabot's opinion that Petitioner is subject to a work restriction of not having to physically restrain patients and that it is not related to the accident is difficult to comprehend given the fact the Petitioner was able to work without restrictions prior to the accident, but is now unable to do so.

In view of the preceding, the Arbitrator finds the opinion of Dr. Gornet to be more persuasive than that of Dr. Chabot in regard to causality.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes that all of the medical treatment provided to the 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 four level cervical disc replacement surgery recommended by Dr. Matthew Gornet.

In support of this conclusion the Arbitrator notes the following:

As noted herein, the Arbitrator found the opinion of Dr. Gornet to be more persuasive than that of Dr. Chabot in regard to causality.

Dr. Gornet made the recommendation Petitioner undergo cervical disc replacement surgery after Petitioner was completely weaned off of narcotic medications. Dr. Gornet credibly testified the surgery was the only way to relieve the effects of the work injury.

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 91 5/7 weeks, commencing February 12, 2018, through November 14, 2019.

In support of this conclusion the Arbitrator notes the following:

Petitioner has been under active medical treatment and authorized to be off work for the aforestated period of time.

William R. Gallagher, Arbitrator

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

BETH HUDDLESTON,

Petitioner,

21IWCC0051

vs.

NO: 19 WC 14163

KERRY AMERICAS,

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

The Arbitrator wrote, "On October 17, 2019, Dr. Hanson examined Petitioner and diagnosed her with continuing left SIA, ACA, and possible SLAP tear." *Dec. 2.* We note that Petitioner was not seen by Dr. Mark Hanson on that date. Rather, she was seen by Katie Hanson and there are no titles or designations listed for her in that record. Also, the diagnosis was "SAI" (subacromial impingement); not "SIA."

The Arbitrator wrote, "On September 4, 2018, Ms. Steele, NP-C, at IWIN diagnosed Petitioner with AC joint separation with a differential diagnosis of dislocation, fracture and/or rotator cuff tear...." *Dec. 4.* We hereby replace "September 4, 2018," with "July 23, 2018."

21IWCC0051

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 20, 2020, is hereby affirmed and adopted with the clarifications noted above.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: FEB 3 - 2021

María Elena Portela
María E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

SE/
O: 1/12/21
49

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

HUDDLESTON, BETH
Employee/Petitioner

Case# **19WC014163**

21IWCC0051

KERRY AMERICAS
Employer/Respondent

On 3/20/2020, 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 0.30% 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 61701

4136 TESTAN LAW
MARCY BENNETT
150 S WACKER DR SUITE 2130
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS
COUNTY OF McLEAN)

21 IWCC0051

☐ 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)

Beth Huddleston
Employee/Petitioner

v.

Kerry Americas
Employer/Respondent

Case # **19** WC **14163**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Bloomington**, on **2/25/20**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **7/23/18**, 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 $**33,800.00**; the average weekly wage was $**650.00**.

On the date of accident, Petitioner was **63** 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 reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,829 to Fort Jesse Imaging, $2,217.35 to IWIN, and $2,070 to McLean County Orthopedics, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for any medical bills which have been paid by its workers' compensation carrier. Respondent is ordered to reimburse Petitioner in the amount of $139.40 for prescription costs she has paid out of pocket.

Respondent is ordered to authorize and pay left shoulder surgery as recommended by Dr. Hanson consisting of a subacromial decompression distal clavicle resectioning and possible biceps tenodesis as provided in Section 8(a) of the Act.

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

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

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

Signature of Arbitrator Gerald Granada

3/19/20
Date

MAR 20 2020

21IWCC0051

FINDINGS OF FACT

This case involves Petitioner Beth Huddleston, who alleges to have been injured while working for the Respondent Kerry Americas on July 23, 2018. Respondent disputes Petitioner's claim, with the issues in dispute being: 1) causation; 2) medical expenses; and 3) prospective medical care.

Petitioner worked as a sanitor in Respondent's a cereal extrusion factory on July 23, 2018. Her job as a sanitor involved cleaning and mopping the floors and walls. On that date, Petitioner was pulling a cart carrying 200 pounds of product when the cart became stuck. She pulled the cart and felt a jerk with a subsequent popping in her left shoulder. She pulled the cart again and felt a second jerk in her left shoulder. Petitioner noticed immediate left shoulder pain and reported the injury to Respondent, who referred Petitioner to IWIN for evaluation.

Later that day, Petitioner saw nurse practitioner Michelle Steele at IWIN. Petitioner noted left shoulder pain that had begun at work that day while pulling a cart. She was referred to an orthopedic doctor, and diagnosed with a dislocated shoulder and left humerus with joint separation. Petitioner was provided with a shoulder immobilizer, Norco, Ibuprofen, and was told to return to work with no use of the left arm, and to follow up in 3-5 days. (Px. 2)

On July 27, 2018, Petitioner returned to IWIN with complaints of sharp and aching left shoulder pain. Her left shoulder pain was noted to have decreased from her prior visit. She was again diagnosed with a dislocation shoulder Left humerus with joint separation and referred to see an orthopedic doctor. She was given medication, provided with work restrictions, and told to follow up after her orthopedic visit. (Px. 4, p.4-5).

On August 1, 2018, Petitioner saw orthopedic surgeon Dr. Armstrong, to whom she reported a work-related left shoulder injury with an onset of July 23, 2018. Dr. Armstrong x-rayed the petitioner's left shoulder and diagnosed grade 2 acromioclavicular separation, subacromial impingement and biceps tendinitis. Dr. Armstrong injected her left shoulder and her LCA biceps, prescribed prednisone and Mobic, and gave Petitioner a work restriction for her left upper extremity. Dr. Armstrong instructed Petitioner to return for an MRI if her pain did not resolve in 4-6 weeks; otherwise she was directed to follow up on an as-needed basis. (Px.3)

On August 3, 2018, Petitioner returned to see Michelle Steele at IWIN with worsened left shoulder symptoms and a poor range of motion due to pain. (PX 4) On August17, 2018, Ms. Steele noted Petitioner's decreased range of motion and difficulty with fastening a bra, and Ms. Steele prescribed continued restrictions of limited use of the left arm, physical therapy, ice/heat therapy, range of motion exercises, and Meloxicam. (PX 4, p.p. 8, 9) The August 24, 2018 physical therapy records noted Petitioner's left shoulder had 90% ROM flexion, 90% ROM abduction, and 90% ROM external rotation positive apprehension sign. (PX 4, p. 22) On September 4, 2018, Ms. Steele noted that Petitioner had improvement with her symptoms, that her pain is generally 0/10 but on occasion with certain movements, she will have 6/10 pain in her anterior biceps region. Ms. Steele released Petitioner to return to work without restrictions and referred her to Dr. Ziad Musaitif for a final evaluation. (PX 4, p. 13, 14) Ms. Steele diagnosed Petitioner with AC joint separation with a differential diagnosis of dislocation, fracture and/or rotator cuff tear. (PX 4, p. 14) Petitioner saw Dr. Musaitif on September 5, 2018, who released Petitioner to base line and stated she was at MMI. (PX 4, p. 15)

While Petitioner treated for her July 23, 2018 shoulder injury, she also concurrently treated with Dr. Oakey, an orthopedic surgeon at McLean County Orthopedics, for bilateral carpal tunnel syndrome related to an April 2, 2018 date of accident (see caption 19 WC 002656, case not consolidated for arbitration). The August 13, 2018 records from Dr. Oakey stated that Petitioner had ongoing carpal tunnel syndrome and that they were awaiting workers' compensation approval for surgery. (PX 7, p.p. 14-16)

Petitioner testified that after Dr. Musaitif at IWIN released her on September 5, 2018, she had continued left shoulder pain, which increased the more she used her left arm at work. She also had bilateral hand pain from her April 2, 2018 accident, for which she was awaiting approval for bilateral carpal tunnel surgery.

Petitioner testified that she learned in December, 2018 that Respondent was closing its factory in February, 2019. Petitioner had been employed by Respondent for over 10 years and she said that she wanted to continue working until the factory closed.

On February 12, 2019, Petitioner underwent a Section 12 exam with Dr. Balaram for her bilateral carpal tunnel claim. In the February 14, 2019 IME report, Dr. Balaram opined that Petitioner's work activities contributed to the bilateral carpal tunnel diagnosis and that Petitioner would benefit from bilateral carpal tunnel releases. (PX 11)

On February 6, 2019, Petitioner saw Dr. Armstrong's partner, Dr. Hanson, who took a history that Petitioner had continued left shoulder pain and symptoms following a work related injury to her left shoulder on July 23, 2018 when she was pulling a two wheel cart that got stuck on a door frame. Dr. Hanson stated that Petitioner pulled the cart and felt a pop in her shoulder. Dr. Hanson noted that Petitioner had continued pain and symptoms with ROM and ADLs as well as continued weakness in the left shoulder. On exam, Dr. Hanson noted tenderness of the acromioclavicular joint, bicipital groove, and rotator cuff. Dr. Hanson diagnosed continued AC joint pain status post-low grade separation, possible RCT, SLAP tear. Dr. Hanson ordered an MRI taken on February 27, 2019 that showed mild marrow edema at the inferior posterior boney glenoid and mild capsular and boney hypertrophy of the left acromioclavicular articulation with small undersurface osteophytes (PX 6). On March 6, 2019, Dr. Hanson stated that Petitioner had pain of the left shoulder joint, subacromial impingement of the left shoulder, and that she likely had a tear of the superior glenoid labrum of the left shoulder. Dr. Hanson recommended that Petitioner undergo a left shoulder arthroscopy SAD, DCR, and possible BT. (PX 8, p.p. 7-9)

On March 14, 2019, Petitioner underwent a right carpal tunnel release with Dr. Oakey. On April 9, 2019, Dr. Okey performed Petitioner's left carpal tunnel release. (PX 8, p.p. 14-17). On July 22, 2019, Dr. Oakey placed Petitioner at MMI as it related to her bilateral carpal tunnel claim. (PX 10, p. 4)

On October 17, 2019, Dr. Hanson examined Petitioner and diagnosed her with continuing left SIA, ACA, and possible SLAP tear. Dr. Hanson recommended left shoulder arthroscopy SAD, DCR, possible BT. Dr. Hanson noted that physical therapy, NSAIDs, and injections did not help, and prescribed Prednisone and Tramadol for severe pain only. (PX 12, p. 3) On February 14, 2020, Nicholas Von Holten, P.A. at Dr. Hanson's office, examined Petitioner's left shoulder and found decreased ROM of the left shoulder with tenderness of the AC joint, the bicipital groove, the rotator cuff and the posterior joint, for which

Mr. Van Holten prescribed a Medrol Dose Pack and refilled her tramadol pending surgery. (PX 14)

On July 18, 2019, Respondent's Section 12 IME Dr. Neal drafted a report. Dr. Neal noted that Petitioner's symptoms included the inability to rotate her arms behind her back to fasten her bra, pain in her left shoulder at night, pain if she reaches above shoulder level, and ongoing pain like a "sword" through the shoulder. (RX 1, p.p. 4, 5) On exam, Dr. Neal noted Petitioner's limited range of motion in her left shoulder and indicated that impingement testing could not be truly assessed because of the fixed range of motion and the uncomfortable Hawkins testing. (RX 1, p. 8) Dr. Neal diagnosed Petitioner with left shoulder adhesive capsulitis which was also commonly referred to as "frozen shoulder." Dr. Neal noted that Petitioner denied having any shoulder symptoms prior to her July 23, 2018 accident and that the only injury she sustained to her left shoulder was the July 23, 2018 work accident. Dr. Neal indicated that from the description of the July 23, 2018 accident, Petitioner sustained a soft tissue strain/injury whose symptomatology completely resolved by September 5, 2018. Dr. Neal stated that he would not conclude that there was any malingering and that he did believe Petitioner developed left shoulder adhesive capsulitis, however he was uncertain of the origin of her adhesive capsulitis due to a 5 month gap in Petitioner's treatment. (RX 1, p. 18)

In his October 21, 2019 report, Dr. Hanson stated that Petitioner's MRI was negative for cuff tear and labral tear, but that his March 6, 2019 exam was consistent with a subacromial impingement, AC joint pain, status post-separation, and a SLAP tear. Dr. Hanson stated that plain MRIs frequently miss SLAP tears and that an MR arthrogram is often required to pick this condition up – which he suspected was the case with Petitioner. Dr. Hanson noted that Petitioner did not have shoulder pain prior to her July, 2018 injury and that he believed that the work injury resulted in the low grade separation, subacromial impingement, and a likely SLAP tear. Dr. Hanson recommended a shoulder arthroscopy with subacromial decompression distal clavicle resectioning and a possible biceps tenodesis. (PX 1)

Petitioner testified that she did not experience any left shoulder pain prior to her July 23, 2018 accident. She experienced improvement after her August 1, 2018 steroid injection with Dr. Armstrong, but she had a gradual worsening of pain and loss of range of motion sometime thereafter. Petitioner continued to experience left shoulder pain and she treated with Dr. Hanson on February 6, 2019 because of the ongoing increasing pain. After the steroid injection wore off, her left shoulder had increased loss of range of motion, that was painful and caused difficulties with lifting, blow drying her hair, and reaching behind her back. Petitioner testified that she was ready and willing to undergo the surgery as recommended by Dr. Hanson.

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator relies on Petitioner's credible testimony, the medical evidence from Petitioner's medical providers and Dr. Hanson's narrative report. The Arbitrator notes that Respondent is in agreement that Petitioner sustained a work accident on July 23, 2018 injuring her left shoulder and that Petitioner's treatment rendered at IWIN on Respondent's referral through September 5, 2018 was causally related to the accident. Respondent denies treatment after September 5, 2018, the date Dr. Musaitif placed Petitioner at MMI and Petitioner had been released to return to work after noted improvement in her left shoulder. The Arbitrator notes that the Petitioner did return to work and testified that her arm condition worsened with work activities, which supports the Petitioner's claim that she did not reach MMI.

21IWCC0051

The Arbitrator notes that the medical providers have made similar diagnoses throughout Petitioner's treatment. On September 4, 2018, Ms. Steele, NP-C, at IWIN diagnosed Petitioner with AC joint separation with a differential diagnosis of dislocation, fracture and/or rotator cuff tear; on August 1, 2018, Dr. Armstrong diagnosed Petitioner with Grade II acromioclavicular separation, subacromial impingement, and biceps tendonitis; and on October 21, 2019, Dr. Hanson diagnosed Petitioner with low grade separation, subacromial impingement, and likely SLAP tear. Dr. Hanson recommended left shoulder arthroscopy to treat the subacromial impingement and AC separation with subacromial decompression and distal clavicle resection; and possibly a biceps tenodesis if Petitioner's bicep is torn. Dr. Hanson's recommended surgery is consistent with the earlier diagnoses made on August 1, 2018 and September 4, 2018. The Arbitrator also notes that Petitioner did not have any prior injury to her left shoulder before her July 23, 2018 accident, has had ongoing pain which has intensified since her accident, and that she has had no other intervening injury to her left shoulder. The Arbitrator finds Petitioner's testimony, as corroborated by the medical records, is credible and concludes that based on a preponderance of the evidence, Petitioner's current condition of ill-being in her left arm and her need for surgery, is causally related to her July 23, 2018 work accident.

2. Based on the Arbitrator's conclusion on the issue of causation, the Arbitrator further finds that Petitioner's medical treatment for her left shoulder thus far has been reasonable and necessary in treating her work related condition. The Arbitrator Orders Respondent to pay all medical expenses relating to the treatment of Petitioner's left shoulder, subject to the fee schedule, as set forth in Petitioner's exhibit 13: $1,829 to Fort Jesse Imaging, $2,217.35 to IWIN, and $2,070 to McLean County Orthopedics, as provided in Section 8(a) and 8.2 of the Act. Respondent shall be given a credit for any medical bills which have been paid by the workers' compensation carrier. The Arbitrator further Orders Respondent to reimburse Petitioner in the amount of $139.40 for prescription costs that she paid out of pocket.

3. Consistent with the Arbitrator's conclusions above, the Arbitrator orders Respondent to authorize and pay for the prospective medical treatment for Petitioner's left shoulder consisting of surgery as recommended by Dr. Hanson, which includes a subacromial decompression, distal clavicle resectioning, and possible biceps tenodesis.

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BONITA CROSS,

Petitioner,

21IWCC0052

vs.

NO: 18 WC 2618
18 WC 6791

CHAMPAIGN COUNTY HEADSTART,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the decision of the Arbitrator as to causation, temporary total disability benefits, and medical, but modifies the permanency award, increasing it from 10% loss of the person as a whole, to 15% loss of the person as a whole.

Petitioner met her burden of proof that her shoulder condition, subsequent surgery and attendant care were causally related to her two work injuries. Petitioner credibly testified that she did not have any prior physical limitations or problems with her right arm or shoulder. (T. 18)

On September 20, 2017, Petitioner testified she fell when a child crawled between her legs. This mechanism of injury is corroborated by the medical records and Respondent does not dispute accident. Petitioner sought medical treatment the same day and was placed on work restrictions. Petitioner followed up five days post-accident and was referred to physical therapy. (T. 24) Petitioner followed up a month later with continued symptoms to the right arm and shoulder and was instructed to continue physical therapy. Petitioner followed up with Dr. Chen

at Occupational Medicine on November 8, 2017. At that time, she was referred to orthopedics per her request.

On November 21, 2017, Petitioner was seen by Brian Cummings with continued complaints of pain and swelling. He recommended Petitioner resume physical therapy. (T. 30) On December 18, 2017, when Petitioner returned to Mr. Cummings, he referred her to the Carle Spine Center as her right sided pain was located in the upper shoulder and neck. Her shoulder exam was benign, except she had tingling in her hand. On January 15, 2018, Petitioner returned to Mr. Cummings. She reported that therapy seemed to be aggravating her right arm, so it was discontinued. She was referred to Dr. Gurtler whom she saw January 30, 2018. In the interim, she was seen by Dr. Johnson at the Spine Center for her neck and a cervical MRI was ordered. (T. 35)

When Petitioner saw Dr. Gurtler on January 30, 2018, he noted she had a normal shoulder. Her primary complaint was pain in the distal 3rd of the humeral area. (Px4) In February of 2018, Petitioner returned to Dr. Johnson to review the results of her MRI. Dr. Johnson ruled out cervical radiculopathy and recommended additional physical therapy. (T. 37)

On February 21, 2018, while working with older children, Petitioner sustained another accident while attempting to restrain a child and was hit and kicked. (T. 39) This accident is not in dispute. Petitioner returned to Dr. Chen with complaints of a re-injury to her right shoulder. Dr. Chen took her completely off work and ordered an MR Arthrogram of her right shoulder. Respondent's workers' compensation carrier did not authorize the right shoulder MR arthrogram, so Petitioner went through her group insurance to obtain same. The MR Arthrogram showed a SLAP tear. (Px6) Petitioner followed up with Dr. Chen who agreed she suffered from a SLAP tear. (Px7) On May 8, 2018, Petitioner followed up with Dr. Gurtler's office and surgery was recommended. (Px9)

Petitioner underwent surgery on June 25, 2018 followed by therapy through December 12, 2018. Periodically, she also followed up with Dr. Gurtler's office during that time. (T. 49) Petitioner was released to return to work with restrictions beginning October 29, 2018. She followed up with Brian Cummings for the last time on November 26, 2018 and was released to full duty. (T. 51-2) Petitioner continues to have problems with lifting, but has not sought further medical treatment and is not on prescription medications. (T. 65)

Petitioner's treating orthopedist, Dr. Gurtler, was deposed on September 6, 2018. He admitted he misdiagnosed Petitioner in January of 2018. (Px27, p. 11) He explained that Petitioner's presentation was confusing. However, when he saw her in May, based on the location of the pain, cervical MRI and MR Arthrogram, Dr. Gurtler agreed with Dr. Chen that Petitioner sustained a SLAP tear and that it was causally related to her work injury. (Px27, p. 12) Dr. Gurtler also recommended a biceps release because of the persistent lump in her arm. (Px27, p. 15) Dr. Gurtler opined that Petitioner's need for surgery was caused by one or both of the work accidents. (Px27, p. 17)

Petitioner underwent an independent medical examination with Dr. Nogalski on April 17, 2018. All of the tests he performed on Petitioner caused some pain, but not in the shoulder – an area where one would expect a positive test for the biceps or rotator cuff issues. (Rx1, p. 12) Dr. Nogalski also reviewed the MR Arthrogram performed on April 3, 2018, but did not agree that it showed a SLAP tear, contrary to the interpretations of the radiologist, Dr. Chen, or Dr. Gurtler. (Rx1, p. 13-14) Dr. Nogalski further opined that Petitioner had right neck trapezial and posterior scapular pain without clear neurologic or anatomic correlation and had a history of right shoulder contusion, which seemed to have resolved. (Rx1, p. 21) Dr. Nogalski did not agree that Petitioner had any specific shoulder issue. He also opined that exams by Petitioner's treaters showed resolution of her right shoulder symptoms prior to seeing Dr. Gurtler in January of 2018. (Rx1, p. 22) He provided a supplemental report based on records review, dated August 15, 2018. He found Mr. Flannell's exam to be a red herring as Mr. Flannell was an athletic trainer and found positive tests that all other examiners, including himself, found to be negative. He also reviewed the operative report and did not agree with Dr. Gurtler that the surgery performed was necessary. (Rx1, p. 27) He additionally opined that Petitioner's mechanism of injuries would not fit with a SLAP tear. (Rx1, p. 30) He also believed Petitioner was at maximum medical improvement from the September 2017 accident before she saw Dr. Gurtler. (Rx1, p. 66)

Petitioner had no prior medical treatment or problems with her right arm. Additionally, there was initially a question amongst providers if the pain was generated by her neck or shoulder. Petitioner had ongoing and continued complaints of pain, as well as a lump that had formed in her arm, following her work accident of September of 2017. Petitioner had a clear aggravation with more specific complaints of pain to the shoulder following the February 21, 2018 accident. By April of 2018, following her MR Arthrogram, a SLAP tear was identified and confirmed by multiple medical providers.

The Commission finds that Dr. Gurtler was more persuasive than Dr. Nogalski regarding causation. Although Petitioner's presentation was initially confusing, even Dr. Gurtler admitted he misdiagnosed Petitioner on their initial visit in January of 2018. Dr. Nogalski's opinion that the MR Arthrogram did not show a labral tear was not persuasive.

The Commission modifies the Arbitrator's award from 10% loss of a person as a whole to 15% loss of person as a whole. In applying the five factors of Section 8.1(b), the Commission finds:

1) No impairment rating submitted, so this factor is given no weight
2) Petitioner worked as a childcare provider/pre-school teacher and was able to return to the equivalent of her prior position, though credibly testified she now needs assistance to perform some of her tasks in the form of working with older children. She has to have another teacher assist her in lifting children and with supplies. Additionally, although she no longer has formal restrictions, she has ongoing physical limitations as a result of her injuries. This factor is given greater weight.
3) Petitioner was 54 years old at the time of the accident and arguably has several working years in her future. This factor is given some weight.

4) There is no evidence that Petitioner's future earning capacity has been impacted as she has returned to the same type of job that she held pre-injury. This factor is given little weight.
5) The Petitioner's disability is corroborated by the medical records. Petitioner had consistent and ongoing treatment regarding her right shoulder and right arm. Although her complaints as to the location of her pain varied, the consistent complaints of pain and limitations present after her two undisputed work injuries, and ultimate surgery, were credible. Petitioner saw several different medical providers in attempts to diagnose and repair her problem, with Dr. Gurtler ultimately diagnosing the SLAP tear based on the MR Arthrogram. Dr. Gurtler surgically repaired the SLAP tear and also noted a right shoulder arthroscopic biceps release and open removal of the biceps from the bicipital groove. At the time of discharge, Petitioner reported continued lagging of strength and also stated she could not be the only adult in a classroom with children in case there was an emergency where the children would need to be lifted. This factor is given greater weight.

The Commission also corrects the following scrivener's errors: 1) on page 7 of the Arbitrator's decision, the Commission replaces "Dr. Gurtler" with "Dr. Chen" in the second to last and last sentence of the first paragraph; 2) on page 14 of the Arbitrator's decision, the Commission replaces "Dr. Gurtler" with "Dr. Chen" in the first sentence of the last paragraph.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $415.83 per week for a period of 35 4/7 weeks, from February 22, 2018 through October 29, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall receive a credit for the $5,904.34 it has already paid in temporary total disability benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $374.25 per week for a period of 75 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 15% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical services for Petitioner's right arm and shoulder from September 21, 2017 through December 12, 2018 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act. Respondent shall be given a credit of $21,470.84 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner 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.

21IWCC0052

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $19,512.00. 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: FEB 3 - 2021

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O:121520
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CROSS, BONITA
Employee/Petitioner

Case# **18WC002618**

18WC006791

CHAMPAIGN COUNTY HEAD START-RANTOUL
Employer/Respondent

21IWCC0052

On 7/9/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

3269 SPIROS LAW PC
WILLIAM P SCHMITZ
2807 N VERMMILION ST SUITE 3
DANVILLE, IL 61832

0734 HEYL ROYSTER VOELKER & ALLEN
BRUCE L BONDS
PO BOX 1190
CHAMPAIGN, IL 61824

21IWCC0052

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

BONITA CROSS,
Employee/Petitioner

v.

CHAMPAIGN COUNTY HEAD START-RANTOUL,
Employer/Respondent

Case # **18** WC **2618**

Consolidated cases: **18 WC 6791**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Champaign**, on **6/13/19**. 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 **9/20/17 and 2/21/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**32,435.00**; the average weekly wage was $**623.75**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of $**5,904.34** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**5,904.34**.

Respondent is entitled to a credit of $**21,470.84** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $415.83/week for 35-4/7 weeks, commencing 2/22/18 through 10/29/18, as provided in Section 8(b) of the Act. Respondent shall receive credit for the $5,904.34 it has already paid in temporary total disability benefits.

Respondent shall pay reasonable and necessary medical services for petitioner's right arm/shoulder from 9/21/17 through 12/12/18, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $21,470.84 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 $374.25/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Kaureen Hyde

Signature of Arbitrator

7/2/19

Date

JUL 9 - 2019

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 53 year old Early Head Start Preschool Teacher, sustained an accidental injury to her right shoulder that arose out of and in the course of her employment by respondent on 9/20/17 and 2/21/18. Petitioner had worked for respondent for 3.5 years on 9/20/17. She also had concurrent employment at Little Wings Learning Center, where she worked before and after school with respondent. Respondent was aware of petitioner's concurrent employment. Petitioner denied any problems with, or treatment for her right shoulder prior to 9/20/17. Petitioner testified that she was also able to perform all her full duty activities without any problems.

Petitioner's duties for respondent as a preschool teacher included operating a classroom, changing diapers, serving meals, putting the children down for naps, playing with the children, potty training the children, and taking care of the toilet needs of the children. Petitioner also had to stock supplies for the classroom, and lift children up and down off the changing table, and in and out of highchairs. She also put cots out for nap time. Petitioner was required to lift up to 50 pounds. The children she worked with ranged in age from 6 weeks to 3 years old.

Petitioner's duties at Little Wings Learning Center were before and after her work for respondent. She was a floater, and worked in the early classrooms. She also drove a bus before and after school. She determined the curriculum, potty trained the children, changed diapers, and stocked supplies. These tasks required her to lift the children.

On 9/20/17 petitioner was on the playground playing with the kids. She had bubbles in one hand and a clip board in the other. As she went to turn and walk away to another area, a toddler crawled between her legs and her legs got tangled up as she tried to walk away. As a result, she fell onto her right shoulder and right side onto the concrete. She testified that her upper right arm made contact with the ground first, and then her right side. She testified that her body jerked and she had pain in her right side from her neck to her leg. Petitioner immediately reported the injury to her director and ice was applied to her shoulder and neck area. She was sent to Dr. Philbert Chen at Carle Occupational Medicine that same day.

She gave Dr. Chen a history of a trip and fall injury. She reported that a small child appeared out of nowhere in front of her. In an attempt to try and avoid tripping on the child, she tried to jump over him and fell, landing hard on her right shoulder and right side. She reported the most pain to her right shoulder and elbow. She also reported some stiffness and achiness in her neck. An examination revealed tenderness over the right shoulder area, and tenderness over the AC joint region. She reported some difficulty with abduction. Otherwise she had fairly full range of motion. She had achiness on the right side of the neck, and a sense of tightness.

Petitioner had tenderness over the right elbow and proximal forearm. She had full extension and flexion. X-rays of the right elbow and shoulder showed no obvious fractures. Dr. Chen assessed a severe contusion to the right shoulder and right elbow areas. He released her to office type work with no lifting.

On 9/25/17 she returned to Dr. Chen and reported that she was doing better overall, but her right shoulder and right elbow still hurt. Petitioner had swelling over the right arm that was more noticeable. She still had difficulty with abduction, and pain over the upper trapezius area. She still had swelling over the lateral arm where she hit the ground. She had some tenderness over the elbow, and some mild discomfort over the extensor muscle group of the proximal arm. She was assessed with a right shoulder strain, right lateral epicondylitis, and a contusion. Dr. Chen referred petitioner to therapy. Her restrictions were continued. Dr, Chen gave her a forearm brace.

On 10/11/17 petitioner followed up with Dr. Chen. Her elbow pain was a little better. Her shoulder pain was about the same, and she was unable to raise her shoulder above horizontal without some pain. She had good movement across the elbow, flexion and extension and rotation. She still had swelling over the distal arm above the elbow. She was assessed with a right shoulder strain, impingement, right lateral epicondylitis and distal right arm contusion. Dr. Chen continued petitioner in therapy. She was restricted with lifting limited to 5 pounds, and work only below shoulder level. He did not want her working with small children, only the older kids. On 10/25/17 she was again seen by Dr. Chen and her condition, assessment and restrictions remained unchanged.

On 11/8/17 petitioner returned to Dr. Chen. She still had a lump over the right arm just distal to the deltoid region. She noted that therapy was not really helping. She stated that her shoulder really did not hurt much. She was able to fully abduct and internally and externally rotate. Her impingement symptoms had improved, as well as her right elbow and wrist. Her main complaint was the tenderness over the mid right arm just distal to the deltoid. An examination revealed that petitioner still had swelling, that Dr. Chen thought felt like a little hematoma. She was assessed with a severe contusion of the right arm with a hematoma. Dr. Chen referred petitioner to orthopedics at her request. He still restricted her from lifting, especially kids.

On 11/21/17 petitioner was seen by physician's assistant Brian Cummings in Orthopedics. She provided a consistent history of the accident. Petitioner's right arm was still sore and swollen. She reported difficulty with lifting any heavy objects or lifting her arm out away from her body. She also reported aching at night. Following an examination, and x-rays that showed very mild glenohumeral arthritis and mild AC joint arthritis, Cummings assessed right shoulder and right arm contusion with a small retained hematoma. Cummings recommended that petitioner resume physical therapy. He prescribed ice, Voltaren topical gel, and NSAIDs.

He restricted her from lifting over 5 pounds, no overhead work, and no repetitive motions or forceful grip with right upper extremity. She was also restricted to only working with the older children that did not need to be lifted or picked up.

On 12/18/17 petitioner returned to Cummings. She reported her pain as more of a tingling electrical radiating pain all the way down from her shoulder to her forearm, wrist and hand into her fingertips. Her motor function for the ulnar, medial and radial nerves was intact. An exam of the shoulder showed she was doing really well and had very good range of motion. She had no motion deficits, and negative horizontal cross arm, Hawkins, Neer's, Speed's, and O'Brien's. Overall, she had a very benign shoulder exam except that all the maneuvers exacerbated the tingling issues in her hand. Petitioner was instructed to continue in therapy. She was also referred to the Spine Center. Her restrictions remained the same.

On 1/15/18 petitioner returned to Cummings. She reported that the therapy seemed to be aggravating her right shoulder, so Cummings discontinued it. She continued with pain in the mid triceps that showed very subtle thickening and swelling to the tissue, tender to palpation. Her shoulder exam was quite benign. She had mild diffuse pain with shoulder manipulation but no real focally positive exam findings. Cummings had no reason other than the contusion for the pain in her right arm. Cummings referred petitioner to Dr. Gurtler. Her restrictions were continued.

On 1/24/18 petitioner presented to Dr. Victoria Johnson for her cervical spine. She gave a consistent history of the injury and her complaints. Petitioner had full range of motion of her neck and no tenderness. Following an examination, Dr. Johnson's assessment was cervical spondylosis with radiculopathy. An MRI of her cervical spine was recommended. Her restrictions were continued. X-rays of the spine showed straightening of the cervical spine.

On 1/30/18 petitioner presented to Dr. Robert Gurtler for her right shoulder. Her primary complaint was pain in the distal 3rd of the humeral area. He was of the opinion that it was not really shoulder pain, but was in the area where she had the contusion. Dr. Gurtler noted that the MRI of the cervical spine had not yet been done. He did not believe her complaints were related to her shoulder. He believed it was related to the contusion. He could not rule anything out with respect to the cervical spine. He noted a normal shoulder.

On 2/9/18 petitioner returned to Dr. Johnson after undergoing her cervical spine MRI on 2/6/18. She noted that the only abnormality was a mild disc bulge at C5-C6 with an annular tear. She saw no foraminal narrowing. She did not think petitioner's arm pain was coming from a cervical radiculopathy. Dr. Johnson recommended additional physical therapy for the neck.

On 2/21/18 presented to Dr. Chen following a new injury that day. She reported that she re-hurt her right shoulder again while trying to restrain a child. She reported that neither Dr. Johnson or Dr. Gurtler had been helpful in localizing her symptomatology and then the new injury occurred. An examination revealed discomfort over the entire right shoulder area. She had difficulty with abduction, and still had a hematoma over the lateral right arm from her previous injury. She was also tender. She was able to forward flex a little easier. She had some mild discomfit over the AC joint. With rotation to the right she had a funny feeling around the neck and the trapezius area. He reviewed the results of the MRI of the cervical spine and assessed right sided shoulder area pain aggravated from prior injury. Dr. Gurtler referred petitioner for an MR arthrogram of the right shoulder. Dr. Gurtler took petitioner off work.

On 4/3/18 petitioner underwent a right shoulder arthrogram. The impression was suggestive of a SLAP IV tear; small subscapularis recess bursitis; mild degenerative changes of the AC joint effacing the fat over the musculotendinous junction of supraspinatus which may produce positional impingement; and enlarged axillary lymph nodes.

On 4/6/18 petitioner returned to Dr. Chen. He noted that she had a pretty significant labral tear. He noted that she was still having difficulty with the shoulder. He assessed a right shoulder SLAP lesion. He referred petitioner for an orthopedic consultation. He continued her off work.

On 4/17/18 petitioner underwent a Section 12 examination performed by Dr. Michael Nogalski, at the request of the respondent. She provided a consistent history of the injury on 9/21/17 (sic) and her treatment to date. She complained of constant pain in her right shoulder, and stated that her shoulder hurts "all the way down". She stated that she felt as though her shoulder was weightless and felt heavy. She stated that driving caused her to have difficulty with her symptoms which were predominantly symptoms along the trapezial area on the back of the shoulder blade. She reported pain that went down to the side of her right shoulder and pain that radiated down to the arm. She noted that reaching and lifting made it worse. Petitioner also reported some increased pain while helping to restrain a child on 2/2/18 (sic). She reported that she was kicked and hit by the child and noted some increase in her pain. She reported that she had to help restrain the child. She denied any problems with her right shoulder before 9/21/18. Dr. Nogalski performed an examination, and a record review. On examination Dr. Nogalski could not identify any focal weakness with respect to the rotator cuff function. He noted active range of motion to 160 degrees forward flexion and abduction with some complaints of pain in the trapezial area upon full forward flexion and abduction. External rotation was 70 degrees. Internal rotation was to T10. She had a negative impingement sign, Speed's and Yergason's maneuvers, but they caused some pain in the left trapezial and posterior scapular region. Her scapular function appeared normal without winging. She

had tenderness on the medial border of the scapula and superior scapular boarder near the greater scapula and rhomboid insertion regions. She had normal motor strength at and below shoulder level with some breakaway weakness due to pain in the trapezial area upon maximal muscle testing above shoulder level. Her crossover maneuver was negative and shoulder stability tests were normal. Her neurovascular exam of the right upper extremity was intact.

Following his examination and record review, Dr. Nogalski's impression was right neck trapezial and posterior scapular pain without clear neurologic or anatomic correlation, with history of right shoulder contusion which appeared to be resolved. His other impression was a history of claimed left sided symptoms after a 2/21/18 event without any discrete complaints regarding that issue on examination. Dr. Nogalski was of the opinion that petitioner had some myofascial or mild neurologic symptoms in her right neck and scapular region. He could not identify any a specific shoulder issue other than some initial complaints noted by Dr. Chen with respect to impingement. He noted that petitioner had consistently not demonstrated any problems with respect to the right shoulder. He was of the opinion that petitioner's objective muscular findings as well as test results with respect to the cervical spine and shoulder did not identify any specific traumatic issues to be addressed. He could not identify a specific discrete hematoma or abnormality on the MRI that would objectively correlate with her symptoms, which appeared to be resolved.

Dr. Nogalski's diagnosis was right neck and posterior medial scapular pain with predominantly a myofascial component. He was of the opinion that given her two accident, her diagnosis might or could be related to the 2/21/18 or September 2017 event. He was of the opinion that trigger point injections in these regions may help shed some diagnostic insight and potential therapeutic benefit. If this did not help, he did not think there was anything else to help her neck or right shoulder. He was of the opinion that consideration could be given to epidural steroid injections if indicated by a pain management specialist. Dr. Nogalski did not identify any significant findings on the MRI to support that she has a remarkable annular tear that would be symptomatic. He believed petitioner likely had some mild spondylolytic issues but had a relatively patent foramina and did not appear to have a radicular component to her symptoms. Dr. Nogalski did not believe petitioner's objective findings clearly supported her subjective complaints. He was of the opinion petitioner could work full duty.

Petitioner underwent physical therapy for her neck from 4/3/18 through 4/23/18 at Carle Foundation Hospital. On 4/23/18 therapy was put on hold pending doctor recommendations given the results of the MRI.

On 5/8/18 petitioner returned to Dr. Gurtler and was seen by the doctor and his sports trainer John Flannell who took the history and did a physical before Dr. Gurtler saw her. She reported that she had not been making

any progress in physical therapy. She stated that she continued to have pain. She also reported numbness and tingling into her arm. She reported that her symptoms were exacerbated by overhead movements, reaching across her body, and long lever movements away from her body. She reported that she could not lift more than 5 pounds overhead. An examination revealed maximum tenderness over the AC joint and long head of the biceps. She had pain and crepitus with passive range of motion. She had 30 degrees of shoulder extension, 150 degrees of shoulder flexion, 90 degrees of shoulder abduction, and 60 degrees of shoulder external rotation at 0 degrees of abduction. Petitioner could not get her hand to her belt. Dr. Gurtler was of the opinion that petitioner indeed had a SLAP tear and this was consistent with her symptoms since her injury in 2017. He was of the opinion that this was why she had complaints in the whole arm. He was of the opinion that the SLAP tear was the source of her pain and started with her injury. Dr. Gurther recommended a right shoulder arthroscopic surgery with biceps release.

On 6/25/18 petitioner underwent a right shoulder arthroscopic biceps release and superior labral debridement with open removal of biceps from bicipital groove, extra-articularly. This procedure was performed by Dr. Gurtler. Her post-operative diagnosis was right shoulder biceps and superior labral tear with biceps adhered in the bicipital groove. Petitioner followed-up post-operatively with Dr. Gurtler. This treatment included a course of physical therapy.

On 7/6/18 petitioner followed-up with Dr. Gurtler. She was doing well overall. On 7/11/18 petitioner began a course of post-operative physical therapy. She remained in therapy.

On 8/3/18 petitioner was seen by Cummings. She had a small amount of keloiding and hypersensitivity. She was continued in physical therapy. She was able to flex to 150 degree and abduct to 100 degrees. On external rotation she had about 45 degrees as compared to 75 degrees on the left. On internal rotation she was able to reach to the bottom of her right back hip pocket. Cummings believed she could return to work with restrictions of office type work as of 8/6/18. He restricted her to mostly left hand work, no heavy lifting with the right upper extremity, and no classroom work or office work.

On 8/15/18 Dr. Nogalski drafted an addendum regarding petitioner after reviewing additional records from Carle Clinic including records from Flannell and Dr. Gurtler from 5/9/18 through 7/6/18. He also reviewed arthroscopic photographs. He was of the opinion that the rotator cuff appeared intact. He noted some generalized superior labral changes and biceps/superior labral insertional changes in the right shoulder. He saw no appreciable instability of the superior labral biceps complex. Dr. Nogalski was of the opinion that the histories petitioner provided, clinical assessments, and objective tests did not support that a specific injury occurred. He believed her clinical presentation was not one that discretely resulted in biceps tendon or superior

labral pathology findings. He believed that a patient in their 40's or 50's would have the same findings as petitioner had in her shoulder at the time of the arthroscopy. His review of the operative photos did not support objective validation that she sustained an injury in her right shoulder region. Additionally, he was of the opinion that petitioner's symptoms had been inconsistent and non-supportive for a superior labral tear or biceps tendon insertion site injury. He was also of the opinion that petitioner's shoulder complaints were not consistent anatomically with a biceps or labral injury. He believed that the MR arthrogram study and operative findings did not support unstable biceps or labral injury that would cause symptoms, and would certainly not cause the group of symptoms that she complained of after either event. He was of the opinion that his findings during his 4/17/18 exam did not support a biceps tendon or superior labral injury. Dr. Nogalski noted that Flannell's findings on evaluation on 5/8/18 were not verified by Dr. Gurtler. Dr. Nogalski was of the opinion that the petitioner's symptoms were subjective in nature and did not correlate specifically with biceps/labral complex injury. He was further of the opinion that the mere existence of this anatomic abnormality (which is fairly common in her age group) in a 54 year old would not reasonably correlate with the injury from her 2/21/18 event nor from her previous September of 2017 event. He was of the opinion that he never saw a purple biceps tendon as a chronic tendinopathic issue since this would imply an acute process, possibly related to the manipulation done by Dr. Gurtler during surgery. He did not believe that Dr. Gurtler's operative findings verify or document that there had been an acute or relatively recent injury dating back to the claimed 2/21/18 event.

On 8/23/18 petitioner was in a motor vehicle accident and was taken by ambulance to Carle emergency department. Petitioner was restrained and it was a low impact rear end at low speed accident. She reported shoulder and neck pain. There was minimal damage to her vehicle. She reported that the accident exacerbated the pain in her right shoulder. She had no numbness or tingling. X-rays of the right shoulder and cervical with spine were normal. She was examined and assessed with a muscle strain. Petitioner testified that after the accident she had increased shoulder symptoms for 2 weeks.

On 9/6/18 the evidence deposition of Dr. Robert Gurtler, an orthopedic surgeon was taken on behalf of petitioner. Dr. Gurtler testified that when he saw petitioner on 1/30/18 he thought her problem was neck pain, but then after the cervical MRI showed her problem was not coming from her neck, he was of the opinion on 5/8/18 that it became more evident that he needed to look harder at her right shoulder. Dr. Gurtler was of the opinion that a SLAP tear is difficult to diagnose. He testified that patients often describe it as pain in their shoulder, inside. He testified that this is consistent with the symptoms she gave him on 5/8/18, which was the clicking and grounding sound. He was of the opinion that he is frequently not sure that it is a SLAP tear until he has an arthro MRI and they put fluid in the shoulder that surrounds the tissues so you can see the tears better.

Dr. Gurtler was of the opinion that petitioner's symptoms were consistent with a SLAP tear. He testified that her rotator cuff was not torn, but she had a tear in the biceps attachment at the top of her glenoid.

Dr. Gurtler opined that the petitioner's need for surgery was caused by her work accident on 9/20/17. Dr. Gurtler opined that petitioner had to be off work from 6/25/18-8/3/18. Dr. Gurtler opined that petitioner's right shoulder condition was caused or aggravated by one or both of her work accidents. He further opined that all of the medical treatment petitioner had for her right shoulder at Carle was reasonable and medically necessary.

On cross-examination, Dr. Gurtler admitted that on 1/30/18 when he examined petitioner, he was of the opinion that petitioner had a normal shoulder and "I feel confident that her shoulder is not related to this"?, referring to 9/20/17 accident. Dr. Gurtler testified that on 5/8/18 he did not chart that he personally performed any objective examination of petitioner. He testified that Flannell did an O'Brien's test that day, which is more specific for SLAP tears, and he replicated it in his examination that day, even though he did not chart it. Dr. Gurtler testified that the findings during the surgery were chronic because 9 months had passed since the September 2017 injury. He was of the opinion that the tear of the biceps and superior labrum was the cause of her pain and that if he got rid of it, her pain would go away, and it did. He agreed that his examination showed pain on the medial border of the scapula and the superior scapular border would not support a biceps. He then testified that SLAP tears are very difficult to diagnose, and he did a poor job for petitioner, and he misdiagnosed her in January of 2018. Dr. Gurtler was of the opinion that petitioner was a sweet lady, but was not a good historian. He was of the opinion that petitioner's complaints with respect to the pain were somewhat diffuse in terms where the pain was and when it was, et cetera.

On 9/14/18 petitioner returned to Cummings. He noted that she continued to do relatively well. He noted that she was making good progress in therapy. She was able to flex to 165 and with passive assistance got to 180. She had 60 degrees of external rotation and on internal rotation. She was able to reach the L3 level reaching behind her back. Overall her motion was improving, and was not that painful. He continued petitioner in therapy, and then transitioned her to a home exercise program. He continued her restrictions.

On 10/22/18 petitioner returned to Cummings. She continued to make steady progress. She still had some apprehension about her shoulder. She was able to actively flex to 165 or nearly 170, and with passive assistance she was able to reach 180 degrees. She had 60 degrees of external rotation, and was able to reach slightly above L3 on internal rotation. Her motion was more confident and less inhibited. He continued her in physical therapy. He released her on 10/29/18 with no heavy lifting, no overhead work and a maximum shift length of 3 ½ hours.

On 11/5/18 the evidence deposition of Dr. Nogalski, an orthopedic surgeon, was taken on behalf of respondent. Dr. Nogalski opined that petitioner had right neck trapezial posterior scapular pain without a clear neurologic or anatomic correlation and had a history of right shoulder contusion, which seemed to have resolved. He also noted a 2nd event on 2/21/18 to the right side without any discreet complaints. He opined that her current complaints when he examined petitioner were related to some myofascial or mild neurogenic symptoms in her right neck and scapular region. Dr. Nogalski opined that petitioner did not have any specific shoulder issues around the glenohumeral joint that was supported by the MRI findings and previous exams from doctors that showed resolution of her symptoms in January as per Cummings exam and Dr. Gurtler's exam in January of 2018. He recommended trigger point injections or possible epidural steroid injections at C5-C6 for her symptoms that could be for diagnostic or potential therapeutic purposes. Dr. Nogalski did not see any evidence on the MRI to support a surgical recommendation. Dr. Nogalski testified that he did not see a purple tendon in the color arthroscopic pictures he reviewed. He testified that he did not ever see a purple biceps tendon when he did scopes. He was of the opinion that the surgical slides showed some superior labral changes and biceps superior labral insertional changes that were consistent with fraying or degenerative findings. He was of the opinion that he did not see any demonstrated instability of the superior labral biceps complex, which would be a symptomatic SLAP tear that would cause symptoms. Dr. Nogalski could not understand how only the single evaluation by athletic trainer Flannell found every test positive when there had been several physicians that had examined petitioner that had not found these tests positive. He admitted that the positive findings would be some clinical correlations to indicate that the biceps might be involved. He also noted the reference to resolved shoulder complaints in December of 2017. He could not explain how all of a sudden these tests were positive and petitioner was having surgery. He was of the opinion that that this did not add up to him. Dr. Nogalski had no objective validation that petitioner sustained an injury to her bicep or labral region of her right arm. He was of the opinion that that biceps and superior labral area are not loaded by a fall directly on the side of the shoulder. He believed direct blows to the side of the shoulder would cause contusions and possible chondral fractures where the ball hits against the socket. They would not load the biceps labral complex to cause an injury. Dr. Nogalski opined that petitioner had reached maximum medical improvement with respect to her two accidents, with the MMI for the September 2017 accident being in December of 2017. Dr. Nogalski opined that petitioner's need for surgery was not related to her two accidents.

On cross examination Dr. Nogalski testified that the last record he reviewed was from 7/6/18. Dr. Nogalski agreed that sometimes a treating physician would be in a better position to know a patient's medical situation, and other times an independent medical examiner would be in a better position. Dr. Nogalski agreed that either her 9/21/17 (sic) or 2/21/18 accident at work could be the date of onset of her symptoms. Dr.

Nogalski was of the opinion that a blunt trauma from a fall cannot strain the ligaments within the shoulder if the arm was tucked into the side. He then testified that any of the ligaments within a shoulder can be torn in a fall, partially or totally, and require surgery. He believed it would be difficult to tear a muscle in a fall with the arm to the side. Dr. Nogalski opined that petitioner's treatment prior to 4/17/18 was reasonable and necessary. Dr. Nagolski opined that petitioner did not need surgery at all and that her need for surgery was not related to her work. Dr. Nagolski admitted that he saw a suggestion of a SLAP tear in the MRI films just as the radiologist Dr. Safei did. However, he did not think petitioner had a symptomatic superior labral tear. Dr. Nogalski was of the opinion that Flannell's findings were inconsistent with previous exam findings, and noted that he is not a board certified orthopedic surgeon or shoulder specialist.

On 11/26/18 petitioner followed-up with Cummings for her right shoulder. She reported that she was back at work in the classroom for a while and has overall done quite well. She stated that she was only working part-time. She stated that she was ready to take on a bigger role. An examination revealed full range of motion, nearly the same as her left arm. However, her strength on the right was still lagging behind the left. Her rating was at least a 4+/5 on flexion and abduction, and she was able to lift against gravity and moderate resistance. Cummings wanted petitioner to complete her therapy, working on her strength. She was given a note to return to full duty work with only a limitation that she need not be in the classroom as the only adult with children in case there is an emergency where the children would need to be lifted to safety. Otherwise, petitioner had no restrictions. Cummings noted that that restriction would end once she completed her strengthening phase of her physical therapy. She was discharged on an as needed basis.

On 12/12/18 petitioner last underwent physical therapy. At that time petitioner was tender but not hurting. pain was 0-1/10 in the right shoulder. Petitioner tolerated the exercises without resistance. She had increased tendon irritation. Petitioner was instructed to do strengthening and range of motion stretching on alternate days at home to allow her muscles to recuperate. She was to continue with strengthening, work simulation, and body mechanics training as tolerated.

Petitioner testified that currently she cannot sleep on her right side, attend to her personal needs, or lift arm too high. She reported difficulty lifting groceries, heavy pots, grandchildren and laundry. She now does more with her left arm. She testified that at work she has difficulty lifting children onto the changing table, carrying the children, moving highchairs, moving strollers, moving cots. She testified that she is assisted by two other teachers when necessary. She testified that her tasks at work are more difficult now because of the pain in her right arm. Petitioner noted the same difficulties at both jobs. Petitioner admitted that any restrictions she has are self imposed and not placed on her by any physician.

In January of 2019 petitioner voluntarily resigned from her job for respondent and at Little Wings because she was moving to Chicago to be with her husband. She testified that her husband and children moved her to Chicago. She stated that she did pack her clothes. She currently works at the Children Development Institute. She started there on 3/12/19. Her duties are similar to those she had with respondent. She earns $14 an hour in her new job. She works 40 hours a day. She works with 2-3 year old children in her new position.

Petitioner testified that she was off work from 2/22/18-10/29/18. She stated that at that time she returned to light duty work, and on 12/12/18 was released without restrictions. Petitioner testified that she only takes over the counter medication for her right shoulder pain.

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

Two opinions were offered with respect to whether or not petitioner's current condition of ill-being is causally related to the injury she sustained on 9/20/17 or 2/21/18. It is unrebutted that petitioner had no documented problems with, or treatment for her right shoulder prior to the injury on 9/20/17. Additionally, the arbitrator finds that petitioner continued with complaints in her right arm throughout, even though at times the intensity varied. Petitioner provided consistent histories of her accidents on 9/20/17 and 2/21/18.

The arbitrator also notes that at first there was a question as to whether or not the pain in petitioner's right arm was coming from her neck or her arm. However, after additional testing of the cervical region it was determined that the pain was not coming from petitioner's neck.

Petitioner treated for her right arm with Dr. Chen, Dr. Gurtler, Cummings P.A., and sports trainer Flannell She was also examined by Dr. Nogalski at the request of the respondent. The arbitrator finds it significant that despite petitioner's right arm complaints, it was difficult for petitioner's healthcare providers to pinpoint the source of her pain. The arbitrator also finds it significant that petitioner's attempts at physical therapy often aggravated her symptomatology.

After it was determined that petitioner's cervical spine was not the source of her right arm/shoulder pain, and petitioner sustained an aggravation to her right arm/shoulder on 2/21/18, Dr. Gurtler recommended petitioner undergo an MR arthrogram the results of which were suggestive of a SLAP IV tear; small subscapularis recess bursitis; mild degenerative changes of the AC joint effacing the fat over the musculotendinous junction of the supraspinatus which may produce positional impingement; and enlarged axillary lymph nodes. Dr. Chen reviewed this and noted that petitioner had a pretty significant labral tear and was still having difficulty with her right shoulder.

On 5/8/18 petitioner was examined by sports trainer Flannell and Dr. Gurtler. Although Flannell did the examination, Dr. Gurtler also saw petitioner. He determined that petitioner had a SLAP tear and this was consistent with her symptoms since her injury in 2017. He was of the opinion that this is why she had had complaints in her whole arm. He was further of the opinion that the SLAP tear was the source of her pain and it started with her injury in 2017. He recommended surgery to address this. On 6/25/18 petitioner underwent a right shoulder arthroscopic biceps release and superior labral debridement with open removal of biceps from bicipital groove, extra-articularly. Her post-operative diagnosis was right shoulder biceps and superior labral tear with biceps adhered in the bicipital groove. Post-operatively petitioner followed-up with Dr. Gurtler and underwent physical therapy. Petitioner was eventually returned to light duty work and then full duty work without restrictions, which she had not been able to do before the surgery.

Dr. Gurtler admitted that when he first saw petitioner he believed her problem was with her neck and not her shoulder. However, when it was determined the neck was not the source of the symptomatology in petitioner's neck, he had the MR arthrogram performed and determined that the SLAP tear was the source of her problems all along. He was of the opinion that SLAP tears are difficult to diagnose. He noted that patients often describe it as pain in the inside of the shoulder, and this is consistent with the symptoms petitioner had on 5/8/18. He noted that he is frequently not sure it is a SLAP tear until he performs an arthrogram MR. He opined that petitioner's symptoms were consistent with a SLAP tear. He noted her rotator cuff was not torn, but she had a tear in the biceps attachment at the top of her glenoid. He opined that her need for surgery was her work accident on 9/20/17. He further opined that her right shoulder condition was caused or aggravated by one or both of her work accidents. Dr. Gurtler testified that although he did not personally chart anything on 5/8/18 he did replicate the O'Brien's test that day, which is more specific for SLAP tears. Dr. Gurtler admitted that SLAP tears are very difficult to diagnose, and he did a poor job petitioner when he misdiagnosed petitioner in January of 2018. He attributed some of this to the fact that petitioner was not a good historian, and her complaints with respect to the pain were somewhat diffuse in terms of where the pain was and when it was.

Dr. Nogalski was of the opinion that when he saw petitioner her complaints were related to some myofascial or mild neurogenic symptoms in her right neck and scapular region. He noted no specific shoulder issues around the glenohumeral joint that was supported by her MRI findings and previous exams. He was of the opinion that he saw no evidence on the MRI to support a surgical recommendation, but could not explain how after surgery she improved to the point where she was able to return to full duty work without restrictions, which she was unable to do before that. Dr. Nogalski agreed that the surgical slides showed some superior labral changes and biceps superior labral insertional changes that were consistent with fraying or degenerative

findings. He did not see any demonstrated instability of the superior labral biceps complex, which would be a symptomatic SLAP tear that cause symptoms. Despite all these opinions, Dr. Nogalski admitted that although he did view the pictures, he did not perform the surgery. Dr. Nogalski also admitted that the positive findings would be some clinical correlations to indicate the biceps might be involved. Dr. Nogalski was of the opinion that the biceps and superior labral area are not loaded by a fall directly on the side of the shoulder. However, he did not address the mechanism of petitioner's injury in Feburary 2018 and how that may relate to her current condition of ill-being. He was also of the opinion that a blunt trauma from a fall cannot strain the ligaments within the shoulder if the arm was tucked into the side. However, the credible medical evidence does not detail what position petitioner's arm was in when she fell, other than the fact that she fell on her shoulder and then her whole side. Dr. Nogalski then admitted that any of the ligaments within a shoulder can be torn in a fall, partially or totally, and require surgery. Although Dr. Nogalski agreed with the radiologist that there was a SLAP tear on the MR arthrogram, he did not think it was symptomatic. The arbitrator does not give much weight to this opinion, given the fact that after the surgery and post-operative treatment petitioner was ultimately released to full duty work without restrictions, something she was not able to do since the accidents. Dr. Nogalski also believed that a patient in their 40's and 50's would have the same findings as petitioner had in her shoulder at the time of the arthroscopy. He was also of the opinion that petitioner's symptoms were subjective in nature and did not correlate specifically with biceps/labral complex injury. Despite these opinions, Dr. Nogalski did not address the fact that prior to the surgery petitioner had undergone extended conservative treatment that included a few sessions of physical therapy with no lasting improvement and an inability to return to full duty work. However, after the surgery for the SLAP tear, petitioner was able to ultimately return to full duty work without restrictions.

Based on the above, as well as the credible evidence, the arbitrator finds the causal connection opinions of Dr. Gurtler more persuasive than those of Dr. Nogalski. The arbitrator bases this finding in part on the fact that Dr. Gurtler was her treating physician and also was the one that performed the surgery and was able to see the condition of her shoulder at the time of the surgery. The arbitrator finds the opinions of Dr. Nogalski unsupported by the credible medical evidence. The arbitrator also notes that petitioner was not a great historian; that petitioner had no problems with her right shoulder/arm prior to the injuries on 9/20/17 and 2/21/18; and, that following these injuries petitioner continued to be symptomatic and unable to work full duty without restrictions. However, after it was determined that the cause of her complaints was the SLAP tear, and after surgery was performed, petitioner was ultimately able to return to full duty work without restrictions, after her post-operative treatment that included a course of physical therapy.

The arbitrator finds the petitioner's current condition of ill-being as it relates to her right arm/shoulder is causally related to the injuries she sustained on 9/20/17 and 2/21/18.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Having found the petitioner's current condition of ill-being as it relates to her right arm/shoulder is causally related to the injuries she sustained on 9/21/17 and 2/21/18, the arbitrator finds the medical services that were provided to petitioner for her right arm/shoulder from 9/21/17 through 12/12/18 were reasonable and necessary to cure or relieve petitioner from the effects of the injuries she sustained on 9/21/17 and 2/21/18.

Respondent shall pay reasonable and necessary medical services for petitioner's right arm/shoulder from 9/21/17 through 12/12/18, as provided in Sections 8(a) and 8.2 of the Act.

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

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner's current condition of ill-being as it relates to her right arm/shoulder is causally related to the injuries she sustained on 9/21/17 and 2/21/18, the arbitrator finds the petitioner was temporarily totally disabled from 2/22/18 through 10/29/18, a period of 35-4/7. The arbitrator further finds the petitioner shall receive a credit of $5,904.34 for temporary total disability benefits already paid.

Respondent shall pay Petitioner temporary total disability benefits of $415.83/week for 35-4/7 weeks, commencing 2/22/18 through 10/29/18, as provided in Section 8(b) of the Act.

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

For injuries that occurred after 9/1/11, according to 820 ILCS 305/8.1B(b) the Commission shall base its determination of permanent partial disability based upon five factors including an AMA report, the occupation of the injured employee, the age of the employee at the time of injury, the employee's future earning capacity and evidence of disability corroborated by treating medical records.

With regard to subsection (i) of §8.1b(b), neither party offered into evidence an AMA impairment report into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the petitioner was a 53 year old Early Head Start Preschool Teacher. On 12/12/18 petitioner had her last physical therapy session and reported no pain, just some tenderness. As of that date petitioner was released to return to

work without restrictions, and continued to work without restrictions until she voluntarily resigned her position in January of 2019 to move to Chicago with her husband. Petitioner performs the same type of work in Chicago. Petitioner has continued to work without restrictions or accommodations since being released to full duty work. For these reasons the arbitrator gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that the petitioner was a 53 year old Early Head Start Preschool Teacher at the time of the injury. Petitioner was released from care to full duty work without restrictions. Although petitioner had no pain on her last day of physical therapy, she was tender. She had increased tendon irritation. She was instructed to do strengthening and range of motion stretching on alternate days at home to allow her muscles to recuperate. She was to continue with strengthening, work simulation, and body mechanics training as tolerated. She testified that at work she has difficulty lifting children onto the changing table, carrying the children, moving highchairs, moving strollers, moving cots. She testified that she is assisted by two other teachers when necessary. She testified that her tasks at work are more difficult now because of the pain in her right arm. Petitioner noted the same difficulties at both jobs. Petitioner admitted that any restrictions she has are self imposed and not placed on her by any physician. The Arbitrator notes that given her age, petitioner could potentially have over a decade of preschool teaching work ahead of her. For these reasons 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 petitioner was released to full duty work without restrictions. Petitioner testified that she currently earns $14.00. but did not state how many hours a week she works. For this reason the arbitrator is unable to determine how these wages compare to her wages for respondent. Additionally, the arbitrator notes that petitioner was able to return to her regular duty job without restrictions after she was released from care, and then voluntarily retired to move to Chicago with her husband. Therefore, the arbitrator gives little weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds the petitioner sustained an injury to his right shoulder. For this injury she underwent conservative treatment and ultimately underwent surgery for a SLAP tear. Following surgery, petitioner underwent a course of physical therapy and was ultimately released from all care on 12/12/18. At that time she had no pain, just some tenderness. However, petitioner testified that currently she cannot sleep on her right side, attend to her personal needs, or lift arm too high. She reported difficulty lifting groceries, heavy pots, grandchildren and laundry. She now does more with her left arm. She testified that at work she has difficulty lifting children onto the changing table, carrying the children, moving highchairs, moving strollers, moving cots. She testified that she is assisted by two other teachers when necessary. She testified that her tasks at work are

more difficult now because of the pain in her right arm. Petitioner noted the same difficulties at both jobs. Petitioner admitted that any restrictions she has are self imposed and not placed on her by any physician. The arbitrator finds it significant that despite these significant subjective complaints after her full duty release to work without restrictions, petitioner has made no attempt to followup with Dr. Gurtler or any other doctor for these complaints. Therefore, the arbitrator gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds the petitioner sustained a permanent partial disability to the extent of 10% loss of use of person as a whole pursuant to Section 8(d)2 of the Act.

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

Calvin Myatt,

Petitioner,

21IWCC0053

vs.

NO: 18 WC 013341

International Paper Company,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

21IWCC0053

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: FEB 3 - 2021
MEP/ypv
O121520
049

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

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

MYATT, CAROL
Employee/Petitioner

Case# **18WC013341**
18WC013342

INTERNATIONAL PAPER COMPANY
Employer/Respondent

21IWCC0053

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:

1816 FREDERICK W NESSLER LAW OFFICE
MATTHEW V KENNEDY
536 N BURNS LA SUITE 1
SPRINGFIELD, IL 62702

6020 GOLDBERG SEGALLA LLP
NATASA TIMOTIJEVIC
222 W ADAMS ST SUITE 2250
CHICAGO, IL 60606-5312

21IWCC0053

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

- [ ] 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)

CALVIN MYATT,
Employee/Petitioner

v.

INTERNATIONAL PAPER COMPANY,
Employer/Respondent

Case # **18** WC **13341**

Consolidated cases: **18 WC 13342**

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 **1/24/20**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0053

FINDINGS

On the date of accident, **7/12/17 and 8/17/17**, 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 not*** sustain an accident that arose out of and in the course of employment.

Timely notice of the alleged accidents ***was*** given to Respondent.

In the year preceding the injury, Petitioner earned **$48,606.48**; the average weekly wage was **$934.74**.

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

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

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$48,276.00** for $10,296.00 in short term disability benefits, and $37,980.00 in long term disability benefits, for a total credit of **$48,276.00**.

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

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury that arose out of and in the course of his employment by respondent on 7/12/17 or 8/17/17. Petitioner's 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.

Signature of Arbitrator

2/8/2020
Date

ICArbDec19(b)

FEB 18 2020

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 60 year old lead operator, alleges he sustained an accidental injury to his low back that arose out of and in the course of his employment by respondent on 7/12/17 and 8/17/17. Petitioner was in charge of 6 machines for respondent in cell #2. He ran the machines, did computer work, set the temps and made adjustments to the machines, and made sure the machines turned out a good product. Petitioner testified that he would turn wrenches on the machines 90% of the time.

He described the machines he worked on as being 40-50 feet long with a feed table attached, and 10 feet wide. He testified that the 6 machines were set side by side with a gap between them. The machines he worked with produced paper cups for fast food restaurants.

Prior to the alleged injuries herein, petitioner underwent a spinal fusion at L4-L5, and was returned to work without restrictions on 12/1/15.

Petitioner offered into evidence Prompt Care records from Dr. Arora, his primary care physician, from 7/25/16 through 7/5/17. On 8/31/16 it was noted that petitioner fell on his right buttock the day before and had a bruise. It was also noted that his back pain was well controlled. On 9/27/16 petitioner was still complaining of back pain. It was noted that petitioner had undergone back surgery the prior year. On 10/7/16 he was seen for an unrelated issue, but it was noted that he still had pain in his knees, low back, ankles and shoulders. It was noted that petitioner treated with a rheumatologist. On 10/25/16 petitioner's joint and low back pain was still significant. On 11/22/16 petitioner was seen for his pain control and it was noted that his rheumatologist appointment had been moved up. There were no specific back complaints between 11/22/16 and 4/10/17. On 4/11/17 it was noted that he had persistent pain well controlled with pain meds.

On 7/12/17 petitioner testified that he was running all 6 machines when they began locking up due to a loss of air pressure. Petitioner knew he would need to get the machine cleaned out of paper right away so that the heaters did not start the paper on fire. He started at machine #1. He went to the back of the machine and turned the controls off. To do this he had to turn a large nut on the top of the machine with a 3 foot breaker bar with his right arm, and with his left arm reach up and push the brake release and give it a big yank. Each big yank would hand crank the electric motor and manually move the paper out of the machine. It would take about 30-40 yanks to crank the electric motor enough times to manually remove the paper in the machine. After each yank petitioner would pull out some of the paper. He would then repeat the process until all the paper was pulled out. Petitioner testified that as he was holding the breaker bar with his right arm, he gave a big yank with the left arm to crank the electric motor. He testified that when he did this the electric motor did not move and he felt a pop and immediate pain in his low back and went to the ground. After a few minutes he got up. He stopped yanking at that time.

About 5 minutes after this alleged injury, the supervisor came and told everyone to get off the floor and go to the break room. It was then determined that lightening had struck the condenser and all employees were sent home. Petitioner did not work anymore that day.

Petitioner returned for his next shift on 7/13/17. He stated that he told Andrew, an operator, that he did not feel well. As a result, Andrew did a lot of the work that day. Petitioner stated that he still performed some work that day, but continued to experience pain in his low back. Petitioner testified that he continued working, despite his pain, until 8/17/17. He testified that sought no treatment during this period.

However, on 8/1/17 petitioner presented to Prompt Care and saw Dr. Arora. It was noted that he was in his "usual state of health". It was noted that he had surgery in September of 2015, and it "never helped". It was also noted that it "strengthened back but didn't help with pain". He was diagnosed with lumbar stenosis. A Norco taper was discussed. He was referred to Dr. Parks for his pain. It was also noted that he may benefit from epidurals. Petitioner made no mention of any injury at work on 7/12/17.

On 8/15/17 petitioner presented to Dr. Brian Parks. He complained of pain all over his entire body, but particularly his low back, his feet and his right knee. He complained of low back pain that went all the way down his legs to his feet, and his right knee from a forklift injury a long time ago. He also complained of pain all over his shoulders. He reported the onset of his back pain as two years ago, and his knee pain as 14 years ago. He stated that his back pain started from an accident while he was walking on concrete for 12 hours a day. He stated that it radiates down to his feet and feels like two blocks of ice. He rated his pain at a 7/10, and stated that it ranges from 6/10 to 9/10. He described his pain as burning, sharp, stabbing, crushing, freezing, and tingling. He stated that his pain was constant, and that walking, climbing stairs, straining, bending backwards, and bending forwards made his pain worse. He reported generalized weakness that was nothing new or progressive. He also reported some dizziness and numbness. Petitioner stated that this pain had really affected his job and affected him socially. He stated that it was hard for him to perform any daily activities. He stated that he hurts all the time and has had 15 different surgeries in the past, but could not remember them all. He noted that the spinal fusion at L4-L5 was performed by Dr. Rerri. He reported that he got a little better after the spinal fusion for a while, but over the last little while his pain was coming back how it was before, and possibly even a little bit worse than it was before the surgery in September of 2015. Dr. Parks examined petitioner and assessed lumbar radiculopathy, failed back syndrome, right knee pain, and chronic pain syndrome. Dr. Parks ordered a new lumbar MRI since petitioner's pain was worse than before his spinal fusion, and different than what it was before. It was scheduled for 8/21/17at 7:30 am. Petitioner made no mention of any injury at work on 7/12/17.

On 8/17/17 petitioner was at work loading the front end of the machine. He noticed that his paper cart was empty. As a result, he went to the holding area to get another cart of full paper. Petitioner attached an ergotug (2 ½ foot tall electric motor with a hydraulic pump) to the cart full of paper. He testified that the full cart of paper weighed about 2000 pounds.

Petitioner testified that the nose piece of the ergotug goes under the cart and lifts it so that you can move the cart. Petitioner did this and moved the cart of paper back to the machine he was loading. Once at the machine he needed to get the cart against the bump stops. However, with the ergotug under the cart he could not move the cart against the bump stops. Since it was about 4 feet away, he removed the ergotug and attempted to push the cart back against the bump stops. To do this petitioner pushed off with his left leg and right shoulder to try and get the cart, weighing in excess of a ton, rolling towards the bump stop. Petitioner testified that as he did this, he heard something pop in his back and he went to the floor. He testified that it felt like a razorblade in his low back. Petitioner testified that he told Andrew that he hurt his back and he was going to see the doctor. This incident occurred on Friday, and he was off Saturday, Sunday and Monday.

On 8/21/17 petitioner returned to Dr. Arora at Prompt Care. It was noted that he saw Dr. Parks. It was also noted that petitioner had severe low back pain with no leg pain. It was noted that petitioner wanted to try a Fentanyl patch. Petitioner was given an off work slip from 8/14/17 until further notice. Petitioner made no mention of any work injury on 7/12/17 or 8/17/17.

On 8/22/17 petitioner underwent x-rays of his lumbar spine. The indication was low back pain, postlaminectomy syndrome. The impression was status post L4-L5 laminotomy and fusion. There was no evidence of hardware complication. Also noted was stable mild features of degenerative disc disease. Petitioner made no mention of any work injury on 7/12/17 or 8/17/17.

On 8/29/17 petitioner returned to Dr. Brian Parks for his lower back pain, legs going numb, and burning. He reported that he had these symptoms for about 2 months and no treatment had helped. He stated that he had tried pain killers but he was still in pain. Petitioner underwent a physical therapy assessment and certification that day. It was noted that petitioner had a referring diagnosis of lumbar radiculopathy. Petitioner presented with multiple impairments including inadequate length and strength of his hip musculature, decreased joint mobility of lumbar spine and bilateral hips, and decreased range of motion of the lumbar spine and bilateral hips. It was noted that these impairments were contributing to his inability to perform work duties, sleep uninterrupted, ambulate for greater than 10 minutes and stand for prolonged periods of time. He had another physical therapy session on 8/31/17. Petitioner made no mention of any work injury on 7/12/17 or 8/17/17 Dr. Parks or in therapy.

On 9/5/17 petitioner underwent another physical therapy session and low back evaluation. He reported that he had been experiencing back pain for many years, with surgery about 2 years ago, which took away a lot of the pain at that time. He further reported that a couple months ago he began having back pain again, and that now it was unbearable. It was noted that petitioner was off work secondary to his low back pain. The best position to relieve his pain was sitting and leaning to his left side. He stated that his pain was worst in the morning after waking up. He had tried heat/ice packs with no success. Petitioner made no mention of any work injury on 7/12/17 or 8/17/17.

A physical therapy daily treatment note for 9/5/17 noted that "patient reports falling down stairs this past Sunday. He led w/his bad leg (left side), and his knee gave out on him, and he fell down the stairs." He noted that his back felt sore. He rated it at 6/10. Petitioner made no mention of any work injury on 7/12/17 or 8/17/17.

On 9/5/17 petitioner also went to Prompt Care to see Dr. Arora after falling down the steps the day before due to back pain. He stated that he saw Dr. Parks who ordered 6 weeks of physical therapy, and he was already in his second week. On 9/25/17 he returned and reported that he reinjured his low back at work. He discussed how his pain felt. He stated that workers' compensation had approved his MRI. (Notes are handwritten and not totally legible). Petitioner made no mention of any work injury on 7/12/17 or 8/17/17.

On 9/7/17 petitioner underwent his fourth and final physical therapy session. He reported that therapy was not helping. However, he did note it did help with his stiffness. He reported that his pain remained constant at a 6/10. Petitioner made no mention of any work injury on 7/12/17 or 8/17/17.

On 9/12/17 petitioner presented to Physician's Assistant Stacey Harminson at Sarah Bush Lincoln, at the request of the respondent. Petitioner gave a history that in late July of 2017 the machine stopped working due to a power outage. He reported that he tried to manually rotate the motor and pull on a breaker bar that he thought would move easily. He stated that breaker bar did not move at all and he twisted his mid/low back causing immediate pain. He stated that after a couple weeks this pain improved and he did not seek any treatment at that time. He also reported that on 8/17/17 he was pushing a cart that weighed over 1000 pounds onto a lift and again had left sided mid/low back pain. He reported that after 3 days of being off work the pain continued and he saw his primary care physician. He was given hydrocodone which did not help. He was sent for therapy and attended 4 sessions without relief. He denied any further testing on his back. He stated that he had been off since the injury, and the pain was now radiating to up into his neck. He also reported occasional pain that radiates into his posterior thighs. He denied any numbness or tingling of the extremities. Following an examination petitioner was diagnosed with a sprain of the lumbar spine. He was instructed to take ibuprofen/Tylenol as directed; to

use ice and heat as directed; and do range of motion exercises as directed. He was given a TENS unit, and Flexeril to take as needed. He was instructed to lift only less than 10 pounds. He was also instructed to limit bending and twisting. His shifts were set to a maximum of 8 hours. An MRI of the lumbar spine was ordered.

On 9/14/17 the Workers Compensation First Report of Injury was completed by Jennifer Hastings, Claims Examiner. She noted that respondent was notified of the injury on 9/12/17, and the date of injury was noted as 9/7/17 at 12:00 am. The type was injury was identified as a strain. How the injury occurred was identified as discomfort in back lifting. Petitioner never completed any injury reports.

On 9/27/17 petitioner underwent an MRI of the lumbar spine with and without contrast. The impression was degenerative and postoperative changes of the lumbar spine with a diffuse disk bulge and degenerative facet joint change at multiple levels of the lumbar spine.

On 9/27/17 petitioner also followed-up with PA Harminson. Petitioner reported that his pain was increasing. He stated he could not sit more than 10 minutes without his pain increasing from "5-6" to "8-9". He reported that his pain in his back was stabbing. He also reported difficulty sleeping. He stated that the Fentanyl patch was not helping. He stated that he had not yet returned to work because his employer had not contacted him. Harminson was of the opinion that the findings on the MRI were not surgical in nature. A referral was made to orthopedics because he was having such severe pain despite the fentanyl patch. He was also referred to a pain clinic for pain management. His restrictions remained the same, and he was released on an as needed basis.

Petitioner did not return to Prompt Care and Dr. Arora until 11/28/17. At that time, he complained of low back pain and pain in his legs that was unbearable and constant. He reported that he could not do his routine activities. He reported back spasms. Petitioner was taken off work for his back pain until further notice.

On 12/27/17, and monthly through 7/18/18 petitioner followed-up with Dr. Arora at Prompt Care for his severe low back pain.

On 8/2/18 petitioner was examined by Dr. Bernard Rerri. His chief complaint was low back pain. Petitioner gave a history of work accidents in July of 2017 pulling on a brake, and in August of 2017 pushing a 2000 pound cart. He reported pain now in his back and left buttock. He also reported frequent exacerbations leading to falls. An examination revealed no impairments. Dr. Rerri diagnosed an occupational back injury, myofascial back pain, left SI joint pain/instability, and post lumbar fusion syndrome. Dr. Rerri refilled petitioner's Norco. An x-ray of the lumbar spine showed the posterior fusion and multilevel mild degenerative changes.

On 8/8/18 petitioner returned to Dr. Rerri with ongoing back pain. Petitioner testified that he could not see Dr. Rerri before this because Dr. Rerri had left Bonutti Clinic and did not get his certification for Centralia Orthopedic and Spine Center until now. Dr. Rerri noted that petitioner had full recovery from his lumbar fusion in 2015 until 2 further back injuries at work. X-rays were taken that showed stable hardware, no adjacent instability, and some callus behind the cage. Dr. Rerri offered a left SI joint injection arthrogram to reduce symptoms. He also ordered a CT of the lumbar spine.

On 8/17/18 petitioner underwent a CT scan of the lumbar spine. It revealed the posterior L4-L5 fusion, moderate central stenosis at L2-L3 and severe central stenosis at L3-L4; mild foraminal narrowing at L3-L4; mild central stenosis at L4-L5; mild to moderate right foraminal narrowing and mild left foraminal narrowing at L4-L5; broad based right sided disc bulging at L5-S1 with mild impression on the thecal sac and nerve root; mild left foraminal narrowing at L5-S1; and 2.5 cm left adrenal gland lesion.

On 8/22/18 petitioner returned to Dr. Rerri for back and right leg pain. Dr. Rerri noted that the CT scan confirmed a solid fusion at L4-L5, with a slight exuberant callus on the right side. Also noted was moderate to severe stenosis at L3-L4. Dr. Rerri offered DLIF L3/L4 and MIS decompression. On 9/19/18 petitioner's condition was unchanged. Dr. Rerri's diagnosis was radiculopathy of the lumbar region, and spondylosis without myelopathy or radiculopathy of the lumbar region. Petitioner noted that his back and thigh pain was getting worse. Dr. Rerri's recommendations remained the same.

On 10/12/18 Dr. Harel Deutsch performed a Section 12 examination of petitioner, at the request of the respondent. Petitioner gave a history of pulling a breaker bar and felt lower back pain on 7/12/17. He also gave a history of his alleged injury on 8/17/17 when he was pushing a 2000 pounds cart of paper. He stated he was sent to a physician's assistant and was angry about it. He further stated that he has not worked since the alleged accidents. Dr. Deutsch performed a record review and examination. He also reviewed surveillance reports for 9/22/17, 9/24/17 and 9/24/18.

Dr. Deutsch's diagnosis was no acute changes on the 2017 lumbar MRI following the alleged accidents on 7/12/17 and 8/17/17. He also diagnosed a lumbar strain from his 7/12/17 alleged work accident. He was of the opinion that petitioner had a prior 2015 lumbar fusion and ongoing complaints of back pain prior to the 2017 alleged work accident. He was of the opinion that his current condition appeared to be related to his preexisting lumbar degenerative changes. Dr. Deutsch was of the opinion that petitioner had complaints of lower back pain that were unchanged from complaints prior to the alleged accident, and the alleged accidents did not accelerate, aggravate or exacerbate any condition. Dr. Deutsch noted that there was no malingering although petitioner was convinced his prior 2015 lumbar surgery was related to a work injury that was not properly compensated. He was of the opinion that

petitioner's care to date had been reasonable and related to the alleged 7/12/17 accident, but any further care would not be related to the 7/12/17 work accident. Dr. Deutsch was of the opinion that an evaluation by a spine surgeon would be reasonable, but not related to his lumbar strain and 7/12/17 and 8/17/17 work injuries. He was also of the opinion that a CT would also be reasonable but not related to these alleged injuries, but rather to his prior fusion. Dr. Deutsch was of the opinion that petitioner was not in need of any restrictions related to his alleged injuries in July and August of 2017. He was further of the opinion that petitioner was at maximum medical improvement for his 7/12/17 and 8/17/17 lumbar strain as of 1/1/18.

On 3/11/19 Dr. Rerri drafted a letter to Mr. Nessler, petitioner's attorney, in response to his letter dated 2/26/19 requesting a medical legal report on petitioner. Dr. Rerri noted that following the lumbar fusion at L4-L5 petitioner was returned to work within six months post-surgery. He believed petitioner further reinjured his back at work on 7/12/17 and 8/17/17, and following these episodes he has been troubled with back and lower extremity pain refractory to various treatments including physical therapy, medications, and modified activity. He noted that petitioner was unable to return to his job as a result of his persistent symptoms. Based on his review of petitioner's history, and his physical findings, imaging and records, he opined that petitioner's current symptoms and disability are secondary to the injuries he described at work. Dr. Rerri offered petitioner further surgery to his back to relieve his symptoms and allow him to return to activity and work after a relevant period of recovery. He opined that petitioner's current problem is due to lumbar stenosis at L3-L4 with spondylosis and radiculopathy above the previous fusion he had at L4-L5. He was further of the opinion that petitioner's current pain and disability are caused by his further injury at work in July and August of 2017.

Dr. Rerri was of the opinion that the work related incidents were sufficient to cause the diagnosis of lumbar spondylosis with radiculopathy; that the recent injury at work in July and August of 2017 had led to the aggravation and exacerbation of existing level spondylosis at the L3-L4 level; that surgical treatment requiring a fusion and decompression at L3-L4 was recommended; and that petitioner's off work status was related to his current condition. Dr. Rerri was of the opinion that petitioner has adjacent level lumbar spondylosis and radiculopathy, and his symptoms were exacerbated and aggravated by his injury at work in July and August of 2017. He was further of the opinion that petitioner remained unable to work.

On 10/25/19 the evidence deposition of Dr. Bernard Rerri, an orthopedic surgeon, was taken on behalf of petitioner. Dr. Rerri opined that petitioner was at maximum medical improvement with no restrictions prior to the work accident in August of 2017, and was completely free from his care and symptoms prior to that injury from the 2015 surgery, since he released him to full unrestricted duty on

12/1/15. He further opined that the two work accidents in 2017 were sufficient to cause the symptoms that he was currently having, and the need for the treatment he recommended.

On cross-examination, Dr. Rerri noted that on the 7/31/15 lumbar MRI petitioner had a moderate left L3-L4 lateral recessed stenosis. He was unaware of the MRI of petitioner's lumbar spine performed 9/26/17. In reviewing both of them he saw no significant change in petitioner's condition at L3-L4. He noted that it is not unusual for someone petitioner's age to have symptomatic stenosis, even though it can also be asymptomatic. Dr. Rerri was of the opinion that stenosis can also be degenerative. He noted that once it starts to develop, it does not improve. He stated that the some of the symptoms associated with stenosis are back pain, and pain down the lower extremity. He was of the opinion that the MRIs of petitioner's lumbar spine in 2015 and 2017 support stenosis of a degenerative progression. He was also of the opinion that it was possible that petitioner could have experienced a natural progression of his degenerative stenosis and it became symptomatic. Dr. Rerri admitted that the only record he saw from December 2015 until the time he saw petitioner in 2018 was the MRI from Sarah Bush. Dr. Rerri was of the opinion that following a lumbar fusion in a degenerative spine there is some ongoing chronic pain that with medications, support and exercise one would be able to live with. He noted petitioner was able to live with it and was working full time. He was of the opinion that there was no evidence on the September 2017 MRI or his CT scan to indicate any acute injury. Dr. Rerri testified that he did not review any of petitioner's treatment records from 2016 or until his visit with petitioner in August of 2018, except for the 9/27/17 MRI of the lumbar spine.

On 11/6/19 the evidence deposition of Dr. Harel Deutsch, a neurosurgeon, was taken on behalf of respondent. Dr. Deutsch was of the opinion that petitioner had ongoing complaints of lower back pain following his spinal fusion in 2015, based on the fact that he continued to follow up with his doctors beginning in July of 2016, and he continued to be on pain medications. Dr. Deutsch noted that on 9/5/17 petitioner reported that he fell down some steps due to back pain, but made no mention of either the 7/12/17 or 8/17/17 alleged work accidents. He also noted that the first mention of these alleged work incidents is not until 9/12/17. Dr. Deutsch was of the opinion that the findings at L3-L4 on the September 2017 MRI were minimal degenerative findings that are consistent with, and expected in, an individual of petitioner's age. Dr, Deutsch noted that findings at L3-L4 on the MRI in July 2015 and the MRI from September 2017 were essentially unchanged.

On cross-examination Dr. Deutsch noted that after a fusion at one level there is a possibility that you can have increased degenerative changes at the level above or below the fusion, and subsequently, need another surgery. Dr. Deutsch was of the opinion that a CT is good at showing instrumentation, screws, rods and bones, and an MRI is good at seeing nerves and spinal fluid and discs. He was of the

opinion that if you want to assess a fusion and see if the bones are growing together you get a CT scan, and if you want to see if anything is pressing on a nerve, a disc herniation, or stenosis, you get an MRI. He noted that stenosis can only be seen on an MRI, or a CT myelogram. He could not understand how a CT that is not a CT myelogram would show stenosis or any types of narrowing, unless someone was looking at shadows and they might interpret it as possibly showing stenosis when it is not there. He noted that MRIs are the definitive test. Dr. Deutsch was of the opinion that any physical activity can result in some back pain and some time off may be reasonable, maybe up to 3 months. Dr. Deutsch was of the opinion that you cannot perform surgery without any objective findings.

Petitioner testified that at some point he was terminated but does not know when. He testified that he had insurance for 90 days and then had to pay for his treatment out of pocket.

Petitioner testified that he felt great after his fusion in 2015, and went back to work at 100% after three months. He further testified that as he was working the next two years, there were intermittent doctor visits and Prompt Care visits for some back pain. He testified that his post surgery pain was different than before surgery and was usually due to overwork and back spasms.

Petitioner testified that after the incident on 8/17/17 he visited Prompt Care. He further testified that he had the fall down the stairs. He stated that he fell when he lost feeling in his legs while walking down the stairs. He stated that he had bruises but his back pain was not worse because it was already bad.

Currently, petitioner testified that he is in a lot of pain, his legs tingle, and his back is killing him. He complained of pain 24 hours a day. He also complained of numbness, and burning in his feet 2-3 times a week. Petitioner testified that he has difficulty standing in place and has to sit after 30-45 minutes. He further testified that he can sit for 10 minutes before he has to move around. Petitioner still uses Fentanyl patches. He testified that it takes away the sharp icepick type pains, but he is still uncomfortable. Petitioner testified that he started working for respondent in early 2015 and had a bad knee before he ever started working there. Petitioner testified that he cannot do his regular duty job, and was never offered any light duty work.

On cross examination petitioner testified that following his release to full duty work on 12/1/15, he did not return to work until the beginning of 2016. He further testified that between that release and the alleged accident on 7/12/17 he did have medical treatment for various conditions and complaints, but not for his back. He then stated that he may have had some complaints of low back uncomfortableness, but not necessarily pain.

With respect to his knees, petitioner testified that he has a limp, but does not favor one leg over another. He stated that he has had a limp since 2003 after sustaining an accident at that time.

Respondent offered into evidence surveillance of petitioner on 9/24/17, 5/10/19, and 5/17/19. There was no activity noted on 9/24/17. There is a lot of video from 5/10/19 showing petitioner out and about going in and out of various businesses. Of note, the arbitrator finds it significant that petitioner was able to load a large bag of what appears to be fertilizer into the back of his truck without lowering the tailgate, pushing a cart containing several large bags and a large bucket of what could be fertilizer or pet food and then lowering the tailgate of his truck, bending forward, and tossing the large items into the bed of the truck without difficulty. Petitioner is also seen that day carry several bags from his truck. Finally, on 5/17/19 petitioner is seen leaving a Wal-Mart, pushing a cart full of items. Petitioner pushes the cart through the Wal-Mart parking lot, unloads his shopping cart into the bed of a pickup truck, including bending down to retrieve an item from the bottom of the cart.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner is alleging he sustained an accidental injury that arose out of and in the course of his employment by respondent on 7/12/17 and 8/17/17.

With respect to the alleged accident on 7/12/17 petitioner claims that while trying to manually crank the electric motor of a machine with a breaker bar, on one yank the electric motor did not move and he felt an immediate pain in his low back and went to the ground. Petitioner did not complete an accident report with respect to this alleged injury on 7/12/17, or at any other time. Additionally, the arbitrator finds there is no credible evidence to support a finding that petitioner reported this alleged injury to his supervisor, or any representative of Respondent.

Following the alleged injury, all employees were sent home for the day. Petitioner returned to work the next day. He testified that he told "Andrew", an operator, that he did not feel well. Again, there is no credible evidence to support a finding that petitioner reported the injury to any respondent representative on 7/13/17, or that he reported any specific injury to Andrew.

Following this alleged injury, petitioner presented to his primary care physician Dr. Arora, at Prompt Care on 8/1/17. The notes of that office visit do not include any history of any alleged injury to his low back at work on 7/12/17. In fact, it specifically noted that petitioner told Dr. Arora that he had surgery in September of 2015 and "it never helped". It was also noted that petitioner told Dr. Arora that the surgery on 2015 "strengthened back but did not help with pain." Dr. Arora diagnosed lumbar stenosis. A Norco taper was discussed, as well as the fact that he may benefit from epidurals. Dr. Arora referred petitioner to Dr. Parks.

Petitioner's next medical treatment after the alleged 7/12/17 injury was on 8/15/17 when he presented to Dr. Parks complaining of pain all over his entire body, but particularly his low back, his feet and his right knee. He complained of low back pain that went all the way down his legs to his feet, and pain in his right knee from a forklift injury a long time ago. He also had complaints of pain all over his shoulders. With respect to any alleged work injury, petitioner only reported that his low back pain started from an accident when he was walking on concrete for 12 hours a day. He stated that the pain radiates down to his feet and feels like two blocks of ice. He described his pain and reported it as constant. He reported generalized weakness that was not something new. He also reported numbness and some dizziness. He stated that he has had 15 surgeries, including a spinal fusion at L4-L5 in 2015. He noted that he got a little better after the fusion for a while, but over the last little while his pain was coming back how it was before, and possibly even worse than what it was before the surgery in 2015. The arbitrator finds it significant that petitioner again made no mention of any injury at work on 7/12/17, or any other date. Dr. Parks ordered an MRI of the lumbar spine at that time based on petitioner's significant complaints.

Petitioner alleged another injury to his low back two days later on 8/17/17. Following that alleged injury petitioner continued to treat. This included office visits and 4 physical therapy visits. There was no mention in these records of any alleged injuries at work on 7/12/17 or 8/17/17. Then on 9/12/17 he presented to PA Harminson, at the request of the respondent, and reported an alleged injury in late July of 2017 while manually rotating the motor with a breaker bar. He reported that he had immediate pain but that after a couple weeks the pain improved and he did not seek any treatment for this alleged injury. As of 9/14/17 petitioner had still never completed any accident reports.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his low back that arose out of and in the course of his employment by respondent on 7/12/17. The arbitrator bases this finding on the fact that there is no credible evidence that petitioner reported the alleged injury to any respondent representative at the time of the injury or prior to 9/12/17; that petitioner did not make any mention of any alleged low back injury occurring at work on 7/12/17, or any other day, when he sought treatment for ongoing back complaints related to his fusion surgery in 2015, on 8/1/17 and 8/15/17; and the arbitrator's finding that the petitioner's testimony regarding this alleged low back injury on 7/12/17 is less than credible, given the fact that there is no credible evidence to support this claim via an accident report, notice to respondent's representative, or any mention of any injury in the medical records most contemporaneous to the alleged injury or for the next two months.

Petitioner is also alleging another injury to his low back on 8/17/17 while working for respondent. On this date, petitioner alleges that he injured his low back while pushing a cart with 2000 pounds of paper on it. Following this alleged injury petitioner testified that he reported his injury to "Andrew" an operator. However, there is no credible evidence to support a finding that "Andrew" is a representative of respondent; that petitioner and/or Andrew reported this alleged injury to respondent's representative; or that petitioner and/or Andrew completed any accident report. Additionally, petitioner did not call 'Andrew" as a witness to corroborate his claim that he injured his low back at work on 8/17/17.

In addition to no notice on or about the alleged date of injury, petitioner sought treatment with Dr. Arora on 8/21/17 and made no mention of any work injury on 8/17/17 or 7/12/17. In fact, all he did was mention that he saw Dr. Parks and still had severe low back pain, asked for a Fentanyl patch, and was taken off work. The next day, 8/22/17, petitioner underwent x-rays of his lumbar spine, and again there was no mention of any work injury on 8/17/17 or 7/12/17. On 8/29/17 petitioner returned to Dr. Parks and again made no mention of any work injuries on 8/17/17 or 7/12/17. In fact, the arbitrator finds it significant that on that date petitioner did make specific mention to Dr. Parks that he had pain in his low back, as well as numbness and burning in his leg for about two months and no treatment had helped. This would put the onset of his back pain as June 2017. Dr. Parks diagnosed multiple impairments that included inadequate length and strength of his hip musculature, decreased joint mobility of the lumbar spine and hips, and decreased range of motion of the lumbar spine and bilateral hips.

On 9/5/17 during one of his physical therapy sessions for his low back, petitioner again made no mention of his alleged injuries on 7/12/17 and 8/17/17, but did report that he had been experiencing back pain for many years, with surgery 2 years ago, which took away a lot of the pain at that time, but then a couple of months ago he began having back pain again, and it was now unbearable. However, as with his 10 other visits to healthcare providers, and diagnostic tests since 7/13/17, petitioner made absolutely no mention of any alleged injuries to his low back at work on either 7/12/17 or 8/17/17. Additionally, during this period petitioner never reported these alleged injuries to respondent's representatives, nor did he complete any accident reports involving these alleged injuries.

Then on 9/5/17 petitioner presented to physical therapy and it was noted that "patient reports falling down stairs this past Sunday. He led with his bad leg (left side) and his knee gave out on him, and he fell down the stairs." He said his back felt sore. Again, petitioner made no mention of the alleged injuries. Instead he reported that his knee gave out and he fell. That same day he presented to Arora and reported that he fell down the steps the day before due to back pain. The arbitrator finds these histories inconsistent. Again, he made no mention of any injuries to his back at work on 7/12/17 or 8/17/17. At therapy on 9/7/17 petitioner also did not make any mention of any work injury on 7/12/17 or 8/17/17.

On 9/12/17 petitioner presented to PA Harminson at the request of the respondent, and for the first time gave very detailed histories of his alleged injuries at work on 7/12/17 and 8/17/17. He reported pain in his back radiating to his neck, and occasional pain radiating to his posterior thighs. He denied any numbness or tingling of the extremities. Petitioner was diagnosed with a lumbar strain. Although Harminson ordered an MRI of the lumbar spine, the arbitrator finds it significant that an MRI had already been ordered on 8/15/17 before the alleged injury on 8/17/17.

Additionally, the arbitrator finds it significant that petitioner told Harminson that a couple weeks after the alleged injury on 7/12/17 his pain was improved and he did not seek any treatment at that time, when in fact petitioner did seek treatment after the alleged injury of 7/12/17 on 8/1/17 and 8/15/17, the date the MRI of the lumbar spine was initially recommended.

It was not until after the visit to Harminson on 9/12/17 that any First Report of Injury was completed, and not by petitioner. On 9/12/17 the Claims Examiner completed a First Report of Injury that identified the date of injury as 9/7/17 at 12:00 am, the injury as discomfort in back lifting, and the first date of notification as 9/12/17.

Petitioner saw Harminson on 9/27/17 after the MRI was performed. She was of the opinion that the findings on the MRI were not surgical in nature. Although petitioner was referred for pain management, he did not return to Dr. Parks. He was also referred to orthopedics, but did not go. He returned to Dr. Arora on 11/28/17 and complained of back pain that was unbearable and constant. From 12/27/17 through 7/18/18 he followed-up with Dr. Arora on a monthly basis.

On 8/2/18 he returned to Dr. Rerri, who performed his surgery in 2015. Petitioner gave a history of the alleged accidents on 7/12/17 and 8/17/17. Dr. Rerri was of the opinion that petitioner had full recovery from his lumbar fusion in 2015 until his 2 alleged accidents in July and August of 2017 at work. However, having reviewed the credible record the arbitrator finds no credible evidence to support this opinion. Although petitioner did return to full duty without restrictions after the L4-L5 fusion in September of 2015, petitioner has not been pain free in his lumbar spine. On 8/31/16 petitioner reported that his back pain was well controlled with pain medication. On 9/27/16 he was still complaining of back pain following the surgery the year before. On 10/7/16 he complained of low back, among other complaints including his knee, ankles and shoulders. He also reported that he was treating with a rheumatologist. On 10/25/16 he reported that his back pain was still significant. On 4/11/17 he reported that he had persistent pain, but it was well controlled with pain medications.

Then on 8/15/17, prior to the alleged injury on 8/17/17, he stated that his back pain started with an accident at work two years ago. He rated his current pain at that time as a 7/10, but noted that it ranges from a 6/10 to a 9/10. He stated that his pain was constant and that pretty much any activity or

movement makes it worse. He also reported generalized weakness that was not new. He stated that it was hard for him to perform any daily activities, he hurts all the time, and has had 15 surgeries. He also noted that his pain improved immediately after the surgery, but over the last little while it was coming back how it was before the surgery, and possibly even a little worse than before the surgery in September 2015. He was assessed with lumbar radiculopathy, failed back syndrome, right knee pain, and chronic pain syndrome at that time. The arbitrator finds it significant that all these complaints and diagnoses are prior to the accident on 8/17/17, and after the alleged accident on 7/12/17, which petitioner specifically stated resulted in only a couple weeks of pain that improved and required no treatment.

Based on the above, as well as the credible evidence the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his lumbar spine on 7/12/17 or 8/17/17, that arose out of and in the course of his employment by respondent. The arbitrator bases this finding on the fact that the petitioner's testimony at trial is inconsistent with the credible record and medical evidence; that in the medical records most contemporaneous with the alleged injuries, petitioner repeatedly made no mention of any work injury on either 7/12/17 or 8/17/17; that in the 12 medical visits between 7/12/17 and 9/7/17 petitioner never made one mention of any work injury on 7/12/17 or 8/17/17; that between January of 2016 and April of 2017 petitioner repeatedly complained of low back pain and was constantly on pain medication for these complaints, as well as other complaints; that petitioner told Dr. Parks on 8/15/17, 2 days before the 2nd alleged injury that the onset of his back pain was 2 years ago after another work injury; that petitioner denied any treatment between 7/12/17 and 8/17/17 but was seen on 8/1/17 and said that the surgery in September 2015 "never helped", and then on 8/15/17 had a multitude of complaints including constant severe back pain he attributed to the accident in 2015; that petitioner told Dr. Parks on 8/27/15 that his low back pain, as well as the numbness and tingling in his legs had been going on for two months, which would put the onset of these complaints in June of 2017, a month before the first alleged injury in July of 2017; that Dr. Rerri admitted that he reviewed no records between December 2015 and his first office visit with petitioner on 8/8/18 other than the MRI performed 9/27/17; that video surveillance in May of 2019 showed petitioner going about his daily activities, including shopping and placing large bags of material in the back of his pickup truck; and that petitioner told Dr. Deutsch that he was convinced that his prior 2015 lumbar surgery was related to a work injury for which he was not properly compensated. Based on this, the arbitrator finds the petitioner's testimony was not persuasive, and that the credible medical records do not support a finding that the petitioner proved by a preponderance of the credible evidence that he sustained accidental injuries that arose out of and in the course of his employment by respondent on 7/12/17 or 8/17/17.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?
K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?
L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury that arose out of and in the course of his employment by respondent on 7/12/17 or 8/17/17, the arbitrator finds these remaining issues 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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify ☐	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Katherine Domashevsky,

Petitioner,

vs. NO: 12 WC 41287

City of Chicago,

21IWCC0054

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability benefits, permanent partial disability benefits, and witness credibility, 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 with respect to the issues of causal connection, medical expenses, temporary total disability benefits, and permanent partial disability benefits.

I. Causal Connection

The Arbitrator ruled that Petitioner also established a causal connection between her injury and her current condition of ill-being. To obtain compensation under the Act, a claimant must prove that some act or phase of her employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Recovery will depend on the employee's ability to show that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of a preexisting condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003). "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* at 205. Our supreme court has held that

"medical evidence is not an essential ingredient to support the conclusion of the [Commission] that an industrial accident has caused the disability," but rather, "[a] chain of events which demonstrates a previous condition of good health, an accident, and subsequent injury resulting in a disability" may be sufficient to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982).

Respondent notes that Petitioner did not complain of shoulder pain until approximately six weeks after her injury. The Arbitrator found there was direct evidence of causation regarding Petitioner's right hand and thumb and that despite Petitioner's inconsistencies, the chain of events supported a finding of causation regarding Petitioner's right shoulder. The Arbitrator correctly noted that Petitioner reported to MercyWorks that her pain had started to radiate to the top of the arm intermittently as early as January 5, 2012 and reported shoulder pain on January 18, 2012. Given the lack of evidence of any prior shoulder condition, this evidence tends to support the conclusion of an initial shoulder injury. However, after February 2, 2012, Petitioner does not refer to shoulder pain until October 24, 2013. Indeed, Petitioner did not complain of shoulder pain to Dr. Samuel Chmell (whom Petitioner saw at her counsel's request) in July 2013 or to Dr. Michael Vender (Respondent's Section 12 examiner) in February 2014. The Commission therefore concludes that this 20-month gap breaks the causal connection between the right shoulder strain diagnosed in early 2012 and the bursitis diagnosed in late 2013.

Respondent asserts that Dr. Chmell did not address the relation between the left and right wrist, even though Dr. Chmell's examination disclosed the weakness of Petitioner's right wrist. Respondent criticizes Dr. Chmell's report for not explaining how the left hand is involved. Respondent relies on Dr. Vender's opinion that the right carpal tunnel syndrome was of recent onset and unrelated to the reported accident, based on unspecified "other risk factors" for the development of the syndrome and the median nerve changes also present on the left side. Dr. Vender obtained electrodiagnostic studies that demonstrated median nerve abnormalities in both upper extremities, but ultimately found the abnormalities were indicative of right carpal tunnel syndrome only. Dr. Vender's report does not address that a January 14, 2012 right wrist MRI was interpreted by the radiologist in part as showing an edematous median nerve at the carpal tunnel, while Dr. Chmell identified the edema and bruising of the median nerve as factors confirming recent significant trauma. Dr. Chmell's opinions are also more consistent with the entirety of Petitioner's treatment records, which document Petitioner's ongoing symptoms regarding her right wrist, hand and fingers after an acute injury when Petitioner fell onto her right hand and wrist on the date of accident with immediate and consistent symptoms thereafter. The weight of the evidence supports the Arbitrator's finding of a causal connection between Petitioner's accident and the current condition of her right wrist, hand and fingers.

II. Medical Expenses

The Decision of the Arbitrator concludes that Respondent is liable for outstanding medical bills, if any, for treatment to the right hand and shoulder. However, the Order portion of the Decision only awards medical bills of $3,784.61, representing a summary bill from Athletico for dates between July 2 and July 25, 2012, submitted into evidence as Petitioner's Exhibit 9. Although Respondent asserts that the Arbitrator awarded unnamed bills without looking at them, Respondent's objections concern only the Athletico bill summary. Moreover, Petitioner

represents in her Statement of Exceptions that the outstanding bills for treatment of the right hand and shoulder "were physical therapy bills," suggesting that the Athletico bills are the only matter in dispute. Petitioner did not submit individual bills into evidence, and the payment summary submitted as Respondent's Exhibit 6 contains only one entry for treatment after 2012, a February 27, 2014 charge for radiology services. The Commission therefore addresses the Arbitrator's award regarding the Athletico bill summary.

Respondent, relying on the payment summary submitted as Respondent's Exhibit 5, objects that the majority of the Athletico summary bill has been paid, leaving only entries from July 2, 6, 18, and 25, 2012, totaling $1,133.00. This objection fails because the Arbitrator's findings and Order both state that Respondent shall have credit for medical bills that Respondent already paid. Respondent also argues that the treatment dates do not correlate to the billing dates, "[w]hich makes it impossible to know what the billed treatment was for and if the treatment was for the shoulder or the hand or something else." Respondent's argument fails because, as Respondent noted regarding the issue of causal connection, Petitioner made no complaint of shoulder pain between February 2012 and October 2013. In addition, there is no record from Athletico from July 2012 indicating treatment of Petitioner's right shoulder, which is consistent with the treatment records indicating that the therapy was undertaken after Petitioner's hand surgery. In addition, Dr. Chmell opined that the treatment which Petitioner received was reasonable and necessary, while Dr. Vender offered no opinion on the subject. Accordingly, the Commission affirms the Arbitrator's award of the Athletico expenses and the award of a credit to Respondent for sums already paid.

III. Permanent Partial Disability

The Arbitrator awarded permanent partial disability (PPD) benefits representing a 20% loss of the right hand. Respondent asserts that Petitioner failed to establish that the shoulder and wrist were related to the accident and suggests an award for a 25% loss of the right thumb. However, the Arbitrator's award is limited to the hand and Petitioner established a causal connection regarding the wrist and hand.

In her cross-appeal, Petitioner argues that the PPD award should have been substantially higher or in the alternative an award for loss of occupation or permanent total disability on an "odd lot" theory. If a claimant's disability is of such a nature that she is not obviously unemployable, or there is no medical evidence to support a claim of total disability, the burden is upon the claimant to prove that she fits into an "odd lot" category; that being an individual who, although not altogether incapacitated, is so handicapped that she is not regularly employable in any well-known branch of the labor market. *Valley Mold & Iron Co. v. Industrial Comm'n.*, 84 Ill. 2d 538, 546-47 (1981).

Petitioner presented no evidence regarding the labor market. While there is no *per se* rule that a retired person is not entitled to PTD benefits, the fact of retirement is a factor to consider, at least in instances where the medical evidence does not support a finding of permanent disability. See *Old Ben Coal Co. v. Industrial Comm'n*, 261 Ill. App. 3d 812, 817 (1994). Moreover, in this case, Petitioner did not present evidence regarding her education, or her efforts (if any) to seek employment, let alone that she was denied employment based on her condition.

Regarding loss of occupation, Dr. Chmell opined that Petitioner could never return to her job, but did so long after her retirement. Petitioner testified that she retired due to her condition. However, Petitioner's own testimony established that she remained somewhat active around her house (including cleaning her gutters) and pursued writing projects. Given these circumstances, the Commission concludes that the Arbitrator correctly awarded PPD benefits rather than PTD benefits. Therefore, the Commission turns to review the Arbitrator's PPD award.

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 2012). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

Regarding factor (i), the Arbitrator correctly noted that no impairment report was submitted. The Commission places no weight on this factor. The Arbitrator gave greater weight to this factor based on the comments and prognoses of Petitioner's treating physicians. The Commission considers the Arbitrator's weighting to be harmless error because the comments and prognoses are properly considered regarding factor (v), to which the Commission, like the Arbitrator, gives greater weight. The Arbitrator correctly gave some weight to factor (ii) because Petitioner may have been able to return to sedentary work but retired from her position. The Arbitrator also correctly gave lesser weight to factor (iii) because Petitioner was 67 years old at the time of the accident and likely did not have a long work life remaining. The Arbitrator further correctly gave no weight to factor (iv), Petitioner's future earnings capacity, in light of her retirement. In sum, the Commission affirms the Arbitrator's award of PPD benefits as re-weighted herein.

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

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner established a causal connection between the December 8, 2011 accident and the condition of ill-being of her right shoulder through February 2, 2012, and a causal connection between the December 8, 2011 accident and the current condition of ill-being of her right wrist, hand, and fingers.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $649.85 per week for the period from December 12, 2011 through September 10, 2012, for a period of 39 and 1/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner's reasonable and necessary outstanding medical bills, pursuant to the fee schedule and §§8(a) and 8.2 of the Act, for the services provided by Athletico in the amount of $3,784.61 as delineated in Petitioner's Exhibit 9. Respondent shall receive 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 Petitioner is receiving this credit, as provided by §8(j) of the Act.

21IWCC0054

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $584.86 per week for 41 weeks, because the injuries sustained caused the 20% loss of the right hand, as provided in Section 8(e) of the Act.

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

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on September 18, 2018 is hereby affirmed and adopted as modified herein.

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 4 - 2021
o: 1/21/21
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

DOMASHEVSKY, KATHERINE
Employee/Petitioner

Case# **12WC041287**

CITY OF CHICAGO
Employer/Respondent

21IWCC0054

On 9/18/2018, 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 2.29% 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:

0006 LAW OFFICES OF LEO F ALT
221 N LASALLE ST
SUITE 2014
CHICAGO, IL 60601

0113 CITY OF CHICAGO
STEPHANIE LIPMAN
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

21IWCC0054

☐ 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

KATHERINE DOMASHEVSKY
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **12** WC **41287**

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 **August 16, 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 **December 8, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**50,688.00**; the average weekly wage was $**974.77**.

On the date of accident, Petitioner was **67** 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 $**25,031.48** for TTD, $---- for TPD, $----- for maintenance, and $----- for other benefits, for a total credit of $.

Respondent is entitled to a credit of $**34,519.00** under Section 8(j) of the Act.

SEE ATTACHMENT

ORDER

The Arbitrator finds a causal relationship between the work injury, December 8, 2011 and the Petitioner's condition of ill being.

The Arbitrator finds that Respondent shall pay benefits of $649.85 per week commencing December 12, 2011 through September 10, 2012 or 39-1/7 weeks. Respondent shall be given credit for payments of $25,031.48. The Arbitrator further denies Respondent's request for Credits for overpayments.

Respondent shall pay Petitioner permanent partial disability benefits of $584.86 for 41 weeks, because the injuries sustained caused the 20% loss of the right hand, as provided in Section 8(e) of the Act.

The Arbitrator also awards medical bills of $3,784.61 pursuant to the medical fee schedule (see attached). Respondent shall receive credit for all amounts it may have paid.

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

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

David A. Kane
Signature of Arbitrator

September 18, 2018
Date

SEP 18 2018

Background

Petitioner, KATHERINE DOMASHEVSKY, (Petitioner) was employed by the City of Chicago (Respondent) as a library clerk. On December 8, 2011, Petitioner was 66 years of age at the date of occurrence. Petitioner was packing books and while turning her foot got caught between two boxes that were stacked. Petitioner started to fall and slammed her right hand at the circulation desk causing injury to her right hand and wrist and claimed injury to **right shoulder** as well. (Emphasis added) Accident is not in dispute. Total temporary disability was paid.

Petitioner (Katherine Domashevsky) Testimony (Deposition)

Petitioner testified by way of evidence deposition. Petitioner worked as a grade III library clerk. (Dep 6) Petitioner duties included the circulation desk, checking books, charging fines, checking books, charging fines, ordering books and returning books to shelves. (Dep 7) Petitioner was a 26 year employee, (Dep 8) had no prior injuries or claims and is right hand dominant. (Dep 8)

On December 8, 2011, Petitioner's foot got caught between 2 boxes that were stacked. Petitioner started to fall and slammed her right hand on the desk, while trying to break her fall. (Dep 9) Petitioner was treated at Mercy Works (Respondent's clinic) and referred to physical therapy. (Dep 12) Petitioner noticed pain going up her right arm. Mercy Works placed her right arm in a sling (Dep 13), however, no MRI was performed and Petitioner, was referred to Dr. Papierski, an Orthopedic Specialists (Dep 14) Mercy works **"assigned"** her to Dr. Papierski (Dep 14) (emphasis added)

Dr. Papierski sent Petitioner for an MRI and after review prescribed surgery. Petitioner underwent surgery on March 1, 2012 for a right trapezium resection, ligament reconstruction, tendon interposition arthroplasty with flexor carpi radialis right wrist. Petitioner was followed with post operative physical therapy (Dep 17) at Athletico, was suggested that right shoulder surgery might be necessary due to pain in **right shoulder** (Dep 19) (emphasis added) and she was discharged on September 24, 2012 (Dep 18)

Petitioner is now on Medicare, but does not know if Medicare paid any medical related to this case (Dep 21) Petitioner retired on September 19, 2012, and stated she never return to work between the date of accident to her retirement. (Dep 20) Petitioner continues to notice her right hand is painful and weak, that three fingers are locking, that she drops things, has grasping problems and uses her left hand more. (Dep 24-25)

On cross exams Petitioners re-confirmed no prior injury or reinjury. Petitioner also acknowledged that she cleaned out a gutter, but mainly used her left hand, (Dep 29) using a window near the roof. (Dep 30) Petitioner does vacuum, but also asks children to do house work. (Dep 31) Petitioner's sons cut the grass and bushes and clean the laundry. Petitioner admits to doing writing and previously wrote about Ukrainian History before the accident. Petitioner advised the physical therapist that she has pain when she "overdoes it" and physical therapy notes further confirm difficulty with her thumb and scar on dorsal thumb and wrist.

MEDICAL

Mercy Works (Petitioner's Exb. #2)

Petitioner was sent to Mercy Works after her accident. Records indicate she tripped-falling on outstretched hand. Petitioner was put in a brace was noted to be tender over dorsal, decreased flexion, decreased grib and was sent to physical therapy and University of Illinois Medical Center at Chicago. Mercy Works records also note (1-5-12) **pain started to radiate to the top of arm** (emphasis added) one January 18, 2012, Mercy Works notes shoulder and wrist pain "feels like a toothache" and ortho referral, and schedule to see Dr. Papierski for January 19, 2012.

Northwest Orthopedic Associate (Dr. Paul E. Papierski): (Petitioner's Exb. #3)

1/19/12	MRI changes of Trapezium bone. Fluid in Trapezium and meta carpal joint and tear of TFC. Recommended conservative treatment.
2/9/12	Continued pain proposed surgery set for 3/1/12 for trapezium ligament reconstruction with carpi radialis right wrist.

3/1/12	Surgery
3/8/12	P.O. Surgery visit
3/15/12	P.O. No infection suggest removal of pin. Physical therapy.
5/3/12	Notes increased pain-moderately after cleaning of gutters. Warned not to do to much.
9/13/12	Notes triggering of middle fingers, pain as result of strengthening activities
10/24/13	Right middle finger locked. Possible right carpal tunnel and cervical radiculopathy.
2/20/14	Painful right shoulder impingement
3/20/14	Improvement with physical therapy remaining impingement sign.
5/1/14	Right shoulder tenderness at acromial region, positive impingement sign. Limited range of motion.

Resurrection Medical Center: (Petitioner's Exb. #4)

Operation Report: Trapezium resection ligament reconstruction tendon interposition arthroplasty. Flexor carpi radialis right wrist.

Dr. Samuel J. Chmell: (Petitioner's Exb. #8)

Report of IME

Exam

Record Review

Diagnosis: Bone contusion/trabecular micro fracture of right carpal trapezium with aggravation osteoarthritis of right thumb-resection of trapezium ligamentour reconstruction and flexor carpi radialis tendor interposition. Flexor tendonitis of long finger right carpal tunnel triangular fibrocartilage tear.

Opinion: Further surgery suggested for release of trigger finger, triangular fibrocartilage tear, EMC/NVC for extent of carpal tunnel and release.

Dr. Chmell opined that Petitioner has "significant permanent impairment and disability affecting her right dominant hand, right thumb and right wrist and the entire right upper extremity" Dr. Chmell opined that Petitioner "would not ever be able to return to her previous job as a library clerk"

Dr. Michael Vender: (Res Exb.)

Dr. Vender performed an IME on behalf of Respondent. Dr. Vender found a causal connection for right hand and thumb treatment, but denied a causal to left hand and carpal tunnel of right hand because of other risk factors. Dr. Vender did consider and suggest right carpal release and tendon sheath release right middle finger appropriate.

Athletico: (Petitioner's Exb. #5)

Petitioner was referred to Athletico Physical Therapy by Dr. Papierski. Within the Athletico records is the description of job duties for a senior library clerk. Among other things, these duties listed data collection, circulation activity, catalog entry, orders, shipments, phone, material searches, office maintenance, supplies and equipment, typing, work reports and other duties. Physical requirements included some ladder climbing, step stool to access materials, frequent lifting and carry of books and materials weighing up to 35 pounds. (Petitioner's Exb. #7) Athletico records also confirm the extensive physical therapy treatment for past operative right hand and thumb surgery as well as later physical therapy for right shoulder pain. The goal was to lessen right hand pain and to increase the right hand strength. Along the way, Petitioner was also treated for finger triggering and gripping difficulty.

Issue presented:

1) Causal connection
2) Credit for TTD payments
3) Medical bills
4) Nature and extent

21IWCC0054

Causal:

It is the decision of the Arbitrator that Petitioner has shown a causal connection between her work injury on September 8, 2011 and her resulting condition of ill being to her right thumb, hand, wrist and shoulder. The Arbitrator bases his opinion in that there is direct evidence as to the injury to her right hand and thumb resulting in surgery, and evidence in early treatment at Mercy Works as to pain in the right arm and shoulder as well. While right hand thumb injury was the main focus that required extensive surgical and post operative care the Arbitrator finds that the physical therapy treatment to the shoulder was causally related as well as there is no evidence of shoulder problems before this job injury. `While the Arbitrator notes inconsistencies in Petitioner's testimony and histories, the chain of medical evidence supports the Arbitrator's causation conclusions.

Temporary Total Disability

Respondent claims additional credit for temporary total disability based upon Petitioner's testimony. The main basis for this is that Petitioner told her surgeon that her hand was sore from cleaning her gutters at home. In fact, Petitioner admits that she did climb out a window and clean the gutter and the medical record does indicate some pain from overuse. This would substantiate Petitioner's claim that her hand was not healed and this also appears to be a one-time event. The arbitrator denies the request for return of any benefits paid. This appears to be a one time activity and it is unclear how much right hand use was involved.. Petitioner did admit this activity to her doctor, who did not decide to return her to work at this time and warned about excessive use of the right hand.

Medical Bills: (Petitioner's Exb. #9)

Respondent has paid the vast majority of the medical bills. The Arbitrator finds the Respondent liable for medical outstanding bills, if any, for treatment to the right hand and shoulder to be paid in accordance with the fee schedule and that Respondent shall

hold Petitioner harmless from claim by medical providers for reasonable and related bills for treatment to Petitioner's right hand thumb and right upper extremity. Respondent shall be given a credit for medical bills that they have paid. For this reason it is the decision of the Arbitrator that Respondent shall pay additional reasonable and necessary medical services of $3,784.61 per the fee schedule as provided in Sections 8(a) and 8.2 of the Act and hold Petitioner harmless from payments made by collateral source payers.

Permanent Partial Disability

With regard to Subsection (I) of Sec. 8.1b(b), the Arbitrator notes that permanent partial disability impairment reports and/or opinions were submitted into evidence. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (I) of Sec. 8.1b(b) the Arbitrator notes that no opinion comporting with the specific requirements of Sec. 8.1b(b) was submitted into evidence. However the Arbitrator has considered the doctor's comments as a factor in the evaluation of Petitioner's permanent partial disability as required. The doctor noted a tear of the trapezium metacarpal joint and a tear of the TFC requiring extensive surgery for resection, ligament reconstruction, tendon interposition arthoplasty with flexor carpi radialis, right wrist, the records of Mercy Medical, Resurrection Hospital, Athletico PT. The Arbitrator also notes the IME report of Dr. Chmell that opines further surgery may be necessary and that Petitioner cannot return to her former job. The Arbitrator also notes the report of Dr. Vendor. Because of the aforementioned, the Arbitrator gives greater weight to this factor.

With regard to subsection (I) of 8.1b(b), the Arbitrator notes that the record does not contain an impairment rating. The Arbitrator gives no weight to this factor.

The Arbitrator notes the medical records and finds that there is a sufficient body of evidence to support an award of permanent partial disability to the right hand despite

the above noted inconsistencies in Petitioner's statements to physicians and in her testimony.

With regard to subsection (ii) of Sec. 8.1b(b) the occupation of the employee, the Arbitrator notes the record reveals that Petitioner was employed as a clerk librarian at the time of the accident and that she may have been able to return, to sedentary work, but retired from work in her former capacity. The Arbitrator notes her job description however gives some weight to this fact because of her retirement.

With regard to subsection (iii) of Sec. 8.1b(b) the Arbitrator notes that the Petitioner was 67 years old at the time of the accident. Because of her advanced age, the Arbitrator gives lesser weight to this factor.

With regard to subsection (iv) of Sec.8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner retired. The Arbitrator gives no weight to this factor.

With regard to subsection (v) of Sec. 8.1b(b), evidence of disability corroborated by the treating medical records of Dr. Papierski, Resurrection Hospital, the IME reports of Dr. Chmell and Dr. Vendor and the records of Athletico as previously set forth. The Arbitrator gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds the Petitioner sustained a permanent partial disability to the extent of 20% loss of the right hand pursuant to Sec. (e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSE DELGADO,
Petitioner,

vs.

NO: 17 WC 32250

STATE OF ILLINOIS,
CENTRALIA CORRECTIONAL CENTER
Respondent.

21IWCC0055

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 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 3, 2020 is hereby affirmed and adopted.

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

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

DATED: FEB 8 - 2021

Thomas J. Tyrrell

TJT/tdm
d: 2/4/21
051

L. Elizabeth Coppoletti

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DELGADO, JOSE
Employee/Petitioner

Case# **17WC032250**

SOI/CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

21IWCC0055

On 8/3/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4689 HASSAKIS & HASSAKIS PC
JOSH HUMBRECHT
206 S 9TH ST SUITE 201
MT VERNON, IL 62864

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

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
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

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

AUG 3 - 2020

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

21IWCC0055

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
NATURE AND EXTENT ONLY

JOSE DELGADO
Employee/Petitioner

v.

STATE OF ILLINOIS/
CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

Case # **17** WC **32250**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville**, on **06/04/2020**. By stipulation, the parties agree:

On the date of accident, **09/27/2017**, 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 ***did*** sustained an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**85,332.00**, and the average weekly wage was $**1,641.00**.

At the time of injury, Petitioner was **47** years of age, ***married*** with **1** dependent children.

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

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

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$790.64 (MAX rate)**/week for a period of **125** weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused permanent partial disability to the extent of **25% person as a whole**.

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

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

Signature of Arbitrator

7/23/20
Date

AUG 3 - 2020

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

21IWCC0055

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
(Nature and extent only)

JOSE DELGADO,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 17-WC-32250
	)	
STATE OF ILLINOIS/CENTRALIA CORRECTIONAL CENTER,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on June 4, 2020. The parties agree Petitioner was employed as a Correctional Lieutenant at Centralia Correctional Center when he sustained injuries to his neck, back, and coccyx on September 27, 2017. The sole disputed issue is the nature and extent of Petitioner's injuries. All other issues have been stipulated.

TESTIMONY

On 9/27/17, Petitioner was 47 years old, married, with one dependent. Petitioner has been employed with the Illinois Department of Corrections for approximately 22 years and has worked at the Centralia Correctional Center for approximately 7 years as a Correctional Lieutenant. Petitioner's job duties include supervising correctional officers and sergeants in their duties, ensuring discipline, safety and sanitation and carrying out orders given by supervisors down to subordinates.

On 9/27/17, Petitioner was called to a unit to address an inmate that was refusing housing at Centralia. As he was attempting to handcuff the inmate, the inmate turned and punched Petitioner directly in the mouth without warning and with a closed fist. A struggle ensued and Petitioner and two of his co-workers attempted to restrain the inmate. Petitioner fell backward and landed directly on his tailbone.

Petitioner filled out an Incident Report the day of the accident reporting cuts to his upper and lower lips, neck stiffness, tailbone bruise, low back pain, a small cut on his right ring finger, and a bruised right palm.

Petitioner testified he was initially treated conservatively with medication, x-rays, and a cervical MRI. He was off work for three months and was referred to Dr. Matthew Gornet for consult. Petitioner admits he was evaluated by Dr. Gornet in 2004 for neck pain due to weight-lifting. He testified he has not had pain in his neck from 2004 through the date of this accident. Dr. Gornet ordered physical therapy for Petitioner's neck and low back and administered injections in Petitioner's cervical spine at levels C5-6 and C6-7. Dr. Gornet ordered an MRI of Petitioner's lumbar spine and recommended a two-level disc replacement surgery in his cervical spine which Petitioner underwent on 10/17/18.

Petitioner testified he has worked full duty since he was released in June, 2019. He experiences constant pain in his tailbone made worse by sitting for extended periods of time. He has to shift positions while sitting, get up and walk around, and take Ibuprofen to alleviate his symptoms. On an average daily pain level is 1 to 3 out of 10 and on his worse days his pain level is 4 to 5 out of ten. He testified his lumbar pain has resolved.

Petitioner testified he normally does not have discomfort in his cervical spine unless triggered by specific activities. Petitioner recently replaced a ceiling fan and painted a ceiling in his residence which caused fatigue in his neck. Prolonged deskwork with his head postured forward causes pain. When he performs security duty in cold weather he has to speak into a microphone attached to his coat collar that causes his neck to feel tired and fatigued. He occasionally takes Ibuprofen to alleviate his neck symptoms.

Petitioner testified he is able to perform his job duties well and recently received a job performance evaluation where he exceeded Respondent's expectations on every category.

MEDICAL HISTORY

Petitioner was assessed at SSM Express Care on the date of accident. He provided a history of the incident and mechanism of injury. He had scratching/bruising to his palm and lacerations to his upper and lower lips. He had complaints related to his mouth, neck and low back, as well as direct pain to his coccyx with sitting. He rated his pain as an 8/10. X-rays were performed of his lumbar spine, sacrum and coccyx and he was provided with medications. He was placed on light duty for the next five days. His diagnoses were acute right-sided low back pain.

On 10/10/17, Petitioner returned to SSM Express Care with complaints of pain in the right side of his neck with numbness into his fingers, persistent low back and tailbone pain, and the inability to sit directly on his coccyx. Petitioner reported that the medication

was not helping and he was doing poor with his return to full duty. He was placed on light duty and a cervical MRI was ordered.

On 11/14/17, Petitioner maintained complaints of right-sided neck pain with head rotation and extension and flexion, improved low back pain with a tender coccyx. Petitioner was continued on light duty and he was referred to Dr. Matthew Gornet at The Orthopedic Center of St. Louis for further evaluation.

Petitioner was evaluated by Dr. Gornet on 1/22/18 at which time he reported neck pain to the base of his neck and both sides as well as headaches. His prior history of numbness and tingling in his right hand was noted. He reported low back pain to both sides with the right buttock being more painful than his left. Dr. Gornet reviewed the cervical MRI which he noted was of poor quality, but did identify an "obvious acute right-sided herniation at C6-7, central disc herniation and annular tear to C5-6 and C6-7". Dr. Gornet felt that if conservative treatment failed he would require a repeat MRI. Dr. Gornet ordered physical therapy for Petitioner's lumbar and cervical spine and ordered a series of injections to his cervical spine at levels C5-6 and C6-7 which were performed on 1/30/18 and 2/20/18. The first injection provided temporary relief and the second injection irritated his symptoms. Petitioner attended physical therapy at St. Joseph's in Breese, Illinois from 1/29/18 through 3/2/18. While some improvement was noted, he remained symptomatic.

Petitioner returned to Dr. Gornet on 3/5/18 at which time a lumbar MRI was performed that revealed a 5.5 to 6 mm protrusion with an annular tear at the apex of level L5-S1. Given the failure of conservative treatment and the obvious pathology of Petitioner's cervical spine, Dr. Gornet recommended a disc replacement at levels C5-6 and C6-7. Petitioner was continued on light duty pending surgery.

On 7/10/18, Petitioner was evaluated by Dr. Kevin Rutz pursuant to Section 12 of the Act. Dr. Rutz opined Petitioner's cervical and lumbar conditions were causally related to the 9/27/17 incident. Dr. Rutz documented ongoing tenderness to palpation over his sacrococcygeal joint which was continuing nearly a year following his injuries. Dr. Rutz agreed with the need for surgery in the form of a two-level cervical disc replacement. Dr. Rutz agreed that Petitioner's ongoing symptoms in his lumbar spine were causally related to the incident and believed a discogram was appropriate to further assess pathology. Dr. Rutz opined that the care to date was reasonable, necessary, and related.

On 9/13/18, Petitioner underwent a cervical MRI that revealed a C6-7 disc bulge and bilateral recess protrusions extending into the foramina at C5-6. Petitioner underwent a CT myelogram which also revealed a disc bulge at C6-7 and protrusions at C5-6. Dr. Gornet recommended a bilateral foraminotomy at level C6-7 and a disc replacement at C5-6 and C6-7 which was performed on 10/17/18. Petitioner noted immediate improvement in his pain level and headaches. He reported his lumbar spine pain was milder in nature and they agreed to observe

the low back and postpone further treatment, including the discogram. On 1/28/19, Petitioner underwent a CT of the cervical spine that showed a satisfactory decompression and disc replacement at C5-6 and C6-7, along with right-sided facet arthropathy at C7-T1 which was unchanged. Dr. Gornet noted a portion of Petitioner's neck symptoms "may be permanent" and recommended physical therapy and return to full duty work effective 3/18/19.

On 5/6/19, Dr. Gornet noted Petitioner had been tolerating his return to full duty work with regard to his neck, but Petitioner continued to have symptoms in his low back. Petitioner stated his lumbar symptoms were more tolerable than they were at the time of his accident. Petitioner underwent a cervical CT Scan one year postoperatively which demonstrated good positioning of the disc replacements. Dr. Gornet again addressed Petitioner's low back and advised Petitioner to return if he required additional treatment.

CONCLUSIONS OF LAW

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 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 Correctional Lieutenant. He has been employed with the Illinois Department of Corrections for approximately 22 years and has held his position of Correctional Lieutenant for approximately 11 years. Petitioner is able to perform all of job duties that he did prior to the accident with some residual symptoms that do not interfere with the performance of his job. The Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes Petitioner was 47 years old at the time of the accident. Petitioner has a substantial number of working years ahead of him. Petitioner will have to work with his ongoing symptoms for the remainder of his work life. 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 employed in the same position he was prior to the accident and is doing well performing his job duties. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner was a credible witness. Petitioner was diagnosed with an acute right-sided disc bulge at C6-7 and bilateral recess protrusions extending into the foramina at C5-6, central disc herniation and annular tear to C5-6 and C6-7, a 5.5 to 6 mm protrusion with an annular tear at the apex of level L5-S1, coccygalgia, and lip abrasions. Petitioner underwent epidural steroid injections at levels C5-6 and C6-7, physical therapy, and medication that did not alleviate his neck pain. He underwent a bilateral foraminotomy at level C6-7 and a disc replacement at C5-6 and C6-7. Surgery significantly improved Petitioner's neck pain and resolved his headaches. Dr. Gornet noted a portion of Petitioner's neck symptoms "may be permanent" and released him to full duty work effective 3/18/19, with no restrictions.

Petitioner testified at Arbitration that despite the improvement resulting from surgery, he continues to experience pain in his neck with specific activities. Petitioner has pain/fatigue in his neck with tilting his head up for extended periods of time, for example, when installing a ceiling fan or painting a ceiling. Prolonged deskwork with his head postured forward causes him pain. When he performs security duty in cold weather he has to speak into a microphone attached to his coat collar that causes his neck to feel tired and fatigued. He occasionally takes Ibuprofen to alleviate his neck symptoms. Petitioner does not experience symptoms in his neck when stationary.

Petitioner testified he experiences constant pain in his tailbone made worse by sitting for extended periods of time. He has to shift positions while sitting, get up and walk around, and takes Ibuprofen to alleviate his symptoms. His pain level is between 1 to 5 out of 10 depending on how long he sits. His tailbone pain increases when riding in a car or an airplane for any significant length of time.

He testified his lumbar pain has resolved and he received minimal physical therapy for his lumbar injury.

Petitioner testified he is able to perform his job duties well and recently received a job performance evaluation where he exceeded Respondent's expectations on every category.

Taking into consideration Petitioner's continued postoperative symptoms with regard to his cervical spine and his daily coccyx symptoms, neither of which he experienced prior to the accident of September 27, 2017, the Arbitrator gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% person as a whole, or 125 weeks, pursuant to §8(d)(2) of the Act.

Linda J. Cantrell

Linda J. Cantrell, Arbitrator

7/23/20

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 Temporary Total Disability	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PHILLIP MUMFORD,

Petitioner,

vs. NO: 11 WC 14916

JACKSON PARK HOSPITAL,

Respondent.

21IWCC0056

DECISION AND OPINION ON REVIEW

Timely Petition for Review pursuant to §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, temporary disability, and medical care (past and prospective), 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 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).

I. Temporary Total Disability Benefits

The Commission notes that Dr. Sharma released Petitioner from care on June 1, 2016 after an invalid Functional Capacity Exam ("FCE") performed on May 23, 2016. RX9. Dr. Sharma stated, "[f]rom my standpoint, the [Petitioner] is restricted by non-organic findings and no organic or treatable pain complaint or pathology is noted." PX1. Based on the persuasive opinions of Dr. Sharma, the Commission finds Petitioner's condition stabilized thereby reaching maximum medical improvement as of June 1, 2016. See *Mechanical Devices v. Industrial Commission (Johnson)*, 344 Ill. App. 3d 752, 759, 800 N.E.2d 819 (2003) ("The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical

improvement. [citation omitted]. Once an injured employee's physical condition has stabilized, the employee is no longer eligible for TTD benefits because the disabling condition has become permanent. [citation omitted]."). As such, the Commission finds Petitioner entitled to temporary total disability benefits from January 15, 2016 through June 1, 2016 and awards the same.

II. Prospective Medical Care

Despite Dr. Sharma's findings and recommendations, Petitioner sought further treatment from Dr. Gaynor, a neurosurgeon, who evaluated Petitioner on December 1, 2016. Dr. Gaynor noted the following:

> I reviewed his prior images and reports independently. He had a CT discogram that showed no extravasation of contrast. His MRI shows mild degenerative changes. He has severe pain which is unexplained by the images. His numbness, I have no explanation for, he is prediabetic, but I will order an EMG to assess for neuropathy. I suggested a chiropractor however, he states he has limited funds. I do not see surgery as a reasonable option for his non-specific back and essentially normal spine. PX1.

Again despite Dr. Gaynor's benign findings and recommendations, Petitioner again sought additional care from both Dr. Sharma and Dr. Dixon. On February 3, 2017, Dr. Sharma re-evaluated Petitioner and reiterated his opinion that no treatment was necessary, specially stating- "I again reiterated no further recommendations from my standpoint will be given." PX1.

On April 26, 2017, Dr. Dixon evaluated Petitioner and recommended another FCE. On June 1, 2017, and FCE was performed which was once again invalid. RX10. Dr. Dixon continued to provide follow-up care and a recommendation for surgical intervention. PX1.

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 305/8(a)* (West 2010); *Zarley v. The Industrial Commission*, 84 Ill. 2d 380, 418 N.E.2d 718 (1981). The same standard applies to prospective medical care. *Homebrite Ace Hardware v. The Industrial Commission*, 351 Ill. App. 3d 333, 814 N.E.2d 126 (2004).

The Commission affords greater weight to the opinions of Dr. Sharma and Dr. Gaynor over those of Dr. Dixon. Dr. Sharma persuasively explained that further pain management treatment was not indicated relying on Petitioner's invalid FCE and non-organic pain complaints. This reliance was bolstered by a second FCE which was once again invalid. Dr. Gaynor persuasively explained that surgical treatment was not warranted given the objective diagnostic testing which was virtually normal. Dr. Dixon provided no reasonable explanation as to why surgery is warranted. The Commission denies Petitioner's request for prospective medical care including but not limited to pain management and surgical intervention.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 3, 2020, as modified above, is hereby affirmed and adopted.

21IWCC0056

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $241.91 per week for a period of 19 6/7 weeks, representing January 15, 2016 through June 1, 2016, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses of $4,038.00 to Chicago Pain and Orthopedic; $4,796.66 to ATI; and $945.00 to AMG, as provided in §8(a), subject to §8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for prospective medical care is hereby denied.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 8 - 2021

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

LEC/cak

O: 12/22/2020

Stephen Mathis

43

21IWCC0056

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on December 22, 2020, before a three-member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and D. Douglas McCarthy, at which time Oral Arguments were heard. Subsequent to Oral Arguments and prior to the departure of Commissioner McCarthy on December 31, 2020, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

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

Marc Parker

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

MUMFORD, PHILLIP
Employee/Petitioner

Case# **11WC014916**

JACKSON PARK HOSPITAL
Employer/Respondent

21IWCC0056

On 4/3/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 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:

0346 WARREN W MARK PC
JAMES LEAHY
205 W RANDOLPH ST SUITE 840
CHICAGO, IL 60606

4027 ODELSON & STERK
MATTHEW DALEY
3318 W 95TH ST
EVERGREEN PARK, IL 60805

21IWCC0056

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)

Phillip Mumford
Employee/Petitioner

v.

Jackson Park Hospital
Employer/Respondent

Case # **11** WC **14916**

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 **Kay**, Arbitrator of the Commission, in the city of **Chicago**, on **February 15, 2019 and March 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. [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 **What is the nature and extent of the work injury?**

FINDINGS

On the date of accident, **3/24/11**, 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*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**18,868.47**; the average weekly wage was $**362.86**.

On the date of accident, Petitioner was **41** 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 $**60,270.14** for TTD, $**0** for TPD, $**0** for maintenance, and $**PPD advance/$3,960.00** for other benefits, for a total credit of $.

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $4,038.00 to Chicago Pain & Orthopedic, $4,796.66 to ATI, and $945.00 to AMG, as provided in §8(a) and §8.2 of the Act.

Temporary Total Disability

Petitioner is not entitled to temporary total disability benefits post the prior decision and his failure to submit additional evidence proving he is now a viable candidate for surgery.

Prospective Medical

Petitioner failed to prove that he is a candidate for additional treatment, including surgery as he has failed to tender any additional evidence that the requested surgical procedure is related or needed.

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

03/22/2020
Date

ICArbDec p. 2

APR 3 - 2020

PROCEDURAL HISTORY

This matter was heard before Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") on February 15, 2019 and March 21, 2019 in Chicago, Illinois.

This case was originally before Arbitrator Molly Mason (hereinafter "Arbitrator Mason") pursuant to §19(b) of the Illinois Workers' Compensation Act (hereinafter "Act"). The Arbitrator found Petitioner sustained an accidental injury arising out of and in the course of his employment on March 24, 2011. As a result, Petitioner was temporarily disabled from March 25, 2011 through April 2, 2011 and April 11, 2011 through October 9, 2012 for 79 4/7 weeks under §19(b) of the Act, is entitled to medical bills (presented at that time in P.X11). (Arb.X2)

Jackson Park Hospital Foundation (hereinafter "Respondent") filed a Petition for Review. On May 2, 2013, the Commission affirmed the Arbitrator's decision and remanded the case to the Arbitrator for further proceeding, including but not limited to a finding of permanency. The case was assigned to Arbitrator Gale.

On January 14, 2016, the case was heard before Arbitrator Gale with the following issues in dispute: whether the medical services that were provided to Petitioner were reasonable and necessary and if Respondent had paid all appropriate charges for all reasonable and necessary medical services, whether Petitioner was entitled to prospective medical care and temporary total disability benefits. (Arb.X4)

Arbitrator Gale's decision was appealed before the Commission. Arbitrator Gale found that Petitioner was temporarily totally disabled from March 25, 2011 through April 2, 2011 and April 11, 2011 through September 16, 2013 for 128 3/7 weeks, Petitioner was entitled to $2265.96 in medical expenses under §8a of the Act. The Petitioner's cost for mail order prescriptions were denied because they were not covered under the medical fee schedule as set forth in the Act. The Arbitrator found Petitioner's treaters lack unanimity as to what type of medical care is required for Petitioner. Specifically, Petitioner did not present with surgery indications at any particular level and as such the Arbitrator did not require Respondent to provide surgery care. (Arb.X3) The Arbitrator did find that due to Petitioner's complaints of pain he was entitled to palliative care to relieve his condition of ill-being and the Arbitrator did not terminate the right to ongoing care. The Arbitrator suggested Petitioner have another doctor look at his condition and het more ongoing testing to determine if surgery was necessary. Lastly, the Arbitrator ordered that Respondent was entitled to a credit of $31,428.48 in TTD benefits and $3960.00 for a PPD advance. (Arb.X4)

The Petitioner appealed Arbitrator Gale's decision. (Arb.X3) On review was whether there was a causal relationship that existed between March 24, 2011 and the Petitioner's condition of ill-being and or the need for medical services and if so, the extent of Petitioner's temporary total disability and the amount of reasonable and necessary medical services. (Arb.X3)

On January 31, 2017, the Commission modified the Arbitrator's decision and found Petitioner failed to prove he is entitled to surgery at this time. In addition, the prescription bills submitted were awarded subject to the medical fee schedule and Petitioner was found to be temporarily totally disabled from March 25, 2011 through April 2, 2011 and April 11, 2011 through January 14, 2016 the date of the last Arbitration hearing. Lastly, the Commission found that the case should be remanded to the Arbitrator for further proceedings pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

Therefore, this matter this matter is heard on remand and on Mr. Phillip Mumford's (hereinafter "Petitioner") third 19(b) Petition for subsequent medical expenses and TTD. In addition, Respondent claims causation and the nature and extent of Petitioner's injury are also at issue.

The submitted records have been examined and the decision rendered by Arbitrator Kay.

SUMMARY OF FACTS AND EVIDENCE

On March 24, 2011, Petitioner was a 41-year-old, married, patient transporter for Respondent. Petitioner alleged that on March 24, 2011 he sustained a work injury to his back while moving a patient two times to surgery. Petitioner reported his injury to Respondent on March 29, 2011.

On March 25, 2011, Petitioner was seen at Jackson Park Hospital complaining of low back pain. He was diagnosed with a lumbar strain and kept off work until April 2, 2011. X-rays of the lumbar spine were negative.

On April 4, 2011, Petitioner was examined at Jackson Park Hospital. Petitioner was prescribed physical and occupational therapy. On April 7, 2011, Petitioner was examined at Jackson Park Hospital with no definitive diagnosis. On August 9, 2011, Petitioner was seen at Accredited Ambulatory Care and received bilateral injections at L5-S1. On August 17, 2011, Petitioner followed up at Chicago Pain and Orthopedic Institute complaining of back pain with a prior diagnosis of lumbar discogenic pain, lumbar facet syndrome and lumbosacral radiculopathy. It was noted that Petitioner had an L5-S1 disc protrusion/herniation without significant spinal stenosis, nor significant neuroforaminal narrowing with radiculopathy noted on EMG.

On August 30, 2011, Petitioner received bilateral L3-4, L4-5, and L5-S1 facet joint injections. On September 20, 2011, Petitioner received more injections and was examined on October 10, 2011 complaining of increased back pain. Dr. Morgan recommended a discogram. To date it does not appear the petitioner ever underwent the discogram and has not treated since this time.

On December 23, 2013 Dr. Vargas performed a lumbar discography. Dr. Vargas opined that there was concordant pain at L5-S1. Additionally, a post discogram CT scan was performed showing, L5-S1, 2-3 mm posterior disc bulge indenting the thecal sac without significant spinal stenosis nor significant neural foraminal narrowing. On January 10, 2014, Petitioner followed up with Dr. Vargas where he opined that the discogram clearly revealed discogenic pain, concordant, at L5-S1 level. Petitioner began treating with Dr. Dixon. An updated MRI was performed on April 9, 2014, revealing a right lateral annular tear of L2-3, a 2mm disc bulge and hypertrophy of the facet joints at L4-5. Dr. Dixon recommended a right L2-3 micro lumbar discectomy, L4-5 laminectomy. L4-5 interbody fusion and pedicle screw instrumentation.

Petitioner continued to treat with Dr. Dixon through the present. In addition to Dr. Dixon, the petitioner was also examined at Chicago Pain and Orthopedic Institute by Dr. Sharma. On June 1, 2016 the petitioner was examined at Chicago Pain and Orthopedic Institute. (P.X1) The doctor noted:

> "At this point, I discussed with the patient that it is difficult to assess the patient's restrictions as maximal effort was not given. The patient states that he requires surgery and that no one is believing his pain and I discussed with the patient that he will follow up with me on an as needed basis as I am not recommending any type of pain management. From my standpoint, the patient is restricted by non-organic findings and no organic or treatable pain complaints or pathology is noted....." (P.X1)

On February 3, 2017, Dr. Sharma re-examined Petitioner reiterating that he was unable to treat him due to the invalid FCE. (P.X1) Further, Dr. Sharma denied Petitioner's request for muscle relaxants. (P.X1) On April

26, 2017, Dr. Dixon re-examined Petitioner and requested an FCE. On June 1, 2017 an FCE was performed and deemed invalid. On June 7, 2017, following the FCE, Dr. Dixon informed Petitioner that he wanted to determine why the test was invalid. (P.X1) Dr. Dixon did not see Petitioner again until November 15, 2017. Dr. Dixon requested another MRI. The MRI was performed and on February 28, 2018. In result, Dr. Dixon recommended conservative treatment including physical therapy and epidural injections.

On May 2, 2018, Dr. Dixon examined Petitioner again seeking referral to pain management. It is noted that similarly to Dr. Sharma, Dr. Dixon refused to refill the prescription for oral narcotics.

IME REPORTS – DR. KORNBLATT REPORTS

On September 16, 2013 the petitioner was examined by Dr. Michael Kornblatt (hereinafter "Dr. Kornblatt") pursuant to §12. Dr. Kornblatt reviewed the pertinent records and radiology report opining that the EMG report of June 17, 2011 was within normal limits, the MRI of May 19, 2011 finding that it was a normal scan of the lumbar spine, no evidence of disc desiccation, herniated disc, spinal stenosis, nerve root impingement or bony pathological changes. (RX. 1a)

Dr. Kornblatt on examination noted pain behaviors, both verbal and facial, as well as simulation and complaints with light palpation of all lumbar spinous processes. Dr. Kornblatt opined that the petitioner's lumbar spine was within normal limits and suffered a lumbar strain which should have resolved within 6-8 weeks. Dr. Kornblatt opined that the subjective complaints were unrelated to the work accident and he should have returned full duty at this point. (RX. 1a)

Subsequently a record review was performed by Dr. Kornblatt on June 26, 2014. Dr. Kornblatt's opinions remained unchanged and surgical treatment was not warranted. Dr. Kornblatt stated that the discogram results were consistent with very mild L4-5 and L5-S1 degenerative disc disease which is unrelated to the lumbar strain. (RX. 2a)

Finally, an addendum was completed on October 6, 2014 to address the MRI of April 9, 2014. Dr. Kornblatt interpreted the MRI as revealing disc desiccation at L2-3, no evidence or herniated disc, spinal stenosis, nerve root impingement, or facet arthropathy involving any motion segments including L2-3. (RX. 3a)

Dr. Kornblatt also addressed the post discogram CT of December 23, 2013 opining that it reveals slight degenerative disc disease at L2-3, with remainder being within normal limits. (RX. 3a)

As such, Dr. Kornblatt opined that after reviewing the post discogram CT, and MRI of April 9, 2014, the reports and films failed to reveal radiographic surgical lesions referable to the lumbar spine. (RX. 3a)

The deposition of Dr. Dixon was completed on May 12, 2015. Dr. Dixon continued to recommend a right L2-3 micro-lumbar discectomy, L4-5 laminectomy. L4-5 interbody fusion and pedicle screw instrumentation. Dr. Dixon admitted he disagrees with Dr. Vargas that the pain is emanating from L5-S1, but rather L4-5. (PX. 8a)

The deposition Dr. Kornblatt was completed on November 9, 2015. Dr. Kornblatt testified that the petitioner suffered a lumbar strain and surgical recommendations are not appropriate based on the radiology reports and subjective complaints. (RX. 7A) Moreover, Dr. Kornblatt, noted that the treating physicians do not share the same surgical recommendations, nor origin of pain. (RX.7a)

MEDICAL EVIDENCE PRESENTED BY PETITIONER

Petitioner's new medical evidence was submitted in Petitioner's Exhibits #1 through #7. Petitioners Exhibit #1 is Chicago Pain and Orthopedic Institute records with the bills for the visits as Petitioner's Exhibit #2. Petitioner's Exhibit #3 are the ATI Physical Therapy records and bills, Petitioner's Exhibit #4 are the Advocate Medical Center records with the bills as Petitioner's Exhibit #5, and Petitioner's Exhibit #6 are the Bone and Joint Clinic records.

The last note provided by Petitioner, prior to the January 14, 2016 hearing, was from the Chicago Pain and Orthopedic Institute on December 28, 2015 from physician's assistant, Vera Misavic, indicating that they were waiting approval for surgery with Dr. Geoffrey Dixon (hereinafter "Dr. Dixon").

The next note is from Dr. Sharma (pain management physician), on May 4, 2016, from the Chicago Pain and Orthopedic Institute stating that the patient had undergone a significant amount of conservative treatment including physical therapy as well as interventional therapy with Dr. Vargas with no lasting relief. The patient states that he was recommended for surgical intervention, however, it has not been approved. During this visit, Dr. Sharma reviewed the MRI report from 2014, and noted that it showed multilevel degenerative changes. However, there was no evidence of a central canal lateral recess or foraminal stenosis. Dr. Sharma assessed a chronic low back pain stemming from a 2011 injury. The doctor prescribed Mobic two times daily and Dr. Sharma's recommendation was for an FCE with validity testing and if valid, restrictions would be determined as there were no further interventional recommendations. The FCE occurred on May 23, 2016.

On June 1, 2016, there was a follow-up visit with Dr. Sharma where he noted that the patient stated that the test caused him pain for 5 to 6 says after his testing and that he tried to comply but was not able to lift more than 5 pounds. Dr. Sharma indicted that he was not recommending any type of pain management and that from his standpoint Mr. Mumford was restricted by non-organic findings and no organic or treatable pain complaints or pain pathology is noted. Dr. Sharma also noted that the patient is also asking for a possible reevaluation with Dr. Vargas.

On December 2, 2016, Petitioner had a neurosurgery consultation with Dr. Brandon Gaynor (hereinafter Dr. Gaynor). Dr. Gaynor's examination showed radicular testing "abnormal". The radicular testing showed a positive Patrick (FABER) test and positive straight leg raising. Dr. Gaynor's assessed a lumbar disc herniation and radicular neuropathy. He provided chiropractic and team management referrals with an EMG of Petitioner's lower extremities.

On February 3, 2017, Petitioner had a follow-up appointment at Chicago Pain and Orthopedic. Petitioner testified that he wanted to see Dr. Vargas. However, he saw Dr. Sharma who reviewed the invalid FCE that was performed and had no recommendations for either intervention or surgery.

On April 26, 2017, Petitioner returned to Chicago Pain and Orthopedic and was seen by Dr. Dixon. Dr. Dixon reviewed the invalid FCE and noted that it was difficult for him to proceed with the recommended surgery for the L2-3 micro lumbar decompression, discectomy, and L4-5 interbody fusion with pedicle screw instrumentation.

On June 1, 2017, a new FCE was performed. On June 7, 2017, Dr. Dixon again noted an invalid examination and indicated he wanted to discuss the FCE with the administering therapist.

On August 28, 2017, Petitioner followed up with his primary care physician, Dr. Sura. His appointment consisted of tests dealing with other issues and not his back.

On November 15, 2017, Petitioner saw Dr. Dixon for a follow-up and complained that his condition was continuing to worsen. Dr. Dixon recommended a new MRI to delineate the pathology and the worsening o the pathology in such a way to obviate the need for an FCE evaluation at the time.

On January 23, 2018, Petitioner followed up with his primary physician Dr. Sura. During this visit he complained of low back pain and headaches. Dr. Sura ordered an MRI.

On February 14, 2018, Petitioner obtained the recommended MRI at Advocate Medical Center. He previously obtained an MRI at Advocate on October 26, 2016 (MRI found minimal degenerative disc disease of the lumbar spine, without significant neural foraminal narrowing or canal stenosis). Petitioner testified that he brought both of the discs with the MRI's to Dr. Dixon. On February 28, 2018, Dr. Dixon noted that Petitioner returned with the new MRI of the lumbar spine and it demonstrated a lateral disc protrusion at L2-L3 as well as a central disc protrusion of L4-L5, slightly eccentric to the left causing bilateral lateral recess stenosis and nerve root compression. He indicated that he discussed the findings with Petitioner and recommended a conservative treatment program consisting of non-steroid anti-inflammatory drugs and PT after consultation with a Pain Specialist. Dr. Dixon wanted Petitioner to be considered for an epidural injection at L4-L5 and indicated that he would see him after completion of the injection and physical therapy to determine whether any additional interventions were necessary. The treatment was not authorized, and Petitioner did not receive any treatment.

On May 2, 2018, Petitioner followed up with Dr. Dixon. On August 22, 2018, Petitioner followed up again with Dr. Dixon. Dr. Dixon noted that he reinforced to Petitioner his recommendation that the optimal treatment for his ongoing pain and disability would be the surgical procedure he previously outlined.

CONCLUSIONS OF LAW

With respect to issue (F) whether the Petitioner's condition of ill-being is causally related to the accident of March 24, 2011, 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 prior Commission's Decisions herein, that of Commission Number 13IWCC0543 (Arb.X2) and the Commission Decision 17IWCC0054 (Arb.X3), modifying the Arbitrator's Decision of Arbitrator Gale (Arb.X4) set forth findings of fact and conclusions of law. Those findings of fact and conclusions of law are the Decisions of the Commission and are not modified by the Arbitrator's Decision herein. Both Commission Decisions find that the Petitioner's condition of ill being is casually related to the complained of accident on March 24, 2011. Therefore, based upon the principle law of the case, all findings in the earlier decisions are law of the case and will not be disturbed.

With respect to issue (J) whether the Respondent has paid all of the 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. Petitioner claims the medical bills and expenses unpaid from Chicago Pain and Orthopedic billing for $4,038.00 (P.X2), the ATI physical therapy billing for $4,796.06 (P.X3), and AMG billing for the dates of service related to his low back in the amount of $945.00 (P.X5). Respondent objected to the submission of the exhibits based on liability. Having found that Petitioner's condition of ill-being is causally connected to the accident that occurred on March 24, 2011, and that the aforementioned bills were reasonable and necessary in connection to Petitioner's injury, the Arbitrator awards the bills pursuant to §8 and §8a of the Act.

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

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Petitioner was found by the Commission to be temporarily totally disabled (hereinafter "TTD") from March 25, 2011 through April 2, 2011 and April 11, 2011 through January 14, 2016, the date of last Arbitration hearing. At hearing, Petitioner requested TTD through the last date of hearing, February 15, 2019.

In *Interstate Scaffolding v. IWCC*, 236 Ill.2d 132 (2010), the Supreme Court held that the "determinative inquiry" for deciding whether an injured worker is entitled to TTD benefits is whether the injured worker's condition has stabilized. Based on treatment records and Petitioner's testimony, the Arbitrator finds that Petitioner's condition is stable. Therefore, Petitioner is entitled to TTD from March 25, 2011 through April 2, 2011, April 11, 2011 through January 14, 2016, the date of the last Arbitration hearing.

With respect to issue (L), what is the Nature and Extent of the injury or issue (O) whether Petitioner is entitled to Prospective medical care, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Regarding the Commissions remand to make a determination regarding prospective medical treatment the Arbitrator has accepted the following additional evidence provided by Petitioner:

The Commission found on Page 11 of the Decision in 17IWCC0054, (Arb.X2) that the medical records show that Petitioner sustained more than a back sprain as diagnosed by Dr. Kornblatt and that the Petitioner's condition has not yet stabilized (through January 14, 2016).

On page 10 of that Decision, Paragraph 22 of The Findings of Fact and Conclusions of Law the Commissioner found at that time that there was sufficient evidence which demonstrates that the Petitioner has failed to prove, by the disparate opinions of the doctors', that he is currently (as of January 14, 2016) a viable surgery candidate.

Specifically, after reviewing the tests and conducting his own examination, Dr. Kornblatt (IME), found that Petitioner had no surgical lesions on his lumbar spine. He disagreed with both Dr. Vargas' and Dr. Dixons' opinions that Petitioner was a surgical candidate. He testified that if Dr. Dixon stated he's going to do a surgery at L4-5 and Dr. Vargas says L5-S1 is the symptomatic level, there is obviously a disagreement between the two doctors as to what the treatment is supposed to be given to the Petitioner which further confirms tat Petitioner was not a surgical candidate.

At trial, Petitioner provided the following additional evidence. Petitioner had an FCE on May 23, 2016 that was deemed invalid. On February 3, 2017, Dr. Sharma reviewed Petitioner's invalid FCE and had no recommendations for either intervention or surgery. On April 26, 2017, Dr. Dixon reviewed the same FCE and noted it was difficult for him to recommend surgery. On June 1, 2017, Petitioner had an additional FCE which was deemed invalid. It was reviewed by Dr. Dixon on June 7, 2017. Dr. Dixon again noted that it was also invalid and that he wanted to discuss the administration of the exams with the therapist. On August 28, 2017, Petitioner followed up with his primary physician Dr. Sura where he did not mention his issues with his back. On November 15, 2017, Petitioner saw Dr. Dixon for a follow-up where he did complain of his condition and an MRI was recommended. On January 23, 2018, due to Petitioner's pain complaints, Dr. Sura ordered an MRI.

On February 28, 2018, Dr. Dixon reviewed the MRI and recommended a conservative treatment program consisting of non-steroid anti-inflammatory drugs and PT after consultation with a Pain Specialist. Dr. Dixon wanted Petitioner to be considered for an epidural injection at L4-L5 and indicated that he would see him

after completion of the injection and physical therapy to determine whether any additional interventions were necessary. The treatment was not authorized and in result Petitioner did not receive the treatment.

On August 22, 2018, Petitioner saw Dr. Dixon for a follow-up where he reiterated, from his office note of April 26, 2017, that the optimal treatment for Petitioner's ongoing pain and disability would be the surgical procedure as he had outlined, which was the surgery with L2-3 micro lumbar decompression and discectomy and L4-5 interbody fusion and pedicle screw instrumentation discussed in his note of April 26, 2017.

The Arbitrator notes that Petitioner complied with Arbitrator Gales' recommendation to seek additional testing and opinions to determine if surgery was necessary. However, the additional testing in the form of the two invalid FCE's, Petitioner's own treaters indicating that he has non-organic pain complaints and that there is nothing they can do for him, failed to provide additional evidence that he is now a surgical candidate. (P.X 1) (June 1, 2016 note)

Signature of Arbitrator

03/22/2020
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 Finding Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jocelyn Cahill,

Petitioner,

21IWCC0057

vs.

NO: 15 WC 11742

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

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

I. FINDINGS OF FACT

A. Background and Accident

Petitioner testified that she was a high school graduate who had been employed by Respondent's Office of Emergency Management since October 23, 2000. On May 13, 2015, Petitioner was 58 years old. She testified that she was an operator and first responder for emergency calls coming in to Respondent's 911 call center. Petitioner stated that she worked eight hours per day, between 5:30 a.m. and 2:00 p.m., with a half-hour break and an hour for lunch. She added that she worked a five-day week, except that every third week she would work six days with a two-day weekend.

Petitioner described her work station as including a desk with monitor screens left, right, and center. She stated that the left screen was called ANI/ALI, the center screen was called EVA, and the right screen was Petitioner's mapping system. She also stated that she had a

keyboard directly in front of her, which Petitioner claimed was not ergonomic. She further stated that her keyboard was not able to adjust upward to position where her hand position would feel comfortable. Petitioner added that the keyboard was broken and wobbly, a condition she had brought to her supervisors' attention. She demonstrated that her hands would be in a flexed position at the wrist. She also stated that her arms would be in the air, not resting on anything. Petitioner later stated that she also had a computer mouse, without a mouse pad, which did not always work correctly and required wiggling or shaking with her right hand to operate. She further stated that she was left-handed but used both hands in her work.

Petitioner testified that when an emergency call comes into the center, she listens to the caller over a headset and simultaneously types everything substantial regarding the reported emergency. She stated that she types this information longhand. She estimated that she takes between 30 and 40 calls per hour. Petitioner testified that she was proud to have the nickname "high roller" based on the number of calls she took.

According to Petitioner, in addition to typing the information for each call, she also uses the "6," "7," and "8" keys to move information from each incoming call from the ANI/ATI screen, which is an AT&T phone system, to the EVA screen, which she described as the event screen. She stated that she usually transfers this information using her right index finger, but rotates to use her left hand when the right begins to hurt. She additionally testified that she uses a touch screen on the ANI/ATI screen for an estimated 15 to 20 percent of her calls when a caller wants service from another city or state and she needs to make contact with as many as 50 other agencies, including the Illinois State Police and the FBI. Petitioner stated that she would toggle to this second screen in order to transfer the call to another agency.

Petitioner further testified that she first began to experience pain in her hands in July or August of 2014. She stated that the pain in her left hand was excruciating, with numbness in her fingers that extended toward her elbow, which made it difficult to flex her hand or grip objects. She also stated that she experienced the same type of discomfort in her right hand, with numbness, pain, and a burning sensation. Petitioner added that she always had the ability to work, but she would rest one hand while using the other. She testified that the pain became so bad that she sought medical treatment in March 2015.

B. Medical Treatment

On March 11, 2015, Petitioner presented to Dr. Ramsey Ellis at Midwest Hand Surgery. Dr. Ellis recorded:

> "The patient is a 58-year-old left hand dominant woman who complains of a long history of bilateral hand numbness and tingling. It has worsened in the past 6 months. She complains of nighttime awakening with numbness and tingling. She reports weakness and clumsiness. She's had no treatment. She's had no EMG or nerve conduction study. She attributes her carpal tunnel

> syndrome to her work as a 911 dispatcher. She states she does extensive typing, daily, over the past 15 years."

A physical exam of Petitioner's extremities disclosed a negative Tinel's but positive Phalen's sign over the carpal tunnels bilaterally. Dr. Ellis recommended an EMG/nerve conduction study before possible open carpal tunnel release surgery.

On March 16, 2015, Petitioner underwent the bilateral EMG/nerve conduction study at Excel Occupational Health Clinic. The interpreting physician's impression of the electrodiagnostic evaluation shows a demyelinating and axonal lesion of the sensory branch of the median nerves bilaterally and a demyelinating lesion of the median motor nerves bilaterally. The physician also found evidence of axonal loss on needle EMG. The doctor concluded that these findings were consistent with moderate to severe carpal tunnel syndrome bilaterally with the right median nerve being more affected than the left.

On March 25, 2015, Petitioner underwent right carpal tunnel release surgery performed by Dr. Ellis at the Palos Surgicenter. The pre- and post-operative diagnoses were of right carpal tunnel syndrome.

On April 1, 2015, Petitioner followed up with Dr. Ellis, reporting nighttime awakening with numbness and tingling. Petitioner wished to undergo left carpal tunnel release surgery. PX1. The doctor kept Petitioner off work. On April 8, 2015, Dr. Ellis removed Petitioner's sutures and initiated therapy for her right medial epicondylitis and postoperative carpal tunnel condition. The doctor released Petitioner to her regular work duties as of April 14, 2015.

On October 26, 2015, Petitioner presented to Dr. Blair Rhode at Orland Park Orthopedics for consultation of left wrist pain. Dr. Rhode noted:

> "The patient demonstrates evidence of bilateral work-related carpal tunnel syndrome. She complains of bilateral palmar wrist pain with numbness and tingling to the thumb index and long finger. The patient describes job activities which consist of a significant amount of typing. She describes her exposure as approximately 7 hours of typing per day with a superimposed mandatory 12 hour over time with a half-hour break a proximally [sic] one day per week. Her exposure dose has been over the course of 15 years. She also performs other manual tasks such as stapling and manipulating files. She feels that her work environment is non-ergonomic and requires a significant amount of digital activities to adjust screens and other aspects of her work environment. She experiences nocturnal symptoms. She notices that her symptomology worsens throughout the day and as she works deeper into the work week."

"The patient's past medical history is positive for hypothyroidism for which she takes Synthroid. She denies a history of diabetes, recent pregnancy, rheumatoid arthritis or tobacco. Her BMI is less than 30. We recognized that there is debate relative to causation and keyboard exposure. We feel that the science is not settled and have provided a literature review discussing the Mayo study, Swedish study and Indian typing study. We must acknowledge that relative to a dose exposure, this patient certainly qualifies as a high dose exposure candidate. She also has a history of pre-existing hypothyroid that will make her more susceptible to carpal tunnel syndrome and, thereby, lowering her exposure threshold."

"At this point we will continue a conservative course. Today, we performed a left wrist steroid injection. We taught the patient a home stretching program. She will continue to modify activity while at home. She will tale over-the-counter oral medications."

Dr. Rhode's note then reviewed the literature regarding carpal tunnel syndrome (CTS) and keyboard usage. Dr. Rhode summarized a 2001 study of computer users in a Mayo medical facility which concluded there was no difference in the frequency of CTS between computer users and the general population. The doctor noted several aspects of the study what result in questioning its validity, including its lack of a control group, the inclusion of only current workers (i.e., the "survivor effect"), subject selection and exclusions that were not fully explained, exposures not being adequately quantified, and age and gender not being adequately controlled for in comparison studies. Dr. Rhode concluded that the Mayo study should not be used to conclude whether there was a cause/effect of computer usage on the frequency of CTS, based on these methodological issues.

Dr. Rhode next summarized a 2007 Swedish study which concluded that heavy keyboard usage was beneficial in reducing the occurrence of CTS based on questionnaires sent to 2465 randomly selected persons from the general population with 2003 respondents, 301 of which reported hand numbness as compared to a control group sample of 123 persons who reported no symptoms. Nerve conduction studies were performed, though Dr. Rhode noted that a considerable number of CTS cases can be missed even when using nerve conduction studies. Dr. Rhode also noted that the Swedish study had some of the same methodological issues as the Mayo study (possibly including the "survivor effect"), further noting that only 240 of the 2003 respondents underwent clinical examination and only 219 of those underwent nerve conduction studies. The doctor further noted that the 4.2 % of CTS cases reported in the general population (and the even higher 5.2% reported for non-keyboard users) was substantially higher than the less than 1% reported in the general population of the U.S., suggesting major differences between the Swedish and U.S. populations regarding age, gender, work environment and exposure.

Lastly, Dr. Rhode summarized a 2006 Indian keyboarding study addressing a causal effect of duration of computer use on the production of CTS. Dr. Rhode noted that the Indian study focused on current computer professionals, many of whom worked longer hours than in the other studies and younger than those in the Swedish study (suggesting that effect could become more pronounced in a follow-up study). The doctor noted that the Indian study had been criticized in other reviews because there were no nerve conduction studies, but noted that clinical examinations had been performed. Dr. Rhode wrote that the Indian study was in several respects a better controlled study on a more appropriate subject group. He concluded that while some of aspects of the study design could be criticized, the results left little doubt that heavy computer usage can lead to CTS.

Petitioner returned to Orland Park Orthopedics on November 9, 2015, when he was seen by Mark Bordick, P.A. Petitioner complained of bilateral palmar pain with numbness and tingling to the thumb, index, and long fingers. Petitioner also reported minimal relief from the injection. While noting that Petitioner had bilateral carpal tunnel syndrome secondary to over exposure at her job, P.A. Bordick noted that Petitioner would continue working full duty. P.A. Bordick noted similar assessments during follow-up visits on December 7, 2015 and January 4, 2016.

On February 8, 2016, Petitioner additionally reported worsening strength and increased numbness and tingling. She reported that she was no longer willing to live with her condition and wished to proceed with carpal tunnel release surgery. P.A. Bordick took Petitioner off work pending a post-operative evaluation.

On February 23, 2016, Petitioner underwent a left open carpal tunnel release performed by Dr. Rhode at South Chicago Surgical Solutions. The pre- and post-operative diagnoses were left carpal tunnel syndrome.

On March 4, 2016, Petitioner's sutures were discontinued. P.A. Bordick noted that Petitioner was stable since her surgery.

On April 7, 2016, Petitioner began occupational therapy at Athletico, which consisted of 19 sessions ending on July 7, 2016. Petitioner was officially discharged by Athletico on August 10, 2016.

On April 26, 2016, Petitioner reported that she had returned to full duty because she was head of her household and was experiencing increasing pain and swelling. P.A. Bordick noted that Petitioner was stable and making slow progress in occupational therapy. He also noted that Petitioner continued to work full duty despite her obvious discomfort. On June 6, 2016, P.A. Bordick noted a similar assessment, prescribing two or three occupational therapy sessions weekly for another four weeks.

On July 11, 2016, Petitioner was seen by Dr. Rhode. Petitioner continued to complain of severe left hand pain, now radiating to the ring and little fingers. She also complained of dorsal wrist pain and pain radiating to the elbow. An examination of the left wrist included a positive Guyon's test. Petitioner had a QuickDash score of 68. Dr. Rhode prescribed another EMG study, while indicating that Petitioner remained at full duty.

On July 20, 2016, Petitioner underwent a second EMG/nerve conduction study at Excel Occupational Health Clinic. The interpreting physician's impressions were of left carpal tunnel syndrome (though with significant improvement in the function of the left median nerve since the prior study) and left ulnar nerve neuropathy in the Guyon's canal.

On August 8, 2016, Petitioner followed up with Dr. Rhode, who noted the EMG study contained evidence of mild residual carpal tunnel syndrome and evidence of Guyon tunnel. Petitioner's QuickDash score was 55. Dr. Rhode administered an injection for the ulnar nerve.

On September 12, 2016, Petitioner revisited Dr. Rhode, reporting that the injection had provided relief to her ring and little fingers. Petitioner's QuickDash score was 50. Petitioner indicated she was unwilling to live with her symptoms and wished to proceed with a Guyon release. Petitioner was continued at full duty, with a follow-up to occur after the surgery.

C. Section 12 Report by Dr. John Fernandez

On June 10, 2015, Petitioner underwent a Section 12 examination by Dr. John Fernandez at Respondent's request. Dr. Fernandez noted that he reviewed medical records from March 11, 2015 through April 8, 2015, including the March 25, 2015 operative report and a copy of the March 16, 2015 EMG. He also noted that Petitioner reported any sudden event or trauma causing her symptoms and attributed them to repetitive typing at work. He further noted that Petitioner reported symptoms outside of work including while driving a car and at night. The doctor added that Petitioner had a near-resolution of symptoms on the right after the carpal tunnel release surgery but continued to have increasingly severe symptoms, rated 9/10, on the left and "scored an 81.6 on the DASH."

Dr. Fernandez also wrote that he reviewed a "job video" of a workstation compatible with Petitioner's description of her work, noting: "The position of the hands and wrists appears to be relatively physiologic within 20 to 30 degrees of wrist extension with elbow flexion of no more than 60 to 80 degrees with a pronation of about 60 degrees." The doctor also noted that the person in the video was not engaged with physical gripping or grasping. This video was not submitted into evidence. Dr. Fernandez further reviewed a written job description, which he observed did not include descriptions of the frequency or force required for the job duties.

Dr. Fernandez's examination found subjective paresthesias intermittently on the right and fairly constant on the left. He also found significant irritability on the left with positive Tinel's, Phalen's, and median nerve compression tests, with some residual irritability on the right. He

further found moderate tenderness to direct palpation along the right wrist carpal tunnel incision site, consistent with pillar pain.

Dr. Fernandez diagnosed Petitioner with pain and weakness related to pillar pain post-operative from her right carpal tunnel release for right carpal tunnel syndrome, and active carpal tunnel syndrome on the left.

Dr. Fernandez opined that there is no reasonable scientific evidence that would support a claim of aggravation or causality with regards to data entry or keyboarding in and of itself as the cause or aggravation of underlying carpal tunnel syndrome. He wrote that Petitioner's symptoms may have increased during those activities, which in and of itself does not prove causality or aggravation of the underlying condition. He observed that carpal tunnel syndrome is a multifactorial disorder with a normal prevalence in the general population and is most commonly seen in Petitioner's age group, more prevalent in females and those with risk factors associated with thyroid disease or tobacco use. He acknowledged that carpal tunnel syndrome can be caused by repetitive tasks such as forceful gripping, use of tools, exposure to vibrational machines, exposure to cold environments, or repetitive extension and flexion through the wrist itself.

Dr. Fernandez further opined that regardless of causality, Petitioner required carpal tunnel release surgery on the left side. He recommended a brief course of supervised therapy and a home program for the right side. The doctor opined that Petitioner could continue to work full duty without formal restriction or limitation. He concluded that Petitioner would reach MMI on the right side within the next two months, and on the left side within three to six months after surgery.

D. Additional Information

Petitioner testified that she incurred bills for medical treatment included in Petitioner's Exhibit 5 which remained unpaid, other than sums paid by Blue Cross/Blue Shield.

Regarding her current condition of ill-being, Petitioner testified that she continues to experience burning, numbness, and tingling in her left arm. She stated that she experiences less severe burning and pain in her right arm. She also stated that she rests her arms and takes Ibuprofen to alleviate the pain.

Petitioner also testified that at home, she has difficulty mowing the lawn or removing snow. She further stated that she has difficulty with vacuuming and jobs which involve lifting. She added that it is very difficult for her to open jars due to difficulty turning and gripping objects. Petitioner stated that she used hand tools before her injury but does not now. On cross-examination, Petitioner explained that she had used gardening tools before her injury but had not tried to use them afterwards. She additionally stated that she did a little bit of painting and carpentry before the incident, but not much.

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Petitioner testified that she had not injured either of her wrists before or after the incident in this case.

Petitioner acknowledged that she had started smoking in 2002 and quit in 2015, at which time she was smoking approximately a pack of cigarettes per week. She also acknowledged that she took medication daily for her thyroid condition and for hypertension.

II. CONCLUSIONS OF LAW

A. Accident and Causal Connection

The Arbitrator found that Petitioner failed to prove by a preponderance of evidence that she sustained an accident that arose out of and in the course of her employment which resulted in a disabling injury. To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that she suffered a disabling injury that arose out of and in the course of her employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" one's employment if it originated from a risk connected with, or incidental to, the employment and involved a causal connection between the employment and the accidental injury. *Id.* "In the course of" refers to the time, place, and circumstances of the accident. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Both elements must be present at the time of the claimant's injury to justify compensation under the Act. *Id.*

In this case, Petitioner alleges an injury based on repetitive trauma. It is well-settled that there is no legal requirement that a certain percentage of the workday be spent on repetitive tasks in order to establish the repetitive nature of a claimant's job duties. *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2005). The Commission is allowed to consider evidence, or the lack thereof, of the repetitive "manner and method" of a claimant's job duties. *Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 211 (1993) (citing *Perkins Product Co. v. Industrial Comm'n*, 379 Ill. 115, 120, 39 N.E.2d 372 (1942)). The question of whether a claimant's work activities are sufficiently repetitive in nature as to establish a compensable accident under a repetitive trauma theory will be decided based upon the particular facts in each case, and it is the province of the Commission to resolve this factual issue. *Williams*, 244 Ill. App. 3d at 210-11.

In addition, an employee who alleges an injury based upon repetitive trauma must "show [] that the injury is work-related and not the result of a normal degenerative aging process." *Peoria County Bellwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 530 (1987); *Glister Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182 (2001). "It is axiomatic that employers take their employees as they find them." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). When an employee has a preexisting condition, "recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated

the preexisting disease such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *Id.* at 204-05. A claimant need only prove that her work for the employer "was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* at 205.

In repetitive trauma cases, the claimant "generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470, 477 (1987); see *Johnson v. Industrial Comm'n*, 89 Ill. 2d 438, 442-43 (1982). Of course, "'[e]xpert opinions must be supported by facts and are only as valid as the facts underlying them.'" *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, ¶ 24 (quoting *In re Joseph S.*, 339 Ill. App. 3d 599, 607 (2003)). "'An expert opinion is only as valid as the reasons for the opinion.'" *Id.* (quoting *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174 (1998)). "The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion." *Id.*

The Arbitrator found Dr. Fernandez's opinions to be persuasive and correct in this case. Dr. Fernandez's conclusions rely largely on his opinion that that there is no reasonable scientific evidence that would support data entry or keyboarding in and of itself as the cause or aggravation of carpal tunnel syndrome. However, Dr. Fernandez's Section 12 report provided no facts or data in support of this key opinion. Moreover, finding his opinions persuasive in this case would requires the Commission to ignore the uncontroverted evidence of other factors, including force and flexion, in Petitioner's years-long usage of a workstation with a broken keyboard and unstable mouse.

In contrast, Dr. Rhode provided a detailed review of literature which would establish at a minimum that there is ongoing scientific disagreement over the causal connection between repetitive keyboard usage and carpal tunnel syndrome, even if one disagreed with his ultimate conclusion. Indeed, the Arbitrator ultimately concluded on this point that Dr. Fernandez's opinion was correct "in this case," relying in part on other factors (*i.e.*, age, gender, thyroid condition, past tobacco use), rather than adopting the position that there is scientific consensus on whether repetitive keyboard usage causes or aggravates carpal tunnel syndrome. Moreover, Illinois law has recognized that repetitive data entry may be the basis of a workers' compensation claim since at least the Illinois Supreme Court's decision in *Durand v. Industrial Comm'n*, 224 Ill. 2d 53 (2006). In this case, the Petitioner's unrebutted testimony established that the overwhelming majority of her job duties consisted of repetitive typing for 15 years (now almost 20 years) and that Petitioner had earned the nickname "high roller" based on the number of calls she processed daily. Dr. Rhode found that Petitioner certainly qualifies as a high dose exposure candidate.

Dr. Fernandez's opinions are also flawed in other respects. Most notably, he relied in large part on a written job description that did not include descriptions of the frequency or force required for Petitioner's job duties, even though these factors are crucial in repetitive trauma

cases. Dr. Fernandez further relied on a video recording which Respondent did not submit into evidence and thus constitutes a form of supporting data which cannot be evaluated by the Commission. We note that Dr. Fernandez's opinion relies in part on Petitioner's other risk factors, including age, gender, thyroid condition and history of tobacco use. However, the Respondent takes employees as it finds them. Petitioner need only show that her work duties were one cause of her condition. Accordingly, the Commission concludes that Petitioner established by a preponderance of the evidence that she suffered an accident arising out of and in the course of employment manifesting on March 11, 2015 (the date of Petitioner's initial treatment), and that her current condition of ill-being is causally connected to her accident.

B. Medical Expenses

The Commission, having ruled in favor of Petitioner on the issues of accident and causal connection, turns to address Petitioner's medical expenses. Petitioner has requested the payment of the unpaid medical bills in Petitioner's Exhibit 5, in the amount of $48,470.92. Respondent does not address the issue in its Response brief, which was limited to the issues of accident and causal connection. The Request for Hearing indicates that Respondent only disputed liability. Accordingly, the Commission concludes that Respondent is liable to pay the unpaid charges stated in the exhibit. In addition, per the parties' agreement, Respondent is awarded $14,776.12 regarding group medical bills for which it is entitled a credit under Section 8(j) of the Act.

C. Temporary Total Disability (TTD) Benefits

The Commission next turns to the issue of TTD benefits. Petitioner has requested TTD benefits for the periods of March 16, 2015, March 25, 2015 through April 13, 2015, and February 23, 2016 through March 7, 2016. Again, Respondent does not address the issue in its Response brief, which was limited to the issues of accident and causal connection. The Request for Hearing indicates that Respondent disputed liability. Accordingly, the Commission awards the TTD benefits requested by Petitioner.

D. Permanent Partial Disability (PPD) Benefits

Lastly the Commission addresses Petitioner's request for permanent partial disability (PPD) benefits of $741.24 per week for 61.75 weeks, representing a 17.5% loss of use of the left hand and a 15% loss of use of the right hand. Respondent does not address the issue in its Response brief, which was limited to the issues of accident and causal connection..

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).

Petitioner correctly observes that factor (i) should be given no weight, given the lack of an impairment report. Accordingly, the Commission gives this factor no weight.

Regarding factor (ii), Petitioner remains a 911 operator and thus remains subject to the same work conditions associated with the repetitive trauma claim. Accordingly, the Commission gives this factor some weight.

Regarding factor (iii), Petitioner was 58 years old on the manifestation date and 62 on the date of the hearing. She may be considered to have another three to seven years of work life remaining. The Commission gives this factor lesser weight than it might in the case of a younger claimant.

Regarding factor (iv), Petitioner presented no direct evidence of her future earnings capacity, but the record establishes that she has returned to full-duty work in her position as a 911 operator. The Commission gives little weight to this factor.

Regarding factor (v), Petitioner testified that she continues to experience burning, numbness, and tingling in her left arm, along with less severe burning and pain in her right arm. Petitioner also testified that she continues to work but alternates the usage of her hands to reduce her pain. She further stated that at home, she has difficulty with the activities of ordinary life, including opening jars, gripping and turning objects, vacuuming, mowing the lawn or removing snow. This testimony is generally corroborated by her medical records. The physician interpreting her second EMG/nerve conduction study had impressions of left carpal tunnel syndrome (though with significant improvement in the function of the left median nerve since the prior study) and left ulnar nerve neuropathy in the Guyon's canal. Despite right and left carpal tunnel release surgeries, Dr. Rhode noted the EMG study contained evidence of mild residual carpal tunnel syndrome and evidence of Guyon tunnel. Even Dr. Fernandez diagnosed Petitioner with pain and weakness related to pillar pain post-operative from her right carpal tunnel release for right carpal tunnel syndrome, and active carpal tunnel syndrome on the left. Accordingly, the Commission gives this factor the greatest weight.

Having considered all of the aforementioned statutory factors, the Commission awards Petitioner PPD benefits of $735.37 per week (the statutory maximum) for a total of 42.75 weeks, representing a 12.5% loss of use of the left hand (23.75 weeks) and a 10% loss of use of the right hand (19 weeks).

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner sustained an accident on March 11, 2015 that arose out of and occurred in the course of employment.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's current condition of ill-being is causally related to the accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $48,470.92, as to the medical providers as stated in Petitioner's Exhibit 5, pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $14,776.12 for group 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 shall pay Petitioner temporary total disability benefits of $823.60 per week for 5 weeks, for the periods of March 16, 2015, March 25, 2015 through April 13, 2015, and February 23, 2016 through March 7, 2016, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $735.37 per week for a total of 42.75 weeks, representing a 12.5% loss of use of the left hand (23.75 weeks) and a 10% loss of use of the right hand (19 weeks), as provided in Section 8(e) of the Act.

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 8 - 2021
o: 2/4/21
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Sitkowski,

Petitioner,

21IWCC0058

vs.

Nos: 17 WC 29413

FedEx Trade Networks, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

Regarding the issue of permanent partial disability (PPD) benefits, the Commission affirms the Decision of the Arbitrator but writes additionally on the reasoning supporting the award.

Respondent contends in the alternative that the Commission should reduce the Arbitrator's permanent partial disability benefit award representing a 22.5% loss of the person as a whole to a 17.5% loss of the person as a whole.

Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of PPD benefits to which a claimant is entitled, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2016). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

21IWCC0058

The Commission observes that the Arbitrator gave "greater" weight to each of the statutory factors and assigns weight to the factors differently.

Regarding factor (i), the Arbitrator placed "greater" weight on the impairment report from Respondent's Section 12 examiner, Dr. Avi Bernstein, to which Respondent does not object, although the Arbitrator noted that impairment is not the same as disability. The Commission places some weight on this factor.

Regarding factor (ii), the Arbitrator considered not only Petitioner's ability to return to his prior position as a manager, but also Petitioner's ability to work in his current position as a dock hand. Respondent argues that this factor weighs in favor of a smaller award. However, the Commission considers that the effect of Petitioner's current ability to work is offset in part by the effect that Petitioner's effective demotion has on the weighting of factor (iv), Petitioner's future earnings capacity. The Commission places some weight on this factor.

Regarding factor (iii), the Arbitrator noted that Petitioner was 51 years old on the accident date and 53 at the time of the hearing. Respondent argues that Petitioner has a relatively limited work life, when Petitioner might be expected to work another 12 years if his condition does not deteriorate. The Arbitrator noted that Petitioner appeared to be a somewhat older individual and that it would be more difficult for Petitioner to live with the consequences of the injury, particularly arthritis, than would be the case with a younger employee. Respondent's argument on this point is unpersuasive. The Commission places moderate weight on this factor.

The Arbitrator gave greater weight to factor (iv), while observing that there was no evidence presented of Petitioner future earnings capacity. Although Respondent does not raise this seeming contradiction, the Commission observes that Petitioner's unrebutted testimony estimated that he was making less than he would have made had he remained a manager, suggesting he would have received raises based on his performance history. The Commission places little to no weight on this factor, given that it is based solely on Petitioner's estimate.

Regarding factor (v), Petitioner testified that he continues to experience neck pain, aches and soreness most of the time. He stated that he also experiences neck stiffness and pain in cold weather. He also stated that he normally lifts as many as 500 cartons in a workday and finds it very difficult, rating his pain at the end of a work day at eight or nine out of ten. He further testified that his condition limits his daily activities of life. Petitioner's more recent treatment records include complaints of bilateral trapezial pain but resolved radiculopathy. This is a fairly good result after undergoing an anterior cervical discectomy and fusion at C5-6 and C6-7, with interbody cages, anterior cervical plate, allograft, fluoroscopy and SSEP monitoring. On the other hand, the Commission does not discount that Petitioner underwent this significant procedure, which in this case required two surgeons to perform. The Commission places the greatest weight on this final factor.

Having re-weighed all of the aforementioned statutory factors, the Commission agrees that Petitioner is entitled to an award of PPD benefits representing a 22.5% loss of the person as a whole.

21IWCC0058

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 an accident that arose out of and in the course of his employment on September 26, 2017.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's current condition of ill-being is causally related to the accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay for the reasonable and necessary medical services provided by ATI in the amount of $729.48 and Ortho Specialists in the amount of $241.71, pursuant to §§8(a) and 8.2 of the Act and the medical fee schedule. Respondent shall also hold Petitioner harmless for all other medical bills in evidence that were paid by Anthem Blue Cross for the reasonable, necessary and related medical expenses paid by his group health insurance carrier.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,150.12 per week for the period from September 27, 2017 through March 11, 2018, a period of 23 and 5/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $790.64 per week for a period of 112.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 22.5% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 5, 2020 is hereby affirmed and adopted in all other respects 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.

21IWCC0058

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: FEB - 8 2021
o: 2/4/21
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0058

SITKOWSKI, JAMES Case# **17WC029413**

Employee/Petitioner

FEDEX TRADE NETWORKS INC

Employer/Respondent

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

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

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

1993 ROMANUCCI & BLANDIN LLC
FRANK A SOMMARIO
321 CLARK ST SUITE 900
CHICAGO, IL 60654

0507 RUSIN & MACIOROWSKI LTD
KISA P STHANKIYA
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

21IWCC0058

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

James Sitkowski
Employee/Petitioner

v.

FedEx Trade Networks, Inc.
Employer/Respondent

Case # **17** WC **29413**

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 McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, on **February 26, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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?
[x] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [ ] Other _____

21IWCC0058

FINDINGS

On **September 26, 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 $**89,709.36**; the average weekly wage was $**1,725.18**.

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.

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

ORDER

Medical benefits

Respondent shall pay petitioner reasonable and necessary medical services of $944.19, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also hold petitioner harmless for all other medical bills in evidence that were paid by Anthem Blue Cross for the reasonable, necessary and related medical expenses paid by his Group Health Insurance Carrier.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $1,150.12/week for 23 and 5/7 weeks, commencing September 27, 2017 through March 11, 2018, as provided in Section 8(b) of the Act.

Temporary Partial Disability

Respondent shall pay Petitioner temporary partial disability benefits of $1,121.73 for the period commencing March 12, 2018 through April 23, 2018, as provided in Section 8(b) of the Act.

Permanent Partial Disability with 8.1b language (For injuries after 9/1/11)

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 6% of the whole person as determined by Dr. Avi Bernstein, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (Respondent's Exhibit #6). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The doctor noted that petitioner underwent an anterior cervical discectomy and fusion, C5-7, interbody cages, anterior cervical plate, allograft, autograft, fluoroscopy, and SSEP monitoring with resolution of ridicular pain but still some mild intermittent cervical symptomology. Because of these facts, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a Warehouse Manager 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 his job duties actually required him to do the heavy labor job of a dockman and that petitioner continues to work full duty in this more

heavy labor job of a dockman now through the pain. Because of these facts, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 51 years old at the time of the accident and 53 years old at the time of trial. Because of the fact that petitioner appears to be a somewhat older individual and thus petitioner's permanent partial disability will be moderately greater than that of a younger individual due the fact that it is more difficult for an older petitioner to live with the consequence of an injury when symptoms may increase or arthritis may set in due to age, as opposed to a younger individual, whose body would be more physically able to deal with the injury and given now instead of his prior position of a warehouse manager, 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 that there was no evidence presented regarding his future earning capacity as it relates to this work injury other than his testimony that he is now earning as a dockman $27.98 per hour / approximately $58,198.40 per year, which is much less than he was earning as Warehouse Manager of $89,709.36 per year. Because of this fact, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that petitioner underwent the following: multiple x-rays; two cervical CTs and one cervical MRI, which revealed C5/6 and C6/7 disc herniations with radiculopathy; a cervical epidural steroid injection; an anterior cervical discectomy and fusion, C5-7, interbody cages, anterior cervical plate, allograft, autograft, fluoroscopy, and SSEP monitoring; several sessions of cervical physical therapy; but was ultimately able to return to work full duty. Because of these facts, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, The Arbitrator finds that the respondent shall pay the petitioner the sum of $790.64 per week for a period of 112.5 weeks, as provided in Section 8(d)2 of the Act, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **22.5%** loss of use of the total person pursuant to §8(d)2 of the Act.

Credits

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$20,289.98** for other benefits, for a total credit of **$20,289.98**.

Respondent shall be given a credit for medical benefits that have been paid by Anthem BlueCross, 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.

Penalties

Respondent shall pay no penalties or fees, as provided in Section 19(k) of the Act and as provided in Section 19(l) of the Act.

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.

21IWCC0058

Signature of Arbitrator

5/3/2020
Date

MAY 5 - 2020

FINDINGS OF FACT

The instant case proceeded to trial on February 26, 2020. Petitioner and Respondent were operating under the Illinois Worker's Compensation Act and their relationship was one of employee and employer. The parties also stipulate that Respondent received notice of the accident within the time limits stated in the Act and that Petitioner earnings preceding the injury were $89,709.36 and his average weekly wage was $1,725.18 pursuant to Section 10 of the Act. The Respondent disputes that Petitioner sustained an accidental injury that arouse out of and in the course of his employment and Petitioner's current condition of ill being is causally connected to his injury. The parties are in dispute as to some of the medical bills as well as whether the Petitioner is entitled to TTD and/or TPD. Petitioner also claims to be entitled to penalties/attorney's fees under Section 19(K), 19(1) and/or Sec 16 of the Act. Petitioner has filed a penalty petition.

On September 26, 2017, Petitioner James Sitkowski was a 51 year old married man with 1 dependent child. He was and is employed by Respondent, FedEx Trade Networks, Inc. (here in after FedEx). At the time of the injury the Petitioner's job was as a warehouse manager for FedEx. Petitioner's job description consisted of not only sedentary duties as a manager, but also a wide variety of physical duties as a warehouse lead and as a dock hand such as but not limited to: applying and removing nets from airline pallets, daily lifting of packages weighing up to 150 lbs, manually unload ocean containers, build air pallets, throw 2-3 skids daily into an x-ray machine, move large items and operate machinery such as a fork lift. (TE., 17-24, 33-38, 104-106, PX 10, RX1, RX2, RX10).

Petitioner usually worked in excess of 40 hours a week (TE., 24), 7-9 hours a day were spent on the warehouse floor doing a wide variety of duties including assisting his crew, unloading cargo and 1-5 hours a day doing administrative work. Petitioner was unsure how often he unloaded cargo, he testified he originally

thought they unloaded cargo 5-10 times a week, but on cross examination he stated it could have been 5-10 unloads in a 4 week period. Petitioner did testify that when he unloaded cargo he usually did it on his own and it would take approximately 2 hours to unload.

Petitioner believed his pain began on or about August 29, 2017, when he was moving large mattresses, and that it continued daily thereafter (TE., 34-38). Although he did not fill out an accident-injury report at work, Petitioner stated that he had multiple discussions with Senior Manager John Klausing while walking through the warehouse after August 30, 2017 about his neck pain from work activities (TE., 35-36,100-101, 113-114). On September 26, 2017, while at work, Petitioner was walking in the warehouse with Supervisor Klausing and Managing Director Rob Blackmore when he advised them he was having chest, neck and arm pain and was going to the hospital. Petitioner stated that there was no one specific activity on September 26, 2017 that caused an injury but rather that it was the repetitive heavy lifting work activities that he did from August 29, 2017 through September 26, 2017, when he could no longer take the pain and thus he went to the hospital (TE. 31-39, 93-94, 109-110, PX 1).

Petitioner was told by Blackmore and Klausing to go to the hospital. Petitioner drove home and his daughter drove him to the emergency room at Elmhurst Memorial Hospital. (TE., 38-40). While he was admitted in the emergency room, Petitioner gave a history which was consistent with his testimony (TE., 38-41, PX1, PX2, 2,26). Prior to his August 29, 2017 pain, Petitioner testifies that he had no prior work related neck injuries or neck treatment. Petitioner maintained the prior injuries that had occurred were to his right leg on September 2009, working for UPS, he injured his face and arms from an auto accident in October of 1995 and a right shoulder and right elbow injury while working for Fed EX in March 2015, but that he received minor treatment, had no lost compensable time from work and Petitioner was working on full duty with no restrictions from 2015 through September 26, 2017 (TE., 42-48, 72-74, PX3, 13-24, PX 12).

On September 26, 2017, Elmhurst Hospital performed x-rays of Petitioner's chest and right shoulder, which both were negative (TE., 48, Px2,21, 100, 102). On the same day, Petitioner went to his primary care physician, Dr. Agron Elezi who ordered a CT of the cervical spine, which revealed C5-6 herniation with

stenosis and an EKG which was negative (TE., 48 Px2 26-29, 101-103). Petitioner was admitted to the hospital and referred to orthopedic surgeon Dr. Ryan Hennessy by Dr. Elezi (TE., 48-49, PX2, 29).

Petitioner gave a history of his injury to Dr. Hennessy which was consistent with his testimony, upon review of the CT scan, Dr. Hennessey diagnosed him with right C6 radiculopathy at C5-6. Dr. Hennessy then prescribed Medrol dosepak and Protonix and also prescribed physical therapy (PT), Dr. Hennessy indicated he may proceed with a cervical MRI if the dosepak did not improve the Petitioner's condition (TE., 49-50, PX2, 31-32, PX5, 11-14,16-17). On September 27, 2017, Petitioner underwent a PT and pain evaluation with Dr. Craig Malk (TE., 50, PX2, 49-53, 62-69). Petitioner testified that his wife called Klausing from the hospital and sent him emails notifying him that Petitioner was admitted to the hospital (TE., 48-49).

On September 28, 2020, Dr. Malk performed a cervical epidural steroid injection (TE.,50 Px2, 35-36). Due to the pain still present after the injection, on the same day, September 28, 2017, Dr. Hennessy and Dr. Elezi prescribed a cervical MRI which revealed disc disease and osteoarthritis within the spine resulting in multilevel central canal and neuroforaminal narrowing most advanced at C5/6 (TE., 50, PX2, 34, 45, 61, 83, 99, PX5-TD, 20). On September 29, 2017, Petitioner was discharged from the hospital, prescribed pain medications and advised to remain off work and to see Dr. Hennessy within 2 weeks (TE., 51, PX2, 38-41, PX5-TD, 20).

On October 9, 2017, Dr Hennessy prescribed surgery, prescribed a , a cervical collar and bone stimulator post surgery, and advised him to see Dr. Ashraf Darwish whom Dr. Hennessy was going to use as a co-surgeon due to the complexity of the surgery (TE., 51-52, PX4, 59-60, PX5,-TD, 21-22). Petitioner indicated to Dr. Darwish he was injured on August 29, 2017 unloading mattresses resulting in the cause of his pain (TE., 52-54, PX6, 4-6,8-10). Dr Darwish concurred with Dr. Hennessy that Petitioner needed surgery (TE., 52, 54 PX6, 6).

On October 17, 2017, Petitioner was examined by Dr. Elezi for pre-surgical clearance (TE., 55 PX3, 54-57). On October 31, 2017, Dr. Hennessy and Dr. Darwish performed surgery consisting of anterior cervical discectomy and fusion C5-7, interbody cages, anterior cervical plate, allograft, autograft, fluoroscopy and SSEP monitoring (TE., 55-56, PX2, 168-178, PX4, 72-73, Px5-TD, 22-24, PX6, 14-16). Petitioner was discharged from the hospital on November 2, 2017. On November 6 and 20, 2017, Dr. Hennessy performed cervical X-

rays and prescribed PT (TE., 56-57, PX2, 30-33, PX5-TD, 24-26). On November 27, 2017, Petitioner began PT at ATI (TE., 57, PX7 107-108). On December 18, 2017, Dr. Hennessy performed new cervical X-rays (TE., 57 PX2, 29, PX5-TD, 26-27) and on February 5, 2018, Dr. Hennessy released Petitioner to light duty restrictions but was not allowed to work by Respondent due to the restrictions at that time (TE., 57 ,PX5-TD, 27).

Pursuant to Section 12 of the Act, on February 19, 2018, Petitioner was examined by Dr. Avi Bernstein at the request of Respondent (TE., 58, RX4). After reviewing medical records Dr. Bernstein concluded that the Petitioner developed cervical radiculopathy on the basis of advanced degenerative condition of the cervical spine, and that he could not find a causal relationship between Petitioner's work activity and the onset of his symptoms based on the Doctor's "understanding" of Petitioner's job requirements. Dr. Bernstein concluded that there was "...no evidence of a distinct incident or event that is responsible for the onset of his symptoms," Dr. Bernstein agreed that treatment to date was reasonable and necessary and that upon completion of PT and clearance by his surgeon, Petitioner should be able to return to work as a warehouse manager, and thus he was still currently restricted from full duty work and that he was not yet at MMI (RX4, 1-2).

Petitioner completed PT at ATI on February 26, 2018 (TE., 58, PX7, 19-22). On March 12, 2018, Petitioner returned to work with light duty restrictions but was demoted from the warehouse manager to dock hand at a reduced salary (TE., 58-59). On March 23, 2018, Dr. Hennessy prescribed a CT of the cervical spine, reviewed the Section 12 exam report of Dr. Bernstein, and issued a report that same date that clarified his causal opinions (TE., 59-60, PX2, 26PX5-TD, 28-37). On April 9, 2018, Petitioner underwent a CT which revealed post-surgical changes of C5-7 anterior cervical discectomy/fusion with radiographically uncomplicated hardware and partial pseudoarthrosis at the post surgical levels and some foraminal stenosis at C3-6 (TE., 60 PX2, 24-25) and on April 23, 2018, Dr. Hennessy released him to return to work full duty now as a dock hand (TE., 59-62, PX2, 23).

On June 18, 2018, Dr. Hennessy examined Petitioner and advised him to take OTC pain medications, continue using a pain stimulator and continue home exercises (TE., 62 PX2, 21-22, PX5-TD, 40). On October 19, 2018, Dr. Hennessy released Petitioner at MMI (TE., 63 PX2, 18, PX 5-TD 41). On April 4, 2019, again for

a Section 12 exam and AMA rating at the request of Respondent, Petitioner saw Dr. Bernstein and he again concluded that his opinion remained unchanged.

Petitioner's witness, Karen Brandenburg, testified that she has been a service representative for FedEx since 2001. She testified that the Petitioner was a hard worker and would see him daily unloading containers and air freight during the period of August 26, 2017 through September 26, 2017 (TE., 130-137, 139-140, 146, 152-153). Although she worked in the office, she testified that she could see Petitioner through the window in the dock area doing these physical activities and would also speak with him on the warehouse floor (TE., 139-140, 148-149, 152-153, 165). Brandenburg would often see Petitioner by himself before the other crew members got to work (TE., 150-153). Brandenberg explained that the tally sheets which show who unloaded the container were kept with the file, but that Klausing only asked her to produce the billing statements or invoices for trial (TE., 155-156, 166-168, 170-171, 173-175).

Respondent's witness, Robert Blackmore testified that he is employed at FedEx logistics as a senior manager in the North American region. His duties include product offerings and safety and compliance issues. He testified that the Petitioner's job description at the time was 80 percent administrative, but that he only spent minutes watching the Petitioner do his work during the 1-4 visits a year he was at the Petitioner's distribution center (TE., 178, 197, 212) and that managers had to lift from time to time. Mr. Blackmore did testify that the tally sheets would be a good indication of what was being unloaded and by whom, but that the tally sheets were not in company compliance (TE., 205-206, 214-219). Blackmore testified he recalled seeing Petitioner on September 26, 2017 and noticed Petitioner leaning to one side, and recommended Petitioner seek medical attention. Mr. Blackmore testified he was not aware of Petitioner's reporting an injury that occurred at work over a period of weeks at that time.

Respondent's witness, John Klausing, the senior manager who oversaw Petitioner was the last to testify (TE., 246-249). Klausing testified he was not in the Petitioner's warehouse everyday because he was required to travel to different states due to his job requirements (TE., 252-253). On direct examination, Klausing testified that when he was in the warehouse, the Petitioner never complained of a neck injury and never saw him unloading containers or lifting packages on or off pallets (TE., 253-254, 256-257, 273-274, 297-298). Klausing

filled out an incident report regarding a back injury, information he received while Petitioner was in the hospital (TE., 266-267, 287-288). On cross examination, Klausing testified that Petitioner was a good employee, but that upon his return back to work he was demoted to a lower position.

CONCLUSIONS OF LAW

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

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 (1998). An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n*, 371 Ill.App.3d 882, 888 (2007).

The Arbitrator found the testimony of the Petitioner to be credible.

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

To obtain compensation under the Act, a claimant bears the burden of showing by a preponderance of the accidence, that the claimant has suffered a disabling injury which arose out of and in the course of his employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 203, 797 N.E.2d 665, 671 (2003). In the course of employment refers to the time, place and circumstances surrounding the injury and, generally, must occur within the time and space boundaries of the employment. *Id.* An injury "arises out of"employment when "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id* at 203, 797 N.E.2d at 672.

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that Petitioner suffered an injury that arose out of and the course of his employment by Respondent. The

Arbitrator believes that part of Petitioner's duties from August 2017 to September 2017 were repetitive in that the Petitioner's testimony as well as the testimony of Karen Brandenburg were credible. The testimony and evidence established that Petitioner as a manager included not only administrative duties, but also a hands on approach whereby the Petitioner, a hard-worker, by all who testified, would routinely unload heavy pallets along- side his crew and often times by himself. These tasks were not only testified by Petitioner, but confirmed by Brandenburg, who was in a better position to view Petitioner's daily activities than Respondent's witnesses Blackmore and Klausing who were not at the warehouse on a daily basis.

The Arbitrator finds that the constant lifting of 75-150 pounds lead to over a period of time to cause Petitioner's condition; thus linking Petitioner's condition to arise out of the course of his employment at FedEx.

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

The Arbitrator finds that the petitioner's present condition of ill-being is causally related to the injury. In support of the Arbitrator's decision, the Arbitrator finds the following facts:

It is axiomatic that, in order to prevail on a claim under the Act, an injury must arise out of and in the course of employment. See *Baggett v. Industrial Commission*, 201 Ill. 2d 187, 194 (2002). To this end, a claimant must show, inter alia, that some aspect of his employment was a causal factor that resulted in the complaint of injury. *Teska v. Industrial Commission*, 266 Ill. App. 3d 740, 742 (1994). It is not, however, necessary that the employee demonstrate that the injury was "the sole or principal positive factor, as long as it was a causative factor in the resulting condition of ill-being." *Land and Lakes Company v. Industrial Commission*, 359 Ill.App. 3d 582, 592 (2005). Whether a causal connection exists between a claimant's injury and his employment presents a question of fact. *Land and Lakes Company*, 359 Ill. App. 3d at 692. It is the role of the commission to resolve conflicts in evidence and this is particularly true with regard to medical

opinion evidence. *Navistar International Transportation Corp. v. Industrial Commission*, 331 Ill. App. 3d 405, 415 (2002). It is also the duty of the Commission to assess the credibility of witnesses and assign weight to their testimony. *Paganelis v. Industrial Commission*, 132 Ill.2d 468, 483-484 (1989).

An "accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). In a repetitive injury case, the facts must be closely examined to ensure a fair result for both the faithful employee and the employer. *Durand v. Industrial Comm'n,* 224 Ill. 2d 53, 71 (2006). The supreme court has "stated that the purpose behind the Illinois Workers' Compensation Act is best served by allowing compensation where an injury is gradual so long as it is linked to the claimant's work." *Id.* at 66 (citing *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529 (1987)). The court went on to state:

> "Requiring complete collapse in a case like the instant one would not be beneficial to the employee or the employer because it might force employees needing the protection of the Act to push their bodies to a precise moment of collapse. Simply because an employee's work-related injury is gradual, rather than sudden and completely disabling, should not preclude protection and benefits. ***To deny an employee benefits for a work-related injury that is not the result of a sudden mishap *** penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Id.* (quoting *Peoria County*, 115 Ill. 2d at 529-30).

The medical records of Elmhurst Memorial Hospital, Dr. Elezi, Dr. Hennessy, and Dr. Darwish all causally relate petitioner's neck injury to the repetitive work activities of petitioner during the 4 weeks prior to September 26, 2017 (PX2, PX3, PX4, PX5, and PX6). Specifically, Dr. Hennessy opined that the heavy repetitive work duties that petitioner performed inflamed and made symptomatic the right C6 nerve root that caused him so much pain that he required hospitalization for pain control and ultimately the two-level anterior cervical discectomy and fusion (PX5, p. 33). Petitioner's testimony and that Brandenberg, which as stated above the arbitrator finds to be credible, were consistent with the evidence contained in these medical records. The only evidence to the contrary is the opinion of respondent's Section 12 examiner, Dr. Bernstein. The

arbitrator specifically finds the opinions of treating Dr. Hennessy that was contained in his records, as well as his testimony at his deposition, and the opinions of Dr. Darwish contained in his records to be more credible than the opinions of Dr. Bernstein in his reports and in his deposition.

Dr. Bernstein's opinion was based on a job description he was provided with by Respondent as well as a video which was inconclusive at best. Even Dr. Bernstein, in his deposition admitted that the kind of repetitive activities like moving large mattresses or lifting heavy items could be the cause of his neck injury (RX 7).

The Arbitrator, after considering all medical evidence, evidence from depositions and testimony, concludes that the Petitioner has proven by the preponderance of the credible evidence that his current condition of ill- being is causally related to his accidental work injuries and his current condition of ill- being.

J. 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 relies on his findings above and finds that all the medical services provided were reasonable and necessary and orders Respondent to pay all unpaid medical bills including $214.71 for Ortho Specialists, $729.48 for ATI, subject to medical fee schedule, as provided in Section 8.2 of the Act. Respondent shall hold Petitioner harmless for the unknown Anthem Blue Cross Lien for their payment relating to this injury as provided by Section 8(a) of the Act.

In support of the Arbitrator's ruling, the Arbitrator relied on not only the findings above, but took into consideration the testimony of Dr. Hennessy, Dr. Elezi, ATI, and Respondent's Section 12 examiner, Dr. Bernstein who opined that all medical treatment rendered in the case was reasonable and necessary (PX5, RX7).

K. WITH RESPECT TO ISSUE (K) WHAT TEMPORARY TOTAL DISABILITY BENEFITS ARE DUE, IF ANY, THE ARBITRATOR FINDS AS FOLLOWS:

To be entitled to receive TTD, the claimant must show not only that he or she did not work, but also that he was unable to work. *Interstate Scaffolding, Inc. v. The Illinois Workers' Compensation Commission,* 236 Ill.2d 132, 923 N.E.2d 266, 337 Ill.Dec. 707 (2010). The Arbitrator finds that Respondent is to pay Petitioner's temporary total disability (TTD) benefits of $1,150.12 per week for 23 and 5/7 weeks for a period from September 27, 2017 through March 11, 2018 as provided in Section 8(b) of the Act and temporary partial disability (TPD) benefits of $1,121.73 from a time period commencing March 12, 2018 through April 23, 2018 as provided in Section 8(b) of the Act.

The award is based on all the evidence presented at trial and all the exhibits and depositions which support the fact that Petitioner's disabling condition was temporary and he had not yet reached a permanent condition of MMI until April 24, 2018, pursuant to Section 19 (b) of the Act.

The evidence was that the Petitioner was in the hospital from September 26-29, 2017. Upon his release on September 29, 2017, Dr. Hennessy instructed Petitioner to remain off work until a surgery could be performed. After surgery was performed on October 27, 2020, Dr. Hennessy again prescribed Petitioner stay off work duties (PX 2).

It was not until February 5, 2018 that Dr. Hennessy released Petitioner to return to work with light duty restrictions. On February 19, 2018, after a Section 12 exam Dr. Bernstein opined that once PT was complete and he was cleared by his surgeon, he could return to his job as a warehouse manager, a position which was no longer available to him. Petitioner on March 12, 2018, was cleared to return to work with light duty restrictions, but was not allowed to work by Respondent. Petitioner returned work on a demoted basis at a reduced salary on April 23, 2018. Arbitrator takes notice that if Petitioner's job description as a warehouse manager was purely administrative in nature, the Respondent would have allowed him back to work with light duty restrictions.

Petitioner received no TTD from September 27, 2017 through March 11, 2018, but did receive $20,289.98 in STD on April 23, 2018, Petitioner was released to work full duty. Petitioner still had not received TPD of $1,121.73 from March 12, 2018 through April 23, 2018.

Therefore Arbitrator finds Petitioner is entitled to TTD from September 27, 2017 through March 11, 2018 and TPD of $1,121.73 from March 12, 2018 through April 23, 2018 as provided by Section 8 (b) of the Act.

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

Pursuant to Section 8.1(b) of the Workers' Compensation act, the following criteria and factors must be considered in assessing permanent partial disability:

1. The reported level of impairment;
2. Petitioner's occupation;
3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) also states, "No single 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 a physician must be explained in a written order." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

1. **The reported level of impairment under the AMA Guides.**

The level of impairment reported by Dr. Bernstein, pursuant to the most current edition of the AMA's Guides to the Evaluation of Permanent Impairment is 6% of the whole person (RX6). The arbitrator notes that impairment does not equate to permanent partial disability under the Workers' Compensation Act.

2. **The occupation of the injured employee.**

The petitioner testified credibly that he was employed as a Warehouse Manager at the time of the accident, and that his written job description was of a supervisory position but that his job duties actually required him to do the heavy level labor job of a dock hand (TE., 17-24, 33-38, 104-106, RX2). When he was returned to work full duty, he returned as a dock hand (not as a warehouse manager), and he continues to work full duty in this heavy labor job of a dock hand now through the pain (TE., 64). In light of the foregoing, the

Arbitrator gives greater weight to the foregoing factor, and, taking judicial notice that his job is a heavy level job, concludes that petitioner's permanent partial disability will be larger than an individual who performs lighter work.

3. **Petitioners age at the time of injury.**

At the time of the injury Petitioner was 51 years old (TE., 39). The Arbitrator finds the Petitioner to be an older individual approaching the end of his work life. This is relevant and does receive some weight in determining PPD.

4. **The employee's future earning capacity.**

No evidence regarding Petitioner's earning capacity was presented by Petitioner other than the fact that because of this work-related accident and his surgery, he did not believe he would be able to work as long as she thought he would have been able to prior to the accident. The arbitrator also notes that when he returned to work full duty, respondent placed him in the job of a dock hand at much less pay than what he was earning as a warehouse manager (TE., p. 64). The Arbitrator gives greater weight to this factor.

5. **Evidence of disability corroborated by the treating medical records.**

On September 26, 2017, Elmhurst Hospital performed x-rays of the chest and right shoulder, which were both negative (TE., 48, PX2, 21, 100, 102). The September 26, 2017 CT of the cervical spine revealed C5-6 herniation with stenosis (TE., 48, PX2, 26-29, 101-103). Dr. Hennessy diagnosed him with right C6 radiculopathy at C5-6, prescribed a Medrol dosepak and Protonix, prescribed physical therapy (PT) while in the hospital (TE., 49-50, PX2, 31-32, PX5-TD, 11-14, 16-17). Dr. Malk performed a cervical epidural steroid injection on September 28, 2017 (TE., 50, PX2, 35-36). The September 28, 2017 cervical MRI revealed disc disease and osteoarthritis within the cervical spine resulting in multilevel central canal and neuroforaminal narrowing most advanced at C5/6 (TE., 50, PX2, 34, 45, 61, 83, 99, PX5-TD, 20).

On October 9, 2017, Dr. Hennessy prescribed surgery, prescribed a cervical collar and bone stimulator post-surgery (TE., 51-52, PX4, 59-60, PX5-TD, 21-22). On October 31, 2017, Dr. Hennessy and Dr. Darwish

performed the surgery, which consisted of anterior cervical discectomy and fusion, C5-7, interbody cages, anterior cervical plate, allograft, autograft, fluoroscopy, and SSEP monitoring (TE., 55-56, PX2, 168-178, PX4, 72-73, PX5-TD, 22-24, PX6, 14-16). Cervical X-rays were performed post-surgery on October 31, 2017, he underwent a PT evaluation on November 1, 2017, and he was discharged from the hospital on November 2, 2017 (TE., 56, PX2, 183-187, 201-208, 267).

On November 6, 2017, Dr. Hennessy performed cervical x-rays, and on November 20, 2017, Dr. Hennessy performed cervical x-rays and prescribed PT (TE., 56-57, PX2, 30-33, PX5-TD, 24-26). On November 27, 2017, he began attending PT at ATI (TE., 57, PX7, 107-108). On December 18, 2017, Dr. Hennessy performed new cervical x-rays (TE., 57, PX2, 29, PX5-TD, 26-27). On February 5, 2018, Dr. Hennessy released him to light duty restrictions, which he tendered to respondent but respondent did not allow him to work with the restrictions at that time (TE., 57, PX5-TD, 27). Petitioner completed PT at ATI on February 26, 2018 (TE., 58, PX7, 19-22).

On March 12, 2018, respondent allowed Petitioner to return to work with light duty restrictions but had demoted him from warehouse manager to a dock hand and reduced his salary (TE., 58-59). The April 9, 2018 cervical CT revealed post-surgical changes of C5-7 anterior cervical discectomy/fusion with radiographically uncomplicated hardware and partial pseudoarthrosis at the postsurgical levels and some foraminal stenosis at C3-6 (TE., 60, PX2, 24-25). On April 23, 2018, Dr. Hennessy released him to return to work full duty, and petitioner did in fact return to work full duty at that time although he was now a dock hand instead of warehouse manager (TE., 59-62, PX2, 23).

On June 18, 2018, Dr. Hennessy performed cervical x-rays, advised him to take OTC pain medications, continue using pain stimulator, and continue to do home exercises (TE., 62, PX2, 21-22, PX5-TD, 40). On August 17, 2018, Dr. Hennessy performed cervical x-rays, noted that he still had pain but that he would continue to work through the pain (TE., 62-63, PX2, 20, PX5-TD, 40-41). On October 19, 2018, Dr. Hennessy

performed cervical x-rays, released him at MMI, and advised him to continue doing home exercises to deal with the pain (TE., 63, PX2, 18, PX5-TD, 41). Petitioner did not see Dr. Hennessy after his October 19, 2018 appointment (TE., 63, PX2, PX5-TD, 41). Dr. Bernstein's April 4, 2019 AMA report contains a 6% whole person impairment rating (WPI), pursuant to the most current edition of the AMA's Guide to the Evaluation of Permanent Impairment since he noted that Petitioner had cervical radiculopathy and had underwent a 2-level anterior cervical fusion (RX6).

Petitioner has not seen any other doctors for his neck (TE., 63-64). Petitioner did not have any subsequent injury to his neck and he did not have any prior injuries to the neck (TE., 64-65). Prior to September 26, 2017, he had been working full duty and had no work restrictions (TE., 65). Petitioner still works full duty with no restrictions for respondent but is now in the position of a Dock hand and is now earning less money (TE., 64).

Petitioner's testimony was corroborated by the medical records entered as exhibits. Respondent did not present any convincing evidence to the contrary. The petitioner's complaints, supported by the medical records, evidences a disability as indicated by Commission decisions regarded as precedents pursuant to Section 19(e) of the Act. The Arbitrator places greater weight on the foregoing factor when making the permanency determination.

The Arbitrator places greater weight on the medical records coupled with Petitioner's testimony and finds that the nature and extent of the injury is 22.5% loss of use of the total person pursuant to Section (8)(d)(2) of the Act.

M. WITH RESPECT TO WHETHER OR NOT RESPONDENT SHALL PAY FEES OR PENALTIES IF ANY, ARBITOR FINDS AS FOLLOWS:

Arbitrator awards no fees or penalties. The imposition of penalties under Section 19(l) is mandatory when the Respondent is late in paying benefits, unless the Respondent can articulate an adequate justification for the delay. Both Section 19(k) penalties and Section 16 attorney fees are discretionary rather than

mandatory and are intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. *McMahan v. Industrial Commission*, 183 Ill.2d 499, 702 N.E.2d 545 (1998). In determining whether Section (k) penalties should be awarded, the Supreme Court established a test of "objective reasonableness", which is a question of fact to be resolved by the Commission. *Board of Education of the City of Chicago v. Industrial Commission*, 93 Ill.2d 1, 442 N.E.2d 861 (1982). The burden of establishing the reasonableness of the conduct is incumbent upon the Respondent and, where there has been a delay in the payment of workers' compensation benefits to the employee, the employer has the burden of justifying the delay. *City of Chicago v. Industrial Commission*, 63 Ill.2d 99, 345 N.E.2d 477 (1976). Though respondent's MD was not as persuasive as the Petitioner's MDs, Respondent's reliance upon its experts opinion in denying liability in this case was neither vexatious nor in bad faith penalties and fees will be denied.

N. IS RESPONDENT DUE ANY CREDIT?

The Arbitrator finds that Respondent is entitled to an 8(j) credit of $20,289.98 for the STD/LTD paid by Aetna. In addition, Respondent shall be given a credit for medical benefits that have been paid by Anthem BlueCross in this case, but 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 (ARB Ex. #1).

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

Cherry Bell,

Petitioner,

vs.

NO: 17 WC 2772

Automotive Club of Southern CA,

21IWCC0059

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 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 February 25, 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.

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.

FEB - 9 2021

DATED:
MP:yl
o 1/21/21
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

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

BELL, CHERRY
Employee/Petitioner

Case# **17WC002772**

AUTOMOTIVE CLUB OF SOUTHERN CA
Employer/Respondent

21IWCC0059

On 2/25/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

2461 NYHAN BAMBRICK KINZIE & LOWRY
BRIAN RATERMAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

21IWCC0059

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

CHERRY BELL
Employee/Petitioner

v.

AUTOMOTIVE CLUB OF SOUTHERN CA
Employer/Respondent

Case # **17** WC **02772**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Collinsville and Herrin**, on **October 26, 2017 and December 4, 2017**, respectively. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0059

FINDINGS

On the date of accident, **September 11, 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 the 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 $**Unknown**; the average weekly wage was $**600.00**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

The Arbitrator finds that the Petitioner has failed to prove that she sustained accidental injuries which arose out of and in the course of her employment with the Respondent on September 11, 2015.

No benefits are awarded.

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

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

Signature of Arbitrator

February 22, 2019
Date

FEB 25 2019

STATEMENT OF FACTS

Petitioner testified that she worked for AAA Auto Club of America as an insurance agent, selling auto and home insurance policies from September 14 to June 2016 and earned $27,000.00 a year. Perry Nassif, regional manager, clarified by evidence deposition testimony that the Automobile Club of Missouri was partnered with Auto Club Enterprises in California for insurance sales and affiliated with AAA for road side services. The Application for Adjustment of Claim indicates a date of accident of 9/11/15. (Px1).

Petitioner testified that she obtained clients through solicitations, starting with friends and family, then by referrals. This also included cold calling. She testified that she worked with three other insurance agents out of the same office and worked with an underwriter who checked her policies for errors. She stated she did not work in the same office as the underwriters whom were stationed in St. Louis headquarters. Petitioner testified that her underwriter was named Margaret Criscione, whom she never met in person.

Petitioner testified that her position selling insurance policies meant that she was creating specific policies for customers that met their desires and needs. She testified that specific policy information was entered into a system maintained by AAA. Petitioner testified that if things "worked out," she would submit an insurance policy to Ms. Criscione in underwriting for review. She estimated she submitted more than 100 policies. Petitioner testified that there were guidelines that controlled who could be insured by AAA and that these guidelines controlled what type of information needed to be in policies. These guidelines are issued by the Department of Insurance for the particular state in which a policy is sold. She testified that she, as well as all other sales agents and her underwriter, were subject to these guidelines, and she was aware that the policy must fit those guidelines before it can be issued to a potential insured. Petitioner testified that she understood that sometimes changes had to be made to a policy for it to fit those guidelines and that there was little discretion on how a policy could be written. Petitioner testified that if she incorrectly put information into a policy that she would want this to be corrected.

Petitioner testified that she started to check her accounts after she submitted them to Ms. Criscione for review because she felt Ms. Criscione made "too many" mistakes. Petitioner testified that when she questioned Ms. Criscione about the errors, she would retaliate. Petitioner further testified that claims were returned to her modified from how they were originally submitted, which she believed was done intentionally. She testified that this was a professional issue for her because these changes would impact premiums beyond the original customer quote, which caused her to lose business and impacted her income. Petitioner testified that when she would ask Ms. Criscione about premium changes, she would have an attitude. Petitioner testified that she experienced a hostile work environment from customers, which she believed was the result of her experience she was having with Ms. Criscione that led to emotional trauma.

Petitioner cited three specific policies where she felt mistakes were made by Ms. Criscione on review, including those of Tommy Childs and Ryan Oller, noting that Mr. Oller cancelled his premium because of the alleged mistake. As to the third policy of Mr. Cueto, Petitioner believed information was removed from this policy. Petitioner testified that when she previously complained of this happening, Kurt Chambers, her Insurance Business Manager (IBM), told her this was impossible. Petitioner's review of Mr. Cueto's homeowner's policy indicated he was being charged for 4 ring endorsements but only had 2 rings, which significantly increased Mr. Cueto's premium. $2,000.00. Petitioner testified that she notified Ms. Criscione about the error and when she reviewed Mr. Cueto's policy the following day, Ms. Criscione had removed the error. Petitioner stated that when she looked at Mr. Cueto's name in the system that "It was gone. Like it never existed." Petitioner elaborated that she meant the double charge was gone.

Petitioner testified that she reported these policy issues to her regional manager, Perry Nassif, in person around 8/25/15. Mr. Nassif emailed Petitioner, copying Anwar Othman, Jacob Chambers, and himself, thanking her for coming in to discuss the policies of Cueto, Childs, and Oller. Petitioner replied on 8/27/15, noting that: "My biggest concern is making sure Mr. Cueto receives a refund for the duplicate ring endorsement." Petitioner stated that she knew Mr. Nassif investigated her concerns about Mr. Cueto's policy, but he did not receive a refund. Petitioner testified they removed the duplicate ring, but that her issue was specific to removal of information by Ms. Criscione without her knowledge. Mr. Nassif replied to Petitioner on 9/10/15, again copying the original email recipients, indicating that he investigated the three policies she expressed concern about. Mr. Nassif indicated that (1) Mr. Childs' premium was corrected for his policy and that the underwriter made an error in changing the longevity from 3 years to 9 months; (2) Mr. Oller's mother was not being surcharged for a claim on 4-28-12, that he [Mr. Oller] was charged for his 9/11/14 claim, and that the incident was not properly rated initially; and (3) that Mr. Cueto's policy's duplicate ring was removed and corrected back to the last renewal of the policy. (Px15; Rx20). Mr. Nassif also indicated in this email that there was a record of Mr. Cueto contacting policy services to add the ring at his request. (Px15).

Mr. Nassif testified by evidence deposition on 10/25/17. He testified that he is currently employed by the Auto Club of Missouri in its St. Louis, MO office and has been the regional manager for Region 1 for 6 years. Mr. Nassif testified that in addition to the roadside AAA memberships that they sell, they also offer auto and home insurance. His main territory is the eastern half of Missouri, Southern Illinois, Southern Indiana, and offices also in Arkansas and Eastern Kansas, covering approximately 41 locations. Mr. Nassif testified that he has to ensure that his territory obtains their yearly sales goals. (Rx20).

Mr. Nassif testified that branch agents report directly to an IBM, who in turn reports directly to him. He clarified a branch agent also meant a sales agent. He testified the he had approximately 95 branch agents working under him in 2015, including Petitioner. He would become involved or work with branch agents directly if there was something brought to his attention. He recalled maybe two occasions that he specifically worked with the Petitioner and met face to face or exchanged e-mails concerning an issue. (Rx20; see also Rx5 and Rx15).

Mr. Nassif specifically stated there was an 8/27/15 e-mail from Petitioner (a Thursday) that also copied the vice president of sales, Anwar Othman, and her manager, Jacob Chambers with the subject line: "Today's meeting." (Rx2; Rx5). Mr. Nassif testified that an e-mail from himself to Petitioner on 9/10/15 at 5:17 p.m. was a follow-up e-mail to the in-person meeting. (Rx15 & Rx20). Mr. Nassif stated that he investigated Mr. Childs' issue by speaking with underwriting and learned that there was apparently a mistake initially rating the policy and submitting the application. (Rx20). Mr. Nassif testified there were incidents not noted on the application that would have caused the premium to be different than what guidelines called for. A compensation claim was deleted from the application and a non-fault accident, resulted in an improper rating. Mr. Nassif testified that the terms "rate" and "premium" had the same meaning. Mr. Nassif testified that the only person that could delete something from a policy before it was submitted would be the authoring sales agent. (Rx2; Rx5)

Mr. Nassif testified that underwriting did make an error in the longevity of Mr. Childs' insurance coverage before AAA, and the premium had to be adjusted when the longevity issue was corrected. As to the concerns about Mr. Oller's policy, Mr. Nassif testified that Petitioner did not properly rate two claims when the application was submitted. He indicated that if an agent does not properly rate an application when it's submitted, underwriting had 60 days to find and correct any mistakes made by the agent, and that Petitioner's initial errors were being corrected based on AAA guidelines. (Rx15 & Rx20).

As to the issues Petitioner raised regarding Mr. Cueto's policy, Mr. Nassif testified that it was discovered that a diamond ring had been added to his policy twice and Petitioner was unable to determine how this happened. He testified there was a record of Mr. Cueto contacting another department and the ring was added at that particular time. The duplicate ring was removed pursuant to guidelines and this resolved any issue. Mr. Nassif testified that Mr. Cueto's policy was not assigned to Petitioner as she was not his representative or his sales agent. His policy was actually assigned to headquarters and the policy services department. Mr. Nassif testified that Petitioner only became involved with Mr. Cueto's policy concerns because she happened to be sitting at a desk at the time that he called. (Rx15 & Rx20).

Mr. Nassif testified that he offered for Petitioner to visit underwriting department to sit down with an underwriter to review her applications to better understand what the underwriters are looking for, how to apply eligibility rules, and to help improve the accuracy of her policies. This is an offer that is made to other sales agents all the time, but Petitioner did not accept. (Rx21). Petitioner's testimony acknowledged that she did not accept this offer. Nassif stated that Petitioner professionally would have benefited from less errors due to improved customer satisfaction, as she would have made more money by selling more insurance policies. Mr. Nassif agreed that being a sales agent was a tough job because it called for lots of hours, lots of phone calls and speaking with many customers. Sales agents were compensated on commission, mostly on 100% basis. (Rx20).

Mr. Nassif testified that the policy notes of the insurance policy would capture any conversation logged by the sales agent, and those policy notes exist as long as the policy itself, plus an additional 7 years. Mr. Nassif testified that the notes become a part of the actual application and are considered discoverable. He stated that the notes in the policies are kept in ordinary course of business and preserved with integrity to reflect what actually happened contemporaneously. (Rx20).

Respondent's witness, Margaret Criscione, testified by evidence deposition that she had been employed by AAA of Missouri for seven years, initially as a sales agent for 3.5 years before becoming a personalized underwriter for the last 3.5 years. Margaret Criscione testified that she has been at AAA of Missouri for 7 years overall, with the remaining 3 ½ years as a direct sales agent. She worked out of the underwriting office in St. Louis, Missouri. Ms. Criscione testified that as a personalized underwriter, she communicated with agents and IBMs regarding issues on specific insurance policies to determine if the policies met guidelines and state regulations. She testified there were over 200 different guidelines on home policies and 400 different guidelines on auto policies. She clarified that AAA prepares the guidelines, which are filed with the State where the insurance policy was sold. Ms. Criscione testified that these guidelines are in place to make sure that a risk is accurately being rated and the policy is acceptable within those risks. (Rx21).

Ms. Criscione testified it was her job to make sure that all of the policies are accurately rated and is required to modify any policies where information is missing or incorrect. Ms. Criscione further testified that there are state regulations that are relevant because she also has to make sure policies are consistent with regulations and the States will perform audits. Mr. Nassif clarified that every policy written by AAA had what was called eligibility rules and rating guidelines. Mr. Nassif testified every agent had to properly identify the risk on an application that is being submitted. (Rx20 & Rx21).

Mr. Chambers testified that if a policy insuring an applicant did not match AAA's guidelines, that the State where the policy was sold could impose fines or institute punishment as severe as a cease and desist notice that prohibited the company from writing insurance for a specified period of time, or forever. Mr. Chambers testified that sales agents were the first in line to ensure a policy is written correctly within the guidelines as those agents generate the specific information for a potential applicant. IBM's were the second line of defense to ensure

policy accuracy, and underwriters were the third line. Mr. Chambers testified that agents are reviewed based on an accuracy score to ensure that policies were written within the guidelines.

Ms. Criscione testified that exceptions could be made where the policy written by an agent is not in compliance with AAA guidelines in an effort to salvage the account. This would involve determining if the overall risk of the account was such that an applicant that was otherwise outside of the guidelines could be insured, such as someone who owns an unacceptable breed of dog. Ms. Criscione testified that her performance is reviewed based on personal accuracy and that she is audited to make sure that her policy reviews are accurate to the guidelines. She testified that AAA keeps a record of accuracy scores. She testified that the department standard is 98% accurate and that she personally is in the "exceeds" performance category with over 98.5% of her policies reviewed as in compliance with the guidelines. Her failure to bring an insurance policy into compliance with AAA guidelines could result in an error that would bring down her accuracy score, which could impact her employment with AAA. (Rx21).

Ms. Criscione testified that when she makes a change to a policy to bring it into compliance with guidelines or state regulations she would personally document a note of what changes were made into the electronic policy system. She had no ability to delete any policy notes once entered, whether it was her own or that of another AAA employee. To have anything deleted, a request would have to be made to management, who would then make a request to the IT department. Additionally, if something was deleted in this fashion a time stamp would remain in the place of the actual note itself. The only time Ms. Criscione indicated she had made such a deletion request was when there was confidential personal information in the notes. Ms. Criscione testified that in the calendar year 2015 that she worked over 5,000 items through policy star system, including new business applications and renewals. This did not include any policy or text messages for notes on the policy, nor any e-mails or phone calls that she might receive. In 2015, she had 36 sales agents assigned to her territory, including Petitioner, and that she had never personally met Petitioner. (Rx21).

Ms. Criscione testified to notes for the policy Majias, assigned Policy No. P24143961. She testified this showed that the policy was cancelled on 7/26/14. Ms. Criscione testified that on page 2 of the Majias policy document, there was a 4/11/13 (5:55 p.m.) policy note indicating that a scheduled engagement ring from the Cueto policy was moved to the Majias policy. She testified further that a page 1 entry on 2/11/14 at 3:32 p.m. added the ring to the scheduled jewelry. An 8/13/14 entry at 10:58 a.m. indicated that the Petitioner is now on her husband's policy, assigned No. P11487891, and a note of the same date at 10:57 a.m. indicated that the policy was cancelled effective 7/26/2014. Ms. Criscione testified that page 4 of the documentation reflected amendment details for Mr. Cueto's policy, Policy No. P11487891. There was jewelry deleted from the Cueto policy effective 4/10/13. Page 5 reflected her first interaction with Petitioner relative to this policy was on 8/18/15. Ms. Criscione testified that she was advising Petitioner to upload the photos of the home, but she was not sure what Petitioner was talking about regarding the jewelry endorsement. She testified that there was an earlier note from Petitioner dated 8/7/15 at 5:10 p.m. where the Petitioner wrote "please be advised cust was overcharged for his jewelry endorsement." Ms. Criscione testified that her review of these notes indicated that Petitioner was trying to write the insured under a different policy form and was asking for approval. She then requested more information on Mr. Cueto' s home. (Rx21, Depx1).

Ms. Criscione then testified to her review of review of the policy notes for Policy No. P11487891 belonging to Mr. Cueto. She testified that this was the first policy initially discussed where Mr. Cueto's wife was moved onto his policy. A note from 8/31/14 at 10:54 a.m. indicated that someone, not the Petitioner, spoke with Mr. Cueto' s wife then added her to his policy and cancelled her renter's policy. She testified that meant that the agent added Ms. Cueto's newly married spouse to the existing policy and added her scheduled jewelry items as an endorsement on his. There was a 9/26/14 policy note at 10:34 a.m. that indicated the agent spoke with the

insured and added the engagement ring that was on Policy P24143961 to Mr. Cueto's policy for P11487891. She testified that none of the Cueto policy notes contain a timestamp that would reflect that any of the notes were deleted. (Rx21, Depx1; Rx11).

Mr. Nassif testified that every sales agent has errors with their insurance policies but that procedures are in place to minimize those errors. The investigations of the Childs, Oller and Cueto policies found that there was no intent to harm Petitioner's business as all three policies were corrected to align with eligibility guidelines. (Rx21).

Petitioner testified that she had issues with Mr. Chambers, her IBM, and believed that he created a hostile work environment, which also impacted her mental state. She later clarified that her issues with him was her feeling disappointed because she wanted more professionalism from her supervisor. She communicated these issues in an e-mail to Chambers on 4/12/15 (Px5; Rx4), which reflected that she was upset about a number of things. This included that he (Mr. Chambers) and Doug Matzenbacher had insinuated to Mrs. White that she (Petitioner) was an incompetent agent, and that Chambers had "tried to sabotage my success from the very beginning." She also said that Mr. Chambers took internet leads away from her, testifying: "How can I make my numbers when I was fresh out of training? When I questioned you on this ridiculous idea, you blamed everything on upper management. I knew you were not telling me the truth. Why would upper management spend money for training, then turn around and set me up for failure? Yes, I know it doesn't make sense. Nothing you do or say makes any sense…" (Px5; Rx4).

Petitioner further alleged that Mr. Chambers spent 90% of his time playing games on his cell phone or taking smoke breaks, stating "You don't take your job serious, how do you expect for me to take you serious?" She also accused Mr. Chambers of bullying and harassing other employees in the office, citing his Chambers' handling of personal heaters as an example. Petitioner concluded by stating: "I feel you are abusing the little authority that you have. You are a follower and have no leadership skills. I find your behavior disgusting, childish, unprofessional, and unacceptable. I will not tolerate it anymore. Respectfully, Cherry Y. Bell." (Px5; Rx4). Petitioner testified that her complaints were not investigated. She acknowledged she met with Mr. Nassif and Mr. Chambers, but said she did not feel like there was any investigation being performed. Petitioner testified that she provided multiple examples of how she was being bullied and harassed to Mr. Nassif.

Mr. Chambers testified that he left Respondent's employ in Missouri on 7/21/17 and currently works for AAA of Washington in Tacoma as a sales agent. Starting on 6/20/12 in Missouri, he testified he was employed as a direct sales agent for approximately 1.5 years, an insurance business manager from 1/1/14 until 9/15/15, and then an operations manager from 9/16/15 through 7/21/17. He indicated this represented a series of promotions within AAA of Missouri. As an IBM, he testified he was responsible for agents, including their production and training. A Swansea, Illinois location was the branch where he was Petitioner's manager. Mr. Chambers testified that he trained new sales agents, meaning agents with less than 6 months experience. All new agents go through a structured six-week training program after which the IBMs do on-the-job training for as long as needed. This would consist of checking policies prepared by the new agents, being available for any questions about applications, AAA guidelines, and inspection requirements for home policies. He testified that there is also 2.5 weeks of training for entering policy information into the AAA system. There would be weekly coaching sessions with new agents. Mr. Chambers would communicate by e-mail with his sales agent for on the job training notes. Mr. Chambers testified that Petitioner went through training like all other new sales agents. He testified that the documentation in Rx18 represented e-mail correspondence between the Petitioner and himself documenting his on-the-job training of Petitioner. The dates range between 12/29/14 and 4/23/15. (Rx18). Mr. Chambers testified that internet leads are assigned to sales agents in a round robin system in the

office based on the zip code of the member. He testified he only had the ability to reassign an internet lead if it went unworked within a 2-hour timeframe. An agent could refuse a lead.

Mr. Chambers recalled receiving the 4/12/15 e-mail from Petitioner (Px6; Rx4). He disagreed with Petitioner's statements that she learned to do the job on her own and that Chambers tried to sabotage her success, testifying she was given the same opportunities as all other new agents. He testified that all agents in the office were required to turn off their heaters until it was concluded that all agents could resume heater use. Mr. Chambers testified that following the Petitioner's email, her concerns were addressed in a meeting with himself, Petitioner and Perry Nassif. (Rx4). He testified that Mr. Nassif sent an email summarizing the meeting (Rx5). Mr. Chambers testified he did not have the power to take money out of Petitioner's paychecks and had never threatened to do so. He testified that he had no issues with other sales agents when he was an IBM.

Mr. Nassif testified that the meeting with Petitioner and Mr. Chambers took place on 4/14/15, and he sent his follow-up email on Friday, 4/17/15, summarizing his investigation. (Rx5; Rx20, Depx1). Mr. Nassif testified that he investigated a claim regarding a customer named Ms. White by speaking with her personally and he found no indication that there was anything inappropriate said to Ms. White. Mr. Nassif also investigated Petitioner's claim that she had inadequate training. He reminded Petitioner during the meeting of the trainings she attended the IBM's role to assist her. He testified that Petitioner received a passing grade on the training program and attended the classes for approximately 6 weeks. He investigated Petitioner's complaints as to inadequate sales leads by reviewing AAA's system that tracks leads and by speaking with her manager. He testified that an internal computer system distributed leads automatically to the agents based on the zip code of their branch and that there is no personal discretion in distributing those internet sales leads except where those leads are not followed up on by the agent in a timely manner, or at the end of the month to an agent with a higher closing ratio to help the branch meet its numbers. (Rx20; Rx5).

Mr. Nassif testified that he investigated Petitioner's complaint about Mr. Chambers' cell phone use by discussing this with Mr. Chambers directly and indicated there was no evidence to substantiate these claims. He investigated Petitioner's claims of being bullied and harassed and testified that Petitioner's only example was that he gave an employee trouble about drinking the last cup of coffee without making more, and that he could not investigate this allegation because Petitioner did not provide a name of the alleged employee. As to Petitioner's complaint that Mr. Chambers was insensitive to her need for a personal heater, Mr. Nassif testified that all personal heaters were disconnected at the time because it was suspected that heaters caused computers to shut down. (Rx20; Rx5).

Petitioner testified that she generally treated her supervisors with respect and that she initially behaved professionally with Mr. Chambers. She testified she sent an e-mail to Chambers on 2/16/15 (Rx9) indicating "customers coming in, please review." When Mr. Chambers replied: "What date will be binding the coverage?", Petitioner responded by saying "If you're reminding me to do a quote to quote, just say that. You are a horrible manager. You insist on making things more difficult than they really are." (Rx9).

Petitioner submitted an email exchange between herself and Chris Raymond where Ms. Raymond wrote on 10/15/15 at 12:10: "I've been to the branch on multiple visits since assuming the role at Swansea and have made attempts to work with you individually to ensure your success in writing new business. I've expressed multiple times that I need to speak with you and each time, you're on the phone with closed door until you exit for lunch then you return to complete duty desk assignment, this is not acceptable. I thank you for printing quotes as requested...[email ends]." (Px5). On 10/16/15, Ms. Raymond wrote to Petitioner at 4:34 p.m.: "Cherry, Just a recap to our conversation on 10/15/2015 regarding Minimum Standard for Auto production in 4th Qtr 2015. Your minimum standard auto production is 21 gross issued auto in 4th Qtr 2015. You are currently on a verbal

for Conduct ~07/30/2015. You will have to complete 21 gross issued auto minimally in 4th Qtr to avoid progressive discipline." (Px5). Petitioner responded in an undated response: "I'm truly confused in regards to how you feel you can assist me with being successful when you are total clueless in regards to AAA policy and procedures. When I met you, I sympathized with you because you seemed to be under a lot of stress and pressure. ...you claim Perry Nassif was treating you unfairly, and riding your back for no valid reason. You beg me to never say anything about you to Anwar Othman, you stated he despised you...I really felt sorry for you...now I totally understand why Anwar dislike you...Shall we talk about the real reason you are upset. You are upset because I figured you out. It's clear you have poor management skills and it's obvious you don't know how to do your job. ...I ask myself, Why would a company like this keep a person that is useless around. Well I will tell you, they know you have low self-esteem, no values, no self-respect, and you enjoy being used. You are a pathetic and a disgrace to all women of color. People like you I stay far away from. I advise you to leave me the hell alone. You're completely out of your league. I hate to take another sister down but I am sick, and I am on medication. Therefore, I have zero tolerance for the bullshit, I will destroy you!!!! Have a wonderful weekend, Mrs. Raymond." (Px5).

Petitioner testified that there were no personal issues in her life that caused her emotional trauma. On cross-examination, Petitioner testified that her personal life up to September 10, 2015 was okay. She testified that there was nothing in her personal life that she could not handle herself. Petitioner stated she had issues at home, but it was something that she could handle. She testified also that she had issues with her house. She acknowledged that she had contracted for work to be done on her home in January 2015, paying $23,000.00 to a contractor in February 2015 for work that was not performed well. Petitioner testified that her gas, plumbing, and electricity and air were all malfunctioning as a result and she agreed that living in those conditions was stressful and irritating. Petitioner testified that she didn't tell Kurt Chambers about the issues she had with her home, but a 2/26/15 email sent to her by Mr. Chambers at 8:50 p.m., which she could not recall, stated, "Ok thanks. Hope you get your house taken care of. That's scary." Petitioner responded "I know, Kurt I am sooo irritated. And thanks." (Rx6).

Petitioner testified she had no health issues related to the problems with her home. Petitioner did go to Memorial Hospital in Bellville on 3/3/15 for possible carbon monoxide exposure (Rx3), but testified she did not have any health issues related to the situation at her house and did not have gas poisoning. She testified that she reported to the doctor that the stress from living in her environment could have caused a headache. (Rx3). Petitioner testified that her issues with her home were not resolved as of August 2015 and she was living back and forth with a friend up to that time. Petitioner testified that she filed a pro se civil complaint (Rx19) against the contractor who was supposed to do work for her home.

Petitioner denied that the issue with her home was why she originally sought treatment with Dr. Climaco. Petitioner testified that she first saw Dr. Climaco on 9/11/15 and reported that she was having anxiety and difficulty sleeping. Petitioner said she did not recall telling Dr. Climaco that she had panic attacks for at least 2 months as of that date. She did tell him had a lawsuit pending. (Rx1). She testified that she filed her workers' compensation case on 1/27/17, so the only lawsuit she had pending at that time was the civil suit related to the repairs of her home. (Rx19). Petitioner stated that she may have told Dr. Climaco on 5/16/17 that her house was a trigger for her anxiety secondary to a lawsuit. (Rx1).

Petitioner testified that she went to another doctor in St. Louis, Dr. Philomena Akoh. She testified that her relationship with this doctor was not good because she did not believe that anybody cared and just wanted to prescribe medicine. Petitioner testified that she reviewed the records of Dr. Akoh and disagreed with the doctor's assessment. Petitioner denied telling Dr. Akoh that she was healthy until March 2016. She testified that she does not believe that Dr. Akoh took time to accurately complete the report. Petitioner did tell Dr. Akoh

that she noticed unethical practices at work and brought that to her supervisor's attention. She also testified that she reported to the doctor that her actions were frowned upon and the doctor accurately reported this. Petitioner testified that she did not report that anything in her personal life contributed to her mental state. Petitioner testified that she was under stress and could not remember talking about anything in her personal life with Dr. Akoh, but she remembered talking about what bothered her most and that was her job. Petitioner testified that Dr. Akoh gave her a note following her 3/23/16 visit, but she did not like the contents of it, so on 4/20/16 she asked for it to be changed to state that her condition was related to work. Petitioner stated that she wrote Dr. Maggie Greenberg at SLU Care on 6/30/16 to have her records changed, agreeing that Dr. Greenberg told her it was illegal to do so.

Petitioner testified that as a result of her mental stress, she suffers from insomnia, is irritable all the time, and is fearful that people are trying to hurt her. She testified she has trouble talking to strangers and has isolated herself from most of her family and friends because they are upset with her for not doing something about her issues. Petitioner testified that she was still suffering from these symptoms at the time of hearing. Petitioner testified that she last worked in November 2015.

Various treatment records regarding the Petitioner have been submitted into evidence. On 3/3/15, Petitioner sought emergency care at Memorial Hospital with a three-day history of headache following a furnace that was installed with concern for a gas leak and carbon monoxide exposure. She was assured at the time of discharge that her headache was not from carbon monoxide poisoning, and she then reported that stress related to her home could have caused her headache. (Rx3).

The first time the Petitioner sought care following her alleged accident date was on 9/11/15 with Dr. Climaco of Family Medicine, where she reported anxiety and difficulty sleeping for 2 months. She reported that she was going through a lawsuit, but nothing was indicated regarding her employment conditions. Dr. Climaco prescribed Citalopram and Lorazepam. Petitioner returned to Dr. Climaco on 9/22/15 where she reported that she was not doing well and was feeling overwhelmed. Petitioner reported that she needed time from work as she's feeling overwhelmed and her work being impacted. Petitioner again reported that she was going through a lawsuit and made no mention of her workplace conditions. Petitioner noted that she was not benefitting from Citalopram, so Dr. Climaco increased the dose and held her off work for 10 days with a recommendation for counseling. Petitioner returned again on 10/1/15. There is no report of a specific workplace condition causing her symptoms, but Dr. Climaco indicated that work seemed to be one of her major triggers for anxiety. He encouraged Petitioner to return to work indicating that it will be much harder to return the longer she waits, recommended counseling, and provided alternative instructions for use of Lorazepam. (Rx1).

On 10/14/15, Petitioner again returned to Dr. Climaco, indicating her symptoms were not improving and she continued to have panic attacks for no reason. She said her symptoms began in July 2015 with worsening panic attacks. Dr. Climaco recommended Petitioner be off work, switched her from Citalopram to Sertraline and referred her for a psychiatric evaluation. (Rx1).

Petitioner returned on 10/29/15 to Dr. Climaco and reported for the first time that she was being harassed by her manager. She reported being under increased stress and that work was trying to fire her. Petitioner was assessed with an adjustment disorder by Dr. Climaco and continued to switch to Sertraline and Lorazepam with a recommendation to see psychiatry and counseling. On 12/1/15, Petitioner reported doing worse despite her medications. Dr. Climaco assessed Petitioner with anxiety, continued her medications and again referred her to psychiatry. Dr. Climaco indicated Petitioner has not been back to work since November 2015 and was describing symptoms of early agoraphobia. Petitioner returned on 12/21/15 with no improvements noted and reported worsening on 1/11/16. Dr. Climaco assessed her with adjustment disorder with anxiety, insomnia,

adjusted her medications and noted that he did not recommend her being off work as long as she had been and was unsure if the patient or insurance was dragging out her care. He noted that Petitioner was not confident in her approach to treating her illness. Petitioner saw Dr. Climaco again on 1/14/16, 1/28/16 and 2/19/16. (Rx1).

Petitioner saw Dr. Akoh of St. Louis University Care on 3/23/16 where she reported a history of depression, anxiety and insomnia. She reported that she was healthy mentally and physically until March 2016 when she experienced conflict with her superiors at work after having noticed some unethical practices where clients were being charged double for insurance policies. She reported that her actions were frowned upon and she was reprimanded and verbally threatened by her superiors and co-workers. Dr. Akoh assessed Petitioner with mood disorders including major depression, a single episode, anxiety disorders and persistent, chronic insomnia. Her final diagnosis was anxiety and depression. Dr. Akoh recommended Bupropion and that Petitioner discontinue Amitriptyline and Ativan and to continue Trazadone, starting Xanax and Celexa. A note authored by Jeremiah Swift, Medical Assistant at St. Louis University Physicians, dated 4/20/16 indicated that the Petitioner came to the clinic stating Dr. Akoh's report was not sufficient and requested that the letter must state her current symptoms and diagnosis is a direct result of her employment. Petitioner saw Drs. Ahsan Khan and Dr. Akoh on 5/11/16 where she reported that she was not feeling any improvement with her medications. Petitioner reported that her job was the cause of her mental health issues to the extent that she was angry to the point that she wanted to hurt somebody but would not act on those impulses. Dr. Akoh noted that Petitioner appeared suspicious with her hand over her mouth and the hood of her jacket over her head and was anxious throughout the interview. Dr. Khan noted during the examination that "her response behavior looked exaggerated." Dr. Akoh assessed a moderate major depressive disorder (MDD), and increased Xanax and Celexa with continued use of Trazadone. Petitioner returned to Dr. Akoh on 6/7/16 where she reported her depression and anxiety were not improving and she believed her employer was exacerbating her symptoms. She reported depressed mood, sleep disturbance, irritability, fluctuating appetite, constantly feeling tense, worrying, restlessness, and decreased energy. Dr. Akoh assessed Petitioner with moderate MDD, single episode and anxiety disorder. She recommended decreasing Xanax, increasing Celexa and Trazadone and starting Wellbutrin. Dr. Gadani agreed with Dr. Akoh. A note dated 6/22/16 indicated that Petitioner continued to exhibit symptoms of depression and anxiety that affected her ability to function and she therefore was unable to work for at least 6 months to a year. (Rx2).

On 6/30/16, Petitioner sent an email to Dr. Greenberg of SLU Health Care where she wrote: "I received my medical records and the notes documented were inaccurate and unethical. There is a statement from Dr. Khan where he feels my response and behavior is exaggerated. What was not documented was before he examined me, Dr. Koh examined me first and during our conversation I stress how my job is refusing to take responsibility for what they did to me. Dr. Koh stated I should forget about what they did to me and quit my job because the company was too big for me to fight. I became irritated and frustrated because everything I do is a struggle, Dr. Koh has no right to give that type of advice because she had no idea how I feel. When Dr. Khan entered the room, that is what he saw. A frustrated patient who has a doctor that can hear but not listening. Also I read in the notes where Dr. Koh states due to my hands covering my mouth and having a hood on my head made her suspicious. What she failed to mention that a crowded room causes anxiety with addition to a patient hitting me in the head. I am appalled by her unwarranted observation. Dr. Koh has established my diagnosis, she has witnessed first hand the malicious intent to cause strain in my life caused by my job. That's the kind of imperative information that should have been documented. She has voiced her opinion more than once for me to just quit my job. Who will pay for my medication, my therapy and doctor visits? I didn't do this to myself. Why should I have to struggle with this illness all alone? My whole life is altered. I feel my illness is not taken seriously. I feel my time was wasted. It's hard for me to express how I feel to someone when I don't understand it myself. I am requesting my notes to be revised immediately. If you have any questions or concerns, I can be reached at (618) 514-7098. Thank you, thank you." (Rx2).

Dr. Greenberg and Petitioner continued to exchange emails. On 8/4/16, wrote: "To reiterate our conversation, I think what you were asking that Dr. Koh change the medical records to say your anxiety was a work-related illness. Since it is illegal (and impossible) to change the record once it is written, we can only add it as additional information. I understand YOU are certain that your condition is caused by the stress of your work and you have every right to say that and I can transcribe anything you write into your chart. Please write up anything else you want to add, but I think we are at the end of the line of options other than that. We can't expect Dr. Koh to think something different from what she thinks or to document something after the fact. After the next clarifying explanation you submit to me, I'll have done everything I can. I can see you have a HIGH level of stress and I am wishing you the best. I'm wishing you good luck in finding the doctor who you trust more and think documents in a better way. Take care!" (Rx2).

Petitioner responded shortly thereafter: "First, I would like to say you are very rude, disrespectful and unprofessional. Second, if my medical records were accurate in the first place, we wouldn't be having this conversation. Third, you can't decide what information YOU choose to add and exclude in MY medical records when you feel like it. Not telling the whole truth is the same as lying. Fact = (1) I was assaulted by a patient while in your care (I can sue the hospital for malpractice!!!). Fact = (2) On May 11, 2016, a Dr. Akoh and Dr. Gadani both stated my job is the reason for my stress and anxiety and I should quit. I stated I was afraid of losing my benefits and I want them to pay for my treatment. Their responses were I need to move on because the company is too big for me to fight. (You intentionally left this information out because you know your colleagues' response was unethical and unprofessional).
Fact = (3) Dr. Akoh refused to fill out required paperwork for me to continue receiving medical benefits which caused more anxiety and stress. I called multiple times and made several visits before I was able to get this situation taken care of. (You know damn well this is unacceptable). None of this information was documented in my medical records WHY??? It's my right to be treated with respect, consideration and dignity. It is my right to receive service in a safe, clean environment. I'm tired of being lied to and taken advantage of. I'm only asking you to tell the truth. It's my right to request an amendment if my medical records are inaccurate, incomplete or exclude. My rights have clearly been violated. If you don't rectify this situation as soon as possible, I will file a Complaint with HIPAA. Thank you." (Rx2).

Petitioner saw Dr. Climaco on 9/26/16. She reported she was not feeling irritated or frustrated and had weeks where she was doing fine but had no energy or motivation the last few weeks. Dr. Climaco continued to assess adjustment disorder with anxiety and insomnia, among other issues. Petitioner returned to Dr. Climaco on 10/15/16, where she reported being under stress because her case was going to court. Petitioner reported she failed multiple medications and was not interested in new ones. Petitioner continued to follow up with Dr. Climaco on 1/20/17, 4/28/17, 5/16/17, and 6/16/17. On 5/16/17, Petitioner reported that her house was a trigger for her anxiety secondary to her lawsuit. On 6/20/17, Petitioner's medications included Linzess, Lorazepam and Phentermine. (Rx1).

CONCLUSIONS OF LAW

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

The Arbitrator finds that the Petitioner has failed to prove that she sustained accidental injuries arising out of and in the course of her employment on 9/11/15.

Petitioner is seeking compensation for an alleged psychological injury occurring on 9/11/15, when her underwriter deleted notes she (Petitioner) wrote into the policy of an Insured pertaining to an alleged double charge for an engagement ring. Petitioner also testified that she felt that her underwriter made too many mistakes when reviewing insurance policies submitted for review. Petitioner further testified that she had issues with her manager, Kurt Chambers, who created a hostile work environment that contributed negatively to her mental health.

Petitioner has not alleged that any physical injury precipitated her mental distress. The Petitioner's claim involves what is described in Illinois case law as a "mental-mental" claim. The Illinois Supreme Court in *Pathfinder v. Workers' Compensation Commission*, held that in the absence of physical contact, trauma or injury, a psychological injury could be compensable in cases where the claimant suffered a sudden, severe, work-related emotional shock traceable to a definite time and place. Pathfinder, 62 Ill. 2d 556 (1976). A determination as to what constitutes "sudden and severe" emotional shock is defined by a 3-prong test. *Chicago Board of Education v. Workers' Compensation Commission*, 169 Ill. App. 3d 459 (1988). Under this 3-prong test, a claimant has the burden to prove (1) her mental disorder arose from a situation of a greater dimension than the day to day emotional strain and tension that all employees face; (2) that a stressful condition actually exists – it is not enough that a claimant merely believes a stress environment exists; and (3) That the employment conditions, when compared to non-employment conditions, were the major cause of her mental disorder.

The Petitioner has failed to prove the first prong by the preponderance of the evidence in this case. Her uncorroborated contention that her underwriter, Margaret Criscione, deleted policy notes from Mr. Cueto's insurance policy is not supported by the evidence. Based on Ms. Criscione's credible testimony, any deletion from the notes would have been indicated by a timestamp, and the notes do not show such an entry. Though she testified that she printed proof that Ms. Criscione deleted notes from Mr. Cueto's policy contemporaneous to the alleged act, she failed to produce this alleged evidence at trial. The emails the Petitioner submitted as Px5 do not reflect any evidence that Ms. Criscione acted as alleged. Furthermore, the Arbitrator notes with interest that Petitioner produced an e-mail contemporaneous to the alleged act dated 9/10/15 where she wrote to Perry Nassif that her biggest concern was that Mr. Cueto received a refund. Nowhere in Petitioner's response to Mr. Nassif did she indicate that policy notes were deleted by her underwriter. Mr. Nassif's preceding e-mail to Petitioner of the same date summarizing Petitioner's concerns similarly made no mention about deletion of policy notes.

The Arbitrator finds Ms. Criscione's testimony to be credible with regard to the process of deleting notes, her lack of authorization to do so and the timestamp entry that remains despite the deletion. The greater weight of the evidence does not support that Ms. Criscione deleted the Petitioner's alleged policy notes of Mr. Cueto.

However, the evidence as to Mr. Cueto's ring endorsement does indicate that the duplicate ring was deleted on 4/10/13. Mr. Nassif's investigation concluded this, and Ms. Criscione confirmed that the policy notes attached to Mr. Cueto's policy reflect this action was taken. Ms. Criscione did not perform these actions and Petitioner was not assisting Mr. Cueto when the deletion occurred, as the action to correct the duplication was more than 2 years prior to Petitioner's review of the policy.

Petitioners contention that Ms. Criscione made too many mistakes in review of policies submitted by her is just not reliable. Petitioner provided just two examples of policies where she believed mistakes were made despite submitting 100 policies to her, and Ms. Criscione testified that her accuracy rating was 98.5% with approximately 5,000 tasks in 2015. Her review indicated that she exceeded expectations in her job.

Mr. Nassif testified that while there are checks in place to avoid mistakes, all sales agents experience some mistakes when policies are reviewed. The Arbitrator finds that Petitioner has not proven that she was subject to an abnormal number of mistakes with policy review by Ms. Criscione when compared to a fellow sales agent for AAA. To the extent that Ms. Criscione made changes, requested changes be made, or requested more information, to policies submitted by Petitioner, this was essentially the basis of her job. Her job was to double check policy applications submitted by the sales agents for mistakes and/or violations of the certain guidelines. How she did this was dictated by Respondent's guidelines, which are filed with the state in which a policy was sold. There is no credible evidence to support that Ms. Criscione was somehow using discretion to sabotage the Petitioner's job. The importance of being compliant with the necessary guidelines was noted by Criscione, Chambers and Nassif. Petitioner did not introduce any evidence that Ms. Criscione reviewed insurance policies submitted by her in a way that was inconsistent with written Guidelines.

Mr. Chambers testified that Petitioner received extensive training from the date of hire until approximately April 2015, and there is no evidence that has been presented here as to why he would somehow have a motive to sabotage the Petitioner as opposed to any other agents who worked under him. Mr. Chambers specifically testified that he engaged in significant one on one training with Petitioner, as documented in Rx18. Petitioner herself initially reported to her provider that the stress she was having at home was impacting her job. When the Petitioner sent her 4/10/15 email complaint, Mr. Nassif promptly investigated her complaints and found no merit to Petitioner's allegations.

Petitioner's testimony that she suffered harassment, bullying, insufficient job training, or a stressful condition greater than all her co-workers is simply not supported by the evidence. Petitioner's testimony not only was not corroborated, several emails in evidence would support just the opposite finding, that the Petitioner was being a bully with the threatening and antagonistic statements she was making to both Mr. Chambers and Ms. Raymond, as well as Dr. Greenberg. She provided no evidence to corroborate how she was being treated any differently than her co-workers other than her belief, much less how any of the alleged harassment rose to the level of being the sudden, severe, emotional shock required of *Pathfinder* and its progeny.

The overwhelming evidence fails to prove that the Petitioner was subjected to any situation of greater dimension than the day to day emotional strain and tension that all employees face. In fact, it appears that the Petitioner was subjected to exactly the day to day emotional strain and tension that workers face. She specifically cited only three applications as evidence of something ranging from a lack of support to sabotage of her job, and none of these possible mistakes involved any reasonable definition of being above and beyond normal work stresses.

This leads directly to the second prong of the test, as the evidence strongly supports that the Petitioner's perception of the stress she was facing at work was not reasonable. She testified that she believed Ms. Criscione deleted policy notes from the insurance policy of Mr. Cueto. This was an allegation that is not supported by the documentary evidence or Ms. Criscione's testimony that she didn't even have the authority to delete any notes. Petitioner provided no evidence beyond her testimonial allegations that Ms. Criscione made an abnormal number of mistakes when reviewing her policies. She provided no corroborating evidence that Ms. Criscione intentionally changed policies in way that was inconsistent with the required guidelines.

Petitioner alleged at trial, and in correspondence exchanged with Kurt Chambers and Perry Nassif, that she was not receiving adequate training, that her success was being sabotaged, and that she was being harassed and bullied. However, the credible testimony of Perry Nassif and Kurt Chambers showed that Petitioner's complaints were investigated contemporaneously but were found to have no merit. Petitioner did not offer any proof that would contradict the conclusions of Mr. Nassif's and Mr. Chambers' investigation. The Arbitrator finds similarly, that Petitioner's allegations about her work environment did not actually exist.

The language and tone of the Petitioner's e-mails to her superiors themselves likely negatively and significantly contributed to her problems in her work environment, in particular Rx4 and Rx9. Her correspondence with both Ms. Raymond and Dr. Greenberg evidence what appears to be a clear pattern of attitude and defiance about versions of things that conflicted with her own. In the Arbitrator's view, this is strong evidence that any harassment or sabotage alleged by Petitioner was more based on her perceptions of situations as opposed to the actual behavior of any of her co-workers.

Finally, the evidence in this case also does not support the third prong of the test. Petitioner is alleging that her work environment was the only contributing factor in her psychological injury. The Arbitrator finds that this testimony is just not supported by the other submitted evidence. Petitioner acknowledged significant problems she was having with a home contractor, both structurally and financially, which led to her filing a civil lawsuit on 8/5/15. She testified she had paid a contractor over $23,000 and was left with malfunctioning gas, plumbing, electricity and air. She agreed this was stressful and irritating to her. She agreed that the problems with her living conditions were still existing in September 2015. This is supported by the emails between her and Mr. Chambers (Rx6). Petitioner sought emergency room treatment for suspected carbon monoxide exposure on 3/3/15 with headaches. A fair view of the Petitioner's actual situation at home versus her unsupported allegations at work indicates the former situation would be significantly more stressful. Petitioner's testimony downplaying the construction dispute as a factor in her mental health is not credible. The Arbitrator would note the Petitioner also has the separate civil lawsuit pending, and at least some of her treatment records (see Dr. Climaco on 9/11/15) seem to show Petitioner was indicating more strongly that her home issues played a significant factor in her mental health. This was again noted by Dr. Climaco on 9/22/15, and it was not until 10/29/15 that Petitioner reported anything about her work environment as a contributing factor in her mental health. Prior to that, her reports only noted her job in terms of how her personal issues were impacting her psychologically. The Arbitrator further notes that Petitioner reported on 10/14/15 that her symptoms started in July 2015, which was more contemporaneous with the situation that led to her filing of a civil lawsuit in August 2015.

Overall, the Arbitrator finds that a significantly greater weight of the evidence indicates the Petitioner has failed to prove that she suffered a sudden, and severe work-related emotional shock traceable to a definite time and place, 9/11/15, as articulated in *Pathfinder* and its progeny.

Petitioner's claim for compensation is denied.

WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's finding that the Petitioner failed to prove she sustained a compensable accident, this issue is moot.

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

Based on the Arbitrator's finding that the Petitioner failed to prove she sustained a compensable accident, this issue is moot.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL

APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's finding that the Petitioner failed to prove she sustained a compensable accident, this issue is moot.

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

Based on the Arbitrator's finding that the Petitioner failed to prove she sustained a compensable accident, this issue is moot.

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

Based on the Arbitrator's finding that the Petitioner failed to prove she sustained a compensable accident, this issue is 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

Ivonne Castro,
Petitioner,

vs.

No. 18 WC 023473

21IWCC0060

Scrubs, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, prospective medical care, temporary total disability, and penalties, 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).

I. MOTION TO DISMISS

The Arbitrator's Decision was filed on August 6, 2019 and received by Petitioner on August 7, 2019. Petitioner filed her Petition for Review on September 6, 2019. Respondent filed a motion to dismiss Petitioner's review on February 11, 2020, alleging that Petitioner's Petition for Review was untimely because it was not filed within 30 days of the receipt of the Decision as required by §19(b) of the Act. Under Section 19.1 of the Act, the date of the receipt of the Decision is excluded when computing the time to file a Petition for Review. 820 ILCS 305/19.1. The Commission finds that Petitioner's Petition for Review was filed within 30 days of her receipt of the Arbitrator's Decision as required by Section 19(b) of the Act. Therefore, Respondent's Motion to Dismiss Petitioner's review is denied.

II. FINDINGS OF FACT

Petitioner, a 38-year-old custodian, testified that on July 29, 2018, at approximately 7:55 PM, she was cleaning the women's restroom on the mezzanine at Union Station. She carried a mop as she had been cleaning the toilet and dry mopping the suds. The door to the stall she had cleaned had been repaired a few weeks earlier and was hung so that it swung inward, rather than out into the room, as the other three stall doors did. When she attempted to leave the stall by pushing the door open, the door hit the stall framing and bounced back, striking Petitioner and knocking her off balance. She tripped on her mop and fell, striking her back on the toilet. As she struggled to stand back up, she noticed pain and pulling in her left lower back.

After falling, she collected herself and walked a short distance to the janitors' room where co-worker Nassir offered to call their supervisor, Courtland Pollock, to report the accident. Nassir used a walkie-talkie provided by Respondent but received no response, so he walked Petitioner to the elevator. Petitioner went down the elevator to supervisor Pollock's office and informed him she had fallen in the women's restroom.

Petitioner testified that a couple days prior to her accident she had asked the assistant station manager for maintenance, Jaime Lopez, for the day off on July 29, 2018, as it was her birthday. He explained that he could not arrange for a substitute that close to the day she requested off, so on July 29, 2018, she reported for work at 12:00 PM for her 12-hour shift. Around 7:40 PM, she came to the office of supervisor Pollock, to report that she was not feeling well and asked to be excused from work early. Supervisor Pollock asked Petitioner if she wanted to go home because she was sick or if the real reason was because it was her birthday. Petitioner reiterated that she wanted to go home because she wasn't feeling well. Supervisor Pollock testified that he phoned assistant station manager, Jaime Lopez, who gave permission for Petitioner to leave at 8:00 PM. Assistant station manager Lopez testified that he told Supervisor Pollock to inform the Petitioner that she could leave but would have to be sure the women's restroom was in good shape for the person replacing her. Supervisor Pollock testified that he specifically told Petitioner that she need only "stock" the restroom: refill the toilet paper and pad holders. He denied telling her she had to clean the restroom before leaving.

Supervisor Pollock testified that Petitioner told him she fell while mopping and that she hurt her back on the floor, not the toilet. He further testified that Petitioner's clothing was not wet and that he overheard Petitioner tell the EMTs who arrived with the ambulance that it was his fault she was hurt, because he had made her stay and clean the bathrooms after she had asked to go home as she was ill. Custodian, Kentrell Washington, testified that he saw Petitioner crying in the janitors' room and that she told him she had fallen. Washington stated he then cleaned the women's restroom but did not recall having an issue with any door. He confirmed that one of the stalls had been cleaned before he got to the restroom.

Petitioner arrived by ambulance at the Northwestern Memorial Hospital Emergency Department, where she complained of back pain, mostly to the left side, after a work accident. She reported that she had fallen and hit her back on the edge of a toilet. Petitioner stated that she was cleaning a restroom when a stall door swung inwards, knocking her backward. The hospital notes

also indicate that Petitioner reported having lower back pain intermittently for weeks, possibly as a result of working too many hours, but worsened since the accident. X-rays showed no fractures, and Petitioner was released shortly after midnight with lidocaine patches and ibuprofen. She was advised to follow up with another physician and given a return to work on August 1, 2018.

Petitioner was evaluated by Dr. Murtaza at Illinois Orthopaedic Network ("ION") on August 1, 2018 for 9/10 mid- and low back pain with left leg pain. She described a slip and fall on a wet floor and striking her back on a toilet. Petitioner denied having these issues prior to this July 29, 2018 accident. Dr. Mohiuddin at ION noted that Petitioner pushed a stall door open and it bounced back and struck her, knocking her backward into the toilet. Her pain was more left-sided than right-sided.

On August 7, 2018, Petitioner was seen for a physical therapy evaluation at Mid-City Rehabilitation. She reported that she was cleaning the women's bathroom and when she pushed open one of the stall doors, it slammed back against her, causing her to slip and fall and hit her back on the toilet.

Petitioner underwent a lumbar MRI at Molecular Imaging on September 6, 2018. The MRI revealed disc protrusions with effacement of the thecal sac at L3-4, L4-5, and L5-S1. Early disc desiccation was noted at L3-4, L4-5 and L5-S1. At L5-S1, disc material and facet hypertrophy were found to cause narrowing of the left neural foramen that effaced the left L5 exiting nerve root.

After reviewing the MRI, Dr. Murtaza recommended an L3-S1 medial branch block, which was performed on October 1, 2018. Petitioner was placed on work restrictions of no bending, squatting, or climbing, no lifting more than five pounds, and no longer than 8-hour work shifts.

Dr. Mohiuddin examined Petitioner on October 12, 2018, and Petitioner reported a 70% improvement following the nerve block. She completed a total of 24 physical therapy visits, which she reported were also helpful. Based on that success, the doctor recommended a left L3-S1 radiofrequency ablation procedure. On November 16, 2018, Petitioner reported to Dr. Mohiuddin that she had found work within her restrictions. Petitioner continued to follow up with Dr. Mohiuddin, while awaiting authorization from Respondent for the recommended radiofrequency ablations and remaining on light duty.

At the time of hearing, Petitioner's pain was 7/10. Respondent was unable to accommodate Petitioner's restrictions, but she found alternate employment with Peel & Stik, which allowed her to work within her restrictions.

III. CONCLUSIONS OF LAW

A. Accident

The Arbitrator, who did not preside over the hearing but wrote the decision based upon the record, found that Petitioner was not credible and failed to prove that an accident arising out of and in the course of her employment had occurred. He listed instances which he believed supported

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his finding that Petitioner lacked credibility: discrepancies in her description of the mechanism of injury, various reasons for wanting to be off work on the date of accident, walking some distance to report the accident rather than using a walkie-talkie, and whether she was told to stock or clean the women's restroom. The Commission views the evidence differently and finds Petitioner to be a credible witness.

Petitioner testified and reported to several medical providers that she slipped and fell, striking her back on the toilet, while cleaning the women's restroom. She reported left-sided back pain radiating down her left leg. Her September 6, 2018 MRI revealed disc protrusions at L3-4, L4-5 and L5-S1, where the disc material and facet hypertrophy caused narrowing of the left neural foramen that effaced the left L5 exiting nerve root. These findings were consistent with her subjective complaints.

Petitioner's birthday fell on her date of accident. She had asked off for the day earlier that week but was told she could not be spared and had appeared for her 12-hour shift at noon. She nonetheless reported to work and worked over 7.5 hours prior to her accident, which occurred at approximately 7:55 PM, only a few minutes before the time she had been told by supervisor Pollock that she could leave. Following the accident, she was taken by ambulance to the emergency room, where she stayed until discharged at approximately 12:20 AM. Contrary to Respondent's argument, and the Arbitrator's conclusion, that Petitioner was not credible, the Commission finds it implausible that Petitioner would conjure up an accident five minutes before she had been granted permission to leave and then spend several hours in an emergency room.

In further support of its argument that Petitioner is not credible, Respondent points out that Petitioner's description of her accident, including cleaning the toilet and tripping over a mop, was not credible because its assistant station manager told Petitioner to "stock" the restroom, not "clean" it. Stocking the restroom would not have required Petitioner to clean the toilets or mop the floors. Petitioner understood that she was to clean the restroom and was doing so at the time of her fall. This is confirmed by the testimony of her co-worker, Kentrell Washington, who was called by Respondent as a witness, testified one stall had already been cleaned when he arrived shortly after Petitioner's accident to finish cleaning the restroom. Petitioner's testimony regarding the mechanism of her accident is also consistent with the descriptions she provided to her medical providers and her supervisor shortly after the incident.

Thus, the Commission finds that Petitioner proved she suffered a work accident that arose out of and in the course of her employment with Respondent. Although Petitioner may have had some back pain prior to the accident, which she described to the emergency room physician and attributed to overwork, after the restroom incident, she developed more severe low back pain radiating down her left leg. The severity of her back pain and the left-sided radiculopathy indicated a significant change in Petitioner's complaints following the accident. Based upon this chain of events, the Commission finds that Petitioner's low back and left radicular pain is causally related to her work accident.

B. Medical Benefits

Petitioner offered into evidence treatment records and bills from Northwestern Medicine, Illinois Orthopaedic Network, Mid-City Rehabilitation, Midwest Specialty Pharmacy, and

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Molecular Imaging. As the Commission has found that Petitioner suffered an accident which arose out of and in the course of her employment and a causal relationship between that accident and her need for treatment, the Commission finds that Respondent is liable for the reasonable and necessary medical expenses from the foregoing medical providers at the fee schedule rate, pursuant to §8(a) and §8.2 of the Act.

On October 12, 2018, based upon Petitioner's favorable response to the medial branch nerve block and physical therapy ordered by the physicians at Illinois Orthopaedic Network, Dr. Mohiuddin recommended that Petitioner undergo L3-S1 radiofrequency ablation. Respondent refused to authorize this treatment, and Dr. Mohiuddin declined to provide the treatment without prior authorization. Petitioner testified that her back and left leg pain were at 7/10 at the time of hearing and that she desired to proceed with the ablation procedure. The Commission orders Respondent to authorize the RFA procedure recommended by Dr. Mohiuddin and to pay for the services provided.

C. Temporary Total Disability Benefits

Petitioner also claims 11 weeks of temporary total disability for the period between July 30, 2018 through October 22, 2018. She was initially taken off work by order of the emergency room physician and Dr. Murtaza at ION. On September 3, 2018, Dr. Murtaza released her to return to work light duty: no carrying/lifting greater than five pounds, no pulling/pushing greater than eight pounds, no bending or squatting, no climbing or ladders, no more than eight hours during a shift. Respondent advised Petitioner that it could not accommodate these restrictions, but she was able to find alternate light duty employment with a different employer beginning on October 22, 2018. The Commission finds Respondent liable for 11 weeks of temporary total disability, from the date Petitioner was released from the emergency room to the date she found alternate employment within her restrictions.

D. Penalties

On her Petition for Review, Petitioner took exception to the Arbitrator's denial of §19(k) and §19(l) penalties. However, Petitioner did not raise the penalty issue at hearing and stipulated in the Request for Hearing that she had not filed a penalties petition and that penalties were not at issue. Petitioner is bound by the claims she made in the Request for Hearing. *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084, 1088 (2004), Commission Rule 9030.40. Therefore, her request for penalties is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 25, 2019 is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner proved that she suffered an accident on July 29, 2018 arising out of and in the course of her employment and that her current condition of ill-being is causally related to that accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the reasonable and necessary medical expenses incurred for treatment up to the date of arbitration, June 19, 2019, for services rendered by the following providers: Northwestern

21IWCC0060

Medicine, Illinois Orthopaedic Network, Mid-City Rehabilitation, Midwest Specialty Pharmacy, and Molecular Imaging, as provided under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the radiofrequency ablation procedure recommended by Dr. Mohiuddin.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $253.00 per week, the statutory minimum for workers with one dependent child, commencing July 30, 2018 through October 22, 2018, for temporary total disability as provided under §8(b).

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980), 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 $2,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB - 9 2021

o-12/17/20
mp/dak
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Marc Parker

Barbara N. Flores

Deborah L. Simpson

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

JAMIE SIMENSON,

Petitioner,

vs. NO: 14 WC 29291

ROSEWOOD CARE CENTER,

21IWCC0061

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the Arbitrator's Decision and Order in its entirety except as to modify the first and fourth paragraphs of Section F of the Arbitrator's Decision on page ten.

The Commission modifies the first paragraph, on page ten under Section F, so the second sentence of the paragraph reads as follows: "Four treating physicians have diagnosed CRPS secondary to Petitioner's work injury on March 23, 2014: Dr. Chen, a hand surgeon; Dr. Wilson, a neurologist; and Drs. Alzoobi and Anwar, both pain management specialists." The Commission adds the following after the second sentence, "Dr. Nacke, an orthopedic hand specialist suspected CRPS."

The Commission further modifies the first sentence of the fourth paragraph on page ten under Section F, so it reads as follows: "The Arbitrator assigns great weight on the findings, opinions and conclusions of Drs. Nacke, Chen, Wilson, Alzoobi and Anwar, all of whom treated Petitioner and all of whom diagnosed, or suspected (Nacke), inter alia, CRPS secondary to her work injury."

21IWCC0061

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed October 11, 2018, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $319.00 per week commencing August 7, 2014, through October 6, 2014, and from November 4, 2015, through November 10, 2015, and from April 26, 2016, through May 19, 2016, for a period of 12-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $319.00 per week for a period of 162.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 32-1/2% loss of the person as a whole.

Having found that Petitioner failed to prove that she was eligible for temporary partial disability benefits under §8(a) of the Act, her claim for TPD benefits are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $243,693.61, subject to adjustment based upon the negotiated rate, if any, or in the absence of a negotiated rate, then at the lesser of the actual charges or the statutory medical fee schedule, if applicable, for reasonable and necessary medical services as provided in §8(a) and §8.2 of the Act.

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

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

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

DATED: FEB 10 2021
KAD/bsd
O12/15/20
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Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SIMENSON, JAMIE
Employee/Petitioner

Case# **14WC029291**

ROSEWOOD CARE CENTER
Employer/Respondent

21IWCC0061

On 10/11/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ HORWITZ & ASSOC
MARC A PERPER
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STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

18IWCC0061

JAMIE SIMENSON,
Employee/Petitioner

v.

ROSEWOOD CARE CENTER,
Employer/Respondent

Case # **14** WC **29291**

Consolidated cases: **N/A**

21IWCC0061

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, Illinois**, on **August 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 _____

21IWCC0061

FINDINGS:

On **March 23, 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 $**23,704.84**; the average weekly wage was $**455.80**.

On the date of accident, Petitioner was **34** years of age, ***single*** with **3** 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 $**2,451.63** for TTD, $ **N/A** for TPD, $ **N/A** for maintenance, and $ **N/A** for other benefits, for a total credit of $**2,451.63** .

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 $319.00 /week for 12-3/7 weeks, commencing August 7 through October 6, 2014; from November 4 through 10, 2015; and from April 26 through May 19, 2016 , as provided in Section 8(b) of the Act.

Having found that Petitioner failed to prove that she was eligible for temporary partial disability benefits under Section 8(a) of the Act, her claim for TPD benefits are denied.

Respondent shall pay to Petitioner the sum of $319.00 /week for a further period of 162.5 weeks, because the injuries sustained caused the 32-1/2% loss of the person as a whole, as provided in Section 8(d)(2) of the Act.

Respondent shall pay to Petitioner the further sum of $243,693.61, subject to adjustment based upon the negotiated rate, if any, or in the absence of a negotiated rate, then at the lesser of the actual charges or the statutory medical fee schedule, if applicable, for reasonable and necessary medical services as provided in Sections 8(a) and 8.2 of the Act.

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

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

Signature of Arbitrator

10/8/18
Date

OCT 11 2018

FINDINGS OF FACT:

Petitioner JAMIE SIMENSON was a 34-year old, right-handed certified nursing assistant employed by Respondent ROSEWOOD CARE CENTER on and before March 23, 2014. Her duties involved providing care to fourteen nursing home residents. The physical requirements of the job included lifting patients weighing up to 150 pounds unassisted, and up to 200 to 250 pounds with assistance.

Petitioner had been employed by Respondent for some fifteen months prior to March 23, 2014. She denied any prior accidents, injuries or medical treatment involving her left upper extremity before March 23, 2014.

On March 23, 2014, while showering a resident, Petitioner heard a second resident cry out that he had fallen. Petitioner testified that while helping lift the fallen resident off the floor, she felt a pop in her left wrist, followed by numbness and tingling in the wrist. She notified Kate Hudson, the nursing supervisor, of the incident. That afternoon, Petitioner presented at the emergency room at St. Joseph Medical Center, where she complained of a lifting injury to the left forearm with a pain score at 8 on a scale of 1-10. On physical examination, there was mild palpable tenderness to the distal left ulna and wrist, exacerbated with supination and flexion and extension at the wrist. Also noted was Petitioner's complaint of decreased distal sensation in the left fingertips as compared to the right. X-rays were grossly normal. The emergency room physician, Dr. Patel, diagnosed a sprain to the left wrist and forearm. He prescribed Ibuprofen and placed the left forearm in a cock-up splint. Petitioner was instructed to apply ice, elevate the left arm, and follow up with her primary care physician in two to three days for recheck. He also advised limited use of the left upper extremity until cleared by a physician. (PX 1)

On March 24, 2014, Respondent referred Petitioner to Med Works Occupational Health. There she was seen by Dr. Johanek, who diagnosed a sprain to the left ulnocarpal ligaments and triangular fibrocartilage complex ("TFCC"). He prescribed Naproxen and alternate application of heat and ice. Petitioner was returned to work with restrictions of no lifting, pushing or pulling in excess of five to ten pounds with her left arm (PX 2). Petitioner testified that Respondent accommodated her restrictions.

Petitioner remained under the care of Med Works through July 14, 2014. Diagnoses during this period included left ulnocarpal ligament sprain, TFCC sprain, medial epicondylitis of the left elbow, radiocarpal ligament sprain, and left wrist tenosynovitis with generalized parasthesias, suspected carpal tunnel syndrome and possible cubital tunnel syndrome. (PX 2) During that period a MRI of the left wrist was recommended. The MRI when carried out on April 17, 2014 demonstrated no ligament tears. It was noted the TFCC as well as the ulnar collateral ligament appeared intact. (PX 3)

The records from MedWorks show that on May 5, 2014, Petitioner was complaining of parasthesias of all digits of the left hand, with mild pain over the medial aspect of the left elbow and numbness and tingling in the left forearm. Dr. Hickombottom's examination noted mild tenderness along the thenar snuffbox extending over the dorsum of the thumb. Finkelstein's test was mildly positive. Tenderness was noted over the flexor retinaculum with positive Phalen's test. Left-handed grip strength was diminished when compared to the right. Tenderness was noted along the medial epicondyle with Tinel's sign being positive, suggesting underlying ulnar nerve involvement. Golfer's Test was mildly positive. Pain was reproduced on pronation and supination of the left elbow. Dr. Hickombottom recommended an EMG/NCV of the left upper extremity and referred Petitioner to Dr. Chen, a hand surgeon, for further treatment. (PX 2)

Petitioner came under the care of Dr. Chen on May 9, 2014. On examination, Dr. Chen observed edema about the left wrist with severe pain noted at the ulnar/dorsal aspect of the wrist. Less severe pain was present at the scapholunate interval. Numbness and tingling were noted at the median and ulnar nerve distributions. Dr. Chen diagnosed left wrist pain with possible TFCC and scapholunate ligament tears and possible carpal tunnel syndrome. The doctor continued Petitioner's five (5) pound work restrictions and ordered a repeat left wrist MRI with arthrogram and an EMG/NCV study. (PX 4) Dr. Chen also referred Petitioner to Midwest Hand Care for custom fabrication of a left wrist ulnar gutter orthosis, which she was instructed to wear at all times with the exception of hygiene. (PX 5) The EMG/NCV when performed on May 29, 2014 was negative (PX 1; PX 6) and the MRI arthrogram performed on June 2, 2014 was interpreted by the radiologist, Dr. Fagan, as unremarkable. (PX 1)

Petitioner returned to Dr. Chen on June 3, 2014. The doctor noted the MRI was unremarkable for TFCC tear. However, Dr. Chen indicated same demonstrated a possible extensor tenosynovitis at the wrist and distal forearm. Petitioner reported that her left wrist symptoms had not responded to non-steroidal anti-inflammatories and anti-inflammatory creams. As a result, Dr. Chen prescribed a Medrol Dose Pack. By June 17, 2014, Petitioner reported that the Medrol Dose Pack was ineffective. Dr. Chen recommended surgery consisting of diagnostic arthroscopy and synovectomy. Her work restrictions were continued. (PX 4)

On August 7, 2014, Petitioner underwent surgery by Dr. Chen consisting of left wrist arthroscopy with synovectomy and TFCC repair. (PX 4) Postoperatively, she underwent occupational therapy. (PX 5) Petitioner was off work from August 7 through October 6, 2014, during which she received compensation for temporary total disability ("TTD").

On September 8, 2014, Dr. Chen noted Petitioner presented with complaints of persistent numbness in the forearm that was present prior to surgery as well as numbness in the hand. She also complained of diminished strength in her ring and small finger that the doctor indicated was new since surgery. At that time the doctor indicated Petitioner's symptoms were not explainable by surgery or from EMG/NCV findings. Dr. Chen referred Petitioner to pain management. (PX 4)

Upon her return visit to Dr. Chen on October 6, 2014, Petitioner reported that her range of motion had improved but that she had significant left wrist pain that was still keeping her awake at night. She also reported intermittent swelling in the left wrist and knuckles and intermittent numbness in the left ring and small fingers, worse at night. Physical examination revealed decreased extension and flexion of the left wrist with positive Tinel's sign over the cubital tunnel. Dr. Chen stated that clinical evidence of ulnar nerve compression was present, despite negative EMG/NCV. He released Petitioner to return to work with restrictions of no use of the left hand. (PX 4) Petitioner returned to one-handed work for Respondent effective October 7, 2014.

On October 14, 2014, Petitioner sought a second opinion with Dr. Elliot Nacke of Hinsdale Orthopaedics. (Petitioner initially presented to the doctor on September 30, 2014 but because she did not bring any prior treatment records with her, the appointment was rescheduled.) At this visit, Petitioner reported that she still experienced left arm numbness numb from the left hand up to the elbow and that since the surgery she had pain in the knuckles. She described her pain at 9 on a 10-point scale. Dr. Nacke noted that he still had not reviewed Petitioner's prior treatment records and the appointment was rescheduled. The doctor also ordered a repeat EMG/NCV. (PX 6, PX 7)

Dr. Chen saw Petitioner on November 3, 2014. Petitioner reported an increase with "dropping things." She complained of numbness and tingling to the left ring and small fingers with radiation up to the left elbow. An examination of the left upper extremity revealed her skin was pink, warm and dry. She had decreased extension and flexion of the left wrist. Dr. Chen concurred with the recommendation for a repeat EMG/NCV

and ordered continued occupational therapy along with referral to a pain management specialist. The doctor also released Petitioner to return to work with restriction of no use of the left hand. (PX 4; PX 5)

The prescribed EMG/NCV was performed on November 6, 2014 at St. Joseph Medical Center. The neurologist, Dr. Nadkarni, found electrodiagnostic evidence of mild bilateral carpal tunnel syndrome. (PX 6)

Petitioner returned to Dr. Nacke on November 18, 2014. She reported some decrease in left arm swelling, but indicated she had significant pain localized to the ulnar aspect of the left wrist on lifting three-pound weights during therapy, with significant color changes in the left arm involving a deep, red color on the lateral/ulnar aspect of the wrist and hand accompanied by intermittent swelling in that region. She described her pain as being dull and achy, reaching a level of eight (8) on a scale of one (1) to ten (10). Associated symptoms included weakness, numbness, tingling and joint pain, aggravated by movement. Examination of the left upper extremity revealed a splotchy appearance to the skin from the mid-forearm to the hand. She was maximally tender over the distal ulna and triangular fibrocartilage complex with complaints of decreased sensation in the ulnar nerve distribution. The doctor continued Petitioner's work restrictions. In light of the changes in skin color, intermittent swelling and parasthesias, Dr. Nacke recommended that Petitioner be evaluated by a neurologist for consideration of CRPS. (PX 7; PX 5) He referred Petitioner to Dr. Marquess Wilson, a neurologist, for that purpose. (PX 6)

Dr. Wilson first saw Petitioner on December 18, 2014. She complained of swelling and discoloration at the left hand and arm, worse after physical therapy, with intermittent pain and numbness in the medial three fingers and extending from the wrist to the elbow, sometimes affecting her ability to sleep. She also complained of having gained 63 pounds since the date of the March 23, 2014 work accident. On physical examination of the left upper extremity, strength was limited due to tenderness. Mottling of the skin was noted in the left hand, extending to the middle portion of the forearm, with edema. Dr. Wilson opined that Petitioner's left upper extremity tenderness, discoloration and edema were likely secondary to complex regional pain syndrome. The doctor prescribed Lyrica for nerve pain and Naproxen, a non-steroidal anti-inflammatory, and ordered a renewed course of occupational therapy for the left hand and arm. Dr. Wilson recommended Petitioner continue on light duty at work and limit her physical activities to avoid placing too much demand on the left upper extremity. Dr. Wilson's diagnosis was CRPS. (PX 6; PX 5)

Petitioner returned to Dr. Chen on January 5, 2015. The doctor noted that on examination, her left hand was visibly more swollen and mottled than the right. Her grip strength was 1/5 on the left and 4/5 on the right. Sensation was diminished to the left small, ring, and middle fingers. Extremity was warm with radial pulse 2+ and regular. Dr. Chen provided that he concurred with the diagnosis of CRPS and ordered a functional capacity evaluation ("FCE"). (PX 4)

On January 26, 2015, Petitioner returned to Dr. Wilson, who noted complaints of continued pain in the left upper extremity secondary to CRPS. Petitioner reported experiencing weakness in the left hand causing diminished ability to grasp objects, and sometimes causing her to drop objects. She stated that the Naproxen helped the pain somewhat; the Lyrica not at all. She was participating in occupational therapy and was wearing the left wrist brace at work. She was sleeping poorly. On examination, Dr. Wilson observed discoloration in the left forearm up to the elbow, with tenderness to palpation from the fingers to the elbow. Mild edema was present in the left upper extremity. Left-handed grasp was weak. Dr. Wilson diagnosed CRPS of the left upper extremity, unresponsive to Lyrica. The Lyrica was discontinued and Petitioner was restarted on Gabapentin, along with continued Naproxen. The doctor noted her symptoms were limiting her abilities at work and disrupting her sleep. A pain management referral was given to assess the possibility of a sympathetic nerve block. (PX 6)

The FCE ordered by Dr. Chen took place on January 27, 2015. Bilateral lifting tolerances were found to be seventeen pounds floor to chair, seventeen pounds desk to chair, and 14.8 pounds above shoulder height. Unilateral lifting tolerances were significantly different as between the right and left upper extremities, as follows: Desk to chair, 37.2 pounds right, 6.4 pounds left; above shoulder height, 19.6 pounds right, 6.4 pounds left; carrying, 52 pounds right, 12 pounds left. Physical limitations were demonstrated in relation to upper extremity tolerance, crawling, and simple, firm and fine grasping with the left hand. The FCE therapist, Garret Quail, stated that Petitioner may perform left-handed grasping only minimally occasionally, and crawling not at all. Quail opined that these limitations may limit Petitioner's ability to perform her job. According to Quail, Petitioner's pre-injury line of work as a CNA is considered a "medium" physical demand level occupation, based upon the U.S. Department of Labor's Dictionary of Occupational Titles. Quail stated that Petitioner's lifting capabilities fall below that level. Based upon objective validity determination data and formulas, including consistencies when interfacing grip dynamometer graphing, resistance dynamometer graphing, pulse variations, weight achieved, and selectivity of pain reports and pain behaviors, Quail concluded that the FCE results were valid and represent Petitioner's current safe functional capabilities. (PX 8)

Pursuant to Dr. Wilson's pain management referral, Petitioner presented to Dr. Alzoobi, a specialist in pain management, on February 3, 2015. On examination of the left arm, Dr. Alzoobi observed a patchy, pinkish spot on the arm, which was slightly colder to light touch. Petitioner was able to move her left forearm and hand in all directions; however, left-handed grip was significantly weaker than the right. Deep tendon reflexes were hard in the left biceps and brachioradialis compared to the right hand. Hyperesthesia to light touch was noted. Tenderness was still present over the surgical scar over the dorsal ulnar region. Mild edema was present. Dr. Alzoobi diagnosed left forearm and hand pain, chronic, postoperative and posttraumatic injury status post-arthroscopic surgery and triangular fibrocartilage complex repair. He recommended a series of stellate ganglion nerve blocks. The first nerve block was performed that day. Post-procedure, Petitioner reported a reduction in pain. Dr. Alzoobi ordered increased occupational therapy, continued her light-duty work restriction, and instructed her to return in a week for a second stellate ganglion nerve block. (PX 9; PX 5; PX 6)

Petitioner saw Dr. Chen on February 4, 2015. On examination, the left hand was still numb from the previous day's nerve block. Dr. Chen advised continued occupational therapy for range of motion and strengthening, and continued pain therapy with Dr. Alzoobi. The doctor also issued work restrictions consisting of seventeen pounds maximum lifting with no use of the left hand for a minimum of four weeks. (PX 4; PX 5; PX 6)

Dr. Alzoobi administered repeat stellate ganglion blocks on February 10 and 17, 2015. By February 24, 2015, the doctor noted Petitioner was being seen for diagnoses of chronic neuropathic pain postoperative and posttraumatic injury to the left hand, with possible CRPS. Petitioner was still experiencing pain in the left upper extremity with slight skin morphological changes, slight swelling, and erythematous discoloration, possibly due to use of the splint. Pain and slight irritation were present to light touch. Bruising was seen on the lateral aspect and dorsum of the left hand and over the surgical site. The doctor assessment was complex regional pain syndrome of the left upper extremity. He prescribed Norco for pain and suggested a spinal cord stimulator ("SCS") trial in the event of persistent symptoms. (PX 9)

Petitioner saw Dr. Chen on March 2, 2015. He diagnosed persistent extensor tenosynovitis and placed her on a five-pound weight restriction. (PX 4) Petitioner did not return to Dr. Chen after that date.

Petitioner saw Dr. Wilson on March 30, 2015. She complained of pain, numbness and weakness in the left arm despite three ganglion blocks. She advised that she did not wish to undergo the stimulator trial recommended by Dr. Alzoobi and instead wished to continue being managed medically. On examination, Dr. Wilson observed mild edema in the left upper extremity compared to the right, with tenderness to palpation especially in the mid-palm and adductor polis brevis ("APB"). Left-handed grasp was weak in comparison to

the right. Dr. Wilson diagnosed likely complex regional pain syndrome in the left upper extremity that did not respond to nerve blocks. Dr. Wilson prescribed an increased dose of Lyrica and a reduced dose of extended-release Gabapentin, along with Norco prescribed by Dr. Alzoobi. (PX 6)

Petitioner saw Dr. Alzoobi on March 31, 2015. Dr. Alzoobi noted that Petitioner's left arm was more swollen around the wrist, with purplish changes in coloration of the arm. Tenderness to light touch was still present. Dr. Alzoobi again diagnosed CRPS and again recommended a trial SCS if symptoms did not improve. (PX 9.

On her return visit to Dr. Alzoobi on April 28, 2015, Petitioner complained of numbness, tingling, and significant pain in the left arm. She stated that she had been dropping things and that her family was now assisting in household chores. Petitioner continued to express apprehension about undergoing a trial SCS, stating that the stimulator is "not an option." On examination, significant pain was still present to light touch over the dorsum of the left hand, wrist and forearm, with swelling over the forearm. The left arm was discolored, possibly due to lack of sun exposure. Range of motion was normal but with pain on elevation of the left shoulder and at ninety degrees abduction. Tenderness was present over the left supraspinatus and over the left acromioclavicular joint. Dr. Alzoobi suggested that the mechanism of injury might have affected Petitioner's left shoulder as well as her hand and forearm. Dr. Alzoobi recommended continued physical therapy. He added a compound cream, including ketamine 10%, clonidine 0.02%, diclofenac 3%, imipramine 2% and tetracaine 2% to her medication regimen. He continued Petitioner's work restrictions of no lifting in excess of five pounds with the left hand. (PX 9)

At Respondent's request Petitioner underwent a Section 12 examination with Dr. Kenneth Candido on May 19, 2015. Dr. Candido recorded that Petitioner reported her baseline pain at 7/10 and 10/10 with any activity. She reported arm numbness from her left small finger to her elbow, and loss of grip strength. His exam revealed no color disparity when compared to the right side, no atrophy, no edema, no trophic signs, no allodynia or hyperalgesia. There were expressions of hypesthesias on the left in the approximate distribution of the left ulnar, radial and medical nerves. There was a disparity in the temperature assessment of the left (cooler) vs. right arm (warmer). Dr. Candido provided that he reviewed the preoperative MRI indicating same showed no injury including any TFCC tear. He reviewed the EMG's as normal. He reviewed the MR arthrogram as normal. The doctor indicated that he was "...at a loss to define or describe any pathological process involving the left arm, wrist or hand. All that can be stated is that there is left wrist pain...The cause and rationale for the development of left wrist pain, from my review of purely inconclusive information, remains obscure." Dr Candido diagnosed a.) left wrist pain, etiology unknown; b.) mild bilateral carpal tunnel syndrome; and c.) insufficient evidence for complex regional pain syndrome. The doctor indicated that while he detected a temperature disparity between the right and left sides of the upper extremity, same were insufficient according to the Budapest Clinical Diagnostic Criteria. The doctor also indicated that the diagnosis of leftwrist pain, etiology unknown maybe related to several possibilities including but not limited to a.) an undiagnosed cervical rib or thoracic outlet syndrome, left side; b.) an undiagnosed neuropathic pain condition of small sensory nerves that defies detection by EMG; c.) post-traumatic arthritis pain condition of the left wrist; and d.) a factitious disorder. Dr. Candido stated that "...a reasonable conclusion was [Petitioner suffered] a transient sprain or strain not associated with any long-term permanency or sequelae." He indicated that any such injury had resolved and any ongoing medical treatment is not related to the injury sustained on March 23, 2014. The doctor indicated that he found no basis to advocate for any additional medical treatment including the need for a spinal cord stimulator. Lastly, Dr. Candido stated, Petitioner "...has no bona fide pain or orthopedic diagnosis of a pathophysiological condition which should limit activities or which would normally result in the nature and extent of the pain that she has consistently described." (RX 3)

Dr. Alzoobi renewed his recommendation for trial SCS on June 9 and July 7, 2015. (PX 9)

Pursuant to Dr. Alzoobi's referral, Petitioner saw Dr. Zaki Anwar, another pain management specialist, on August 4, 2015. On examination, Dr. Anwar noted hyperesthesia in the left upper extremity with swelling around the surgical site. Mild allodynia was present on the medial aspect of the hand. Dr. Anwar diagnosed CRPS, left upper extremity. He felt that in light of Petitioner's lack of significant benefit from nerve blocks and medical management of her condition, Petitioner would be a good candidate for trial SCS. Dr. Anwar recommended a "[s]pinal cord stimulator trial as soon as possible." (PX 9) He referred Petitioner to Dr. Wajid Khan, a psychiatrist, for pre-surgical SCS psychiatric clearance. Dr. Khan evaluated the patient on September 18, 2015 and cleared her for SCS trial with no need for further psychiatric consultation. (PX 11)

Dr. Anwar saw Petitioner again on September 29 and October 26, 2015. During that period, Petitioner expressed that she noticed increased swelling, discoloration and pain in the left forearm. She advised Dr. Anwar that she had recently begun wearing a compression sleeve. At this visit, Petitioner consented to the SCS trial. Dr. Anwar maintained her work restrictions. (PX 10)

On November 4, 2015, Petitioner underwent placement of a trial dorsal column stimulator by Dr. Anwar at Flossmoor Pain Institute & Surgical Care. She was off work for one week and returned for follow-up visit on November 11, 2015, at which time the stimulator leads were removed. Petitioner reported 70% reduction in left forearm and hand pain and a decrease in her need for opioid pain medication during the SCS trial. She had increased her activities of daily living and was doing light activities around the house. Based upon the successful SCS trial, Dr. Anwar concluded that Petitioner was a good candidate for outpatient SCS implant placement. Dr. Anwar renewed his recommendation for permanent SCS implant on November 23 and December 14, 2015, and on January 28, February 15, March 14 and April 11, 2016. (PX 10)

On April 26, 2016, Petitioner underwent implantation of a permanent spinal cord stimulator by Dr. Anwar at Flossmoor Pain Institute & Surgical Care. Pre- and post-operative diagnoses were CRPS with neuropathic pain, upper extremity. Dr. Anwar instructed Petitioner to refrain from work for two weeks post-surgery (PX 10).

On May 5, 2016, Petitioner reported excellent relief of upper extremity pain. By May 12, she reported 80% reduction in pain. Dr. Anwar released the patient to return to light work commencing May 16, 2016, with restrictions of no lifting, carrying, pushing or pulling in excess of five pounds, with a fifteen-minute break every two hours. (PX 10)

Thereafter, Petitioner remained under the care of Dr. Anwar for stimulator maintenance and medication management. Issues involving reprogramming, placement and lead migration were periodically addressed. Blood and urine were drawn at regular intervals to monitor her opioid and non-opioid medication levels and her kidney and liver enzyme values. A gradual reduction in her medications was achieved. On March 20, 2017, Dr. Anwar modified Petitioner's weight restriction from five pounds up to ten pounds. (PX 10)

On June 4, 2017, Respondent's Section 12 examiner, Dr. Candido, authored an "addendum" to his orginal Section 12 report. Dr. Candido again expressed his opinion that Petitioner did not meet the accepted or proposed criteria for CRPS. The doctor indicated that Dr. Anwar failed to show that he utilized any type of criteria to consider Petitioner having CRPS and instead Dr. Anwar "...merely proposed this diagnosis based upon unqualified and non-criteria using suggestions of other care providers." Dr. Candido continued to opine that the SCS was medically unnecessary. He questioned that Petitioner had experienced 80% pain relief from the trial SCS, indicating "80% improved following the SCS is simply not based upon reality..." The doctor indicated there has been no reduction in the consumption of Gabapentin or Norco over the past year. He continued that same "...ma[de] no sense. If she was 80% better,...she would have been weaned down off these drugs..." Lastly, the doctor buttressed his opinion relying on interpretation of Dr. Alzoobi's treatment note of April 28, 2015, claiming that Dr. Alzoobi indicated "spinal cord stimulation use is not an option." (RX 4)

On September 26, 2017, Dr. Anwar advised Petitioner to refrain from working with combative residents, in order to minimize the risk that her leads might migrate, which would result in diminished pain relief from the implant. (PX 10)

By May 18, 2018, Petitioner reported that she was happy with the performance of her SCS implant. However, on June 18, 2018, Dr. Anwar noted insufficient charging and stimulation. He suggested that Petitioner be seen by Boston Scientific for possible reprogramming of the SCS. He continued her work restrictions of ten pounds maximum lifting, pushing and pulling, with fifteen-minute breaks every two hours and no direct contact with combative residents. (PX 10)

The last treating medical record in evidence is an office note by Dr. Anwar dated July 16, 2018. On that date, Petitioner stated that she was receiving adequate stimulation from the SCS, although swelling was noted in the left forearm and wrist joint. Petitioner reported an increase in duration and intensity of activities of daily living, and she was now performing light activities at home. Her medication regimen included Norco, Gabapentin, Ambien, Meloxicam, Omeprazole, Trazadone and Xanax. Dr. Anwar stated that Petitioner would require fluoroscopic analysis twice a year for the SCS implant, and ongoing medication management by a pain specialist. Dr. Anwar again maintained her work restrictions of ten pounds maximum lifting, pushing and pulling, with fifteen-minute breaks every two hours and no direct contact with combative residents. The doctor also added that Petitioner may work no more than eight hours per day or forty hours per week. (PX 10)

Petitioner testified at arbitration that she is now more functional than she was before the SCS implant. Petitioner expressed that she previously experienced intractable, shooting pain in her left arm. The pain has now been reduced to an intermittent dull ache. She remains on a light duty restriction at work involving minimal lifting and no contact with combative residents. Her current job duties are largely clerical, involving reception, computer work, and charting patient meals, showers, medications and glucose levels. Her prescription medication regimen includes Gabapentin for neuropathic pain; Ambien, a sedative; Meloxicam, a non-steroidal anti-inflammatory; Omeprazole for gastric distress; Norco, an opioid, for pain; Trazadone, an anti-depressant also used for pain; Xanax, an anti-anxiety medication; and compounded creams that act as muscle relaxants and analgesics. Her Norco, Gabapentin and Meloxicam are gradually being weaned down under the direction of Dr. Anwar.

The following medical, surgical and hospital bills were admitted in evidence:

Provider	Service Dates	Balance Due
Presence St. Joseph Medical Center	03-23-14 to 03-30-15	$6,097.58
Midwest Hand Care	05-09-14 to 02-25-15	$449.00
Associated Pathologists of Joliet	06-02-14	$19.00
Injured Workers' Pharmacy	01-12-15 to 07-01-16	$20,000.46
Dr. Anas Alzoobi	02-10-15 to 02-17-15	$5,937.13
Flossmoor Pain Institute & Surgical	04-26-15 to 05-18-16	$160,944.65
Pain Management Institute	09-18-15 to 07-16-18	$27,376.27
Prescription Partners, LLC	10-30-15 to 07-16-18	$15,583.76
Joliet Radiological	06-28-16	$449.00
Specialty Pharmaceutical, Inc.	03-26-18 to 07-18-18	$6,836.76
Total unpaid medical:		$243,693.61

(PX Group 15).

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

The medical and non-medical evidence in this case establishes a chain of events involving a prior condition of good health, an accident, and a subsequent disabling condition of ill-being. Five treating physicians have diagnosed CRPS secondary to Petitioner's work injury on March 23, 2014: Dr. Nacke, an orthopedic hand specialist; Dr. Chen, a hand surgeon; Dr. Wilson, a neurologist; and Drs. Alzoobi and Anwar, both pain management specialists. The two pain management physicians, Drs. Alzoobi and Anwar, both recommended a spinal cord stimulator for treatment of Petitioner's CRPS. The permanent SCS implant has succeeded in dramatically reducing Petitioner's pain levels, enabling her to increase her functionality and reduce her dependence on opioid pain medication.

Only Dr. Candido, Respondent's Section 12 examiner, questioned the diagnosis of CRPS, the medical necessity of the SCS implant and Petitioner's report of 80% pain relief. The Arbitrator notes Dr. Candido misquoted the medical records making it seem as if Dr. Alzoobi had ruled out the SCS trial. In context, Dr. Alzoobi's April 28, 2015 notes indicate "Previous sympathetic block had failed. The patient had at least four. Spinal cord stimulation is not an option. The patient is reluctant to accept it." The record show Dr. Alzoobi had recommended the SCS, but Petitioner was at first reluctant to consider it. In fact, Dr. Alzoobi first contemplated a trial SCS on February 24, 2015. He continued that recommendation on March 31, 2015 and renewed his recommendation on June 9 and July 7, 2015.

When Petitioner finally did undergo the trial SCS, she experienced significant relief, thereby demonstrating her candidacy for the permanent SCS implant. For her part, Petitioner testified credibly and without rebuttal that she experienced a decrease in pain, an increase in functionality, and a reduction in her medication use as a consequence of the permanent SCS implant.

The Arbitrator assigns great weight on the findings, opinions and conclusions of Drs. Nacke, Chen, Wilson, Alzoobi and Anwar, all of whom treated Petitioner and all of whom diagnosed, inter alia, CRPS secondary to her work injury. In particular, Dr. Anwar treated Petitioner both before and after the trial SCS and the permanent SCS. The doctor was in the best position to assess Petitioner's condition pre- and post-operatively and her improvement following the implant. The Arbitrator is not persuaded by the opinions expressed by Dr. Candido. The doctor's opinions were contrary to those of every treating physician in this case.

For the above reasons, the Arbitrator finds that Petitioner's current conditions of ill-being, including but not limited to her conditions of CRPS and chronic neuropathic pain, as well as the SCS procedure itself, are in all respects causally related to the injuries sustained on March 23, 2014.

With reference to (K) What temporary benefits (TTD) are in dispute, the Arbitrator finds as follows:

Dr. Chen found Petitioner unable to work from August 7, 2014 through October 6, 2014 during her period of recuperation from the August 7, 2014 surgery for synovectomy and TFCC repair. Dr. Anwar found Petitioner unable to work from November 4 through 10, 2015 during the stimulator trial, and from April 26 through May 19, 2016, during her period of recuperation from the permanent SCS implant. The total period of lost time amounts to 12-3/7 weeks.

Based upon the findings, opinions and conclusions of Drs. Chen and Anwar and Petitioner's unrebutted testimony the Arbitrator finds these periods of TTD to be causally related to the injury and supported by the medical evidence. Petitioner is therefore entitled to receive 12-3/7 weeks of compensation for temporary total disability at the applicable weekly compensation rate.

With reference to (K) What temporary benefits (TPD) are in dispute, the Arbitrator finds as follows:

Petitioner claimed on the Request for Hearing form that she was temporarily partially disabled from February 22 through April 25, 2016, representing 9-1/7 weeks. At arbitration, Petitioner testified that she saw a primary care physician who instructed her to work no more than four days per week during that time period. However, Petitioner was unable to recall the name of the primary care physician, and the record contains no medical evidence to support a four-day work restriction during the time period in question. Accordingly, the Arbitrator finds that Petitioner failed to prove that she was eligible for compensation for temporary partial disability ("TPD") from February 22 through April 25, 2016. Petitioner's claim for TPD from February 22 through April 25, 2016 is therefore denied.

With reference to (J) Were the medical services that were provided to Petitioner reasonable aand necessary and has Respondent paid all appropriate charges for all reasonable and ecessary medical services, the Arbitrator finds as follows:

Having found that Petitioner's conditions of ill-being are in all respects causally related to her work injuries, the Arbitrator further finds that the treatment rendered for those conditions was reasonably necessary to cure or relieve the effects of the said injuries. Of particular importance is the fact that the permanent SCS implant enabled Petitioner to experience a reduction in pain, an increase in functionality, and the ability to wean down her medication dosages. *See Peabody Coal Co. v. Industrial Comm'n*, 232 Ill.App.3d 800, 596 N.E.2d 1287, 1291 (1992) (medical treatment is considered to be reasonable and necessary so long as "substantial relief of claimant's symptoms" has been achieved).

For the above reasons, the Arbitrator finds that the medical, surgical and hospital expenses set forth in Petitioner's Group Exhibit 15 were in all respects reasonable, necessary and causally related to the injury. Respondent shall therefore pay to Petitioner the sum of $243,693.61 for reasonable and necessary medical expenses, subject to adjustment based upon the negotiated rate, if any, or in the absence of a negotiated rate, then at the lesser of the actual charges or the statutory medical fee schedule, if applicable.

With reference to (L) What is the nature and extent of the injury, the Arbitrator finds as follows:

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 permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a certified nursing assistant ("CNA"). Petitioner testified credibly and without rebuttal that the job required her to lift patients weighing up to 150 pounds unassisted, and up to 200 to 250 pounds with assistance. The FCE therapist, Mr. Quail, stated that the CNA position is at the medium exertional demand level, according to the Dictionary of Occupational Titles. Because work restrictions have been placed upon Petitioner, as a result of her injury, including no lifting, carrying, pushing or pulling in excess of ten pounds, fifteen-minute breaks every two hours, and no contact with combative residents, she is precluded from performing the full range of duties required in her pre-injury line of work. Based upon these considerations, the Arbitrator assigns great 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. Because of Petitioner's relatively young age, she enjoys a long work-life expectancy, which means that her permanent work restrictions will be in place for several decades. The Arbitrator therefore assigns greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that no evidence was introduced as to Petitioner's future earning capacity. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that permanent work restrictions have been placed on Petitioner consisting of ten pounds maximum lifting, pushing and pulling, with fifteen-minute breaks every two hours and no direct contact with combative residents, and no work in excess of eight hours per day or forty hours per week. While Petitioner is now more functional than she was before the SCS implant, she still experiences a dull ache in her left arm, and although she continues to gradually wean down on her prescription medication, particularly Norco, Gabapentin and Meloxicam, she still maintains a prescription regimen that includes Ambien, Omeprazole, Trazadone, Xanax, and compounded muscle relaxant and analgesic creams, in addition to the reduced doses of Norco, Gabapentin and Meloxicam. The Arbitrator gives great weight to this factor.

The Arbitrator notes that under §8(d)(2) of the Act, an injury that incapacitates an employee from pursuing the duties of her usual and customary line of employment, but does not result in an impairment of earning capacity, warrants an award of compensation for partial disability to the whole person under §8(d)(2) rather than an award for specific loss of use of an extremity under §8(e).

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner has sustained permanent partial disability to the person as a whole to the extent of 32-1/2%, 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 down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MAUREEN KOSLA,

Petitioner,

vs.

NO: 13 WC 33127

COOK COUNTY,

Respondent.

21IWCC0062

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the parties herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, and prospective medical, permanent disability, penalties and attorney's fees, and being advised of the facts and law, vacates in part, and modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Decision of the Arbitrator in part, and vacates in part, viewing the evidence differently than the Arbitrator with respect to the awards of the revised life care plan, personal assistant services, §19(k) and §19(l) penalties and §16 attorney's fees. The Commission vacates the award of personal assistant services for four hours per day, seven days per week, from August 1, 2017, through the last hearing of April 18, 2019, vacates the prospective award of full-time personal assistant services should Petitioner participate in an out-patient opioid weaning program, vacates the award of a revised life care plan, vacates the Arbitrator's award of §19(k) and §19(l) penalties and §16 attorney's fees, and further, modifies the Decision for the reasons set forth below.

Medical and Prospective Medical

The Commission agrees with the Arbitrator's Decision with respect to the award of past and prospective medical expenses except as it relates to the award of a life care plan and personal

21IWCC0062

assistant services.

Life Care Plan

According to the Arbitrator's Decision, Respondent presented a motion to bar (RX18), the report and testimony of Henry Brennan, ("Brennan") a certified life care planner, retained by Petitioner's attorney. (T, 11/18/19, 33-35) Respondent's counsel argued that Brennan is not a physician and is not qualified to address the question of whether companion care for Petitioner is reasonable and necessary under §8(a) of the Act. Respondent's counsel also maintained that Brennan's projections as to the future cost of such care is speculative in nature. (T. 11/18/19, 11-12) Petitioner's counsel argued that Brennan's experience as a guardian and life care planner for disabled individuals uniquely qualified him to assist the Arbitrator in determining the type of care Petitioner requires. The Arbitrator denied Respondent's motion and allowed Brennan to testify. (T. 11/18/19, 16-18)

Brennan testified that he owns and operates a company called "Rehab Assist, Inc." The Commission agrees with the Arbitrator's ruling to allow Brennan to testify, however, also agrees with the Arbitrator's Order to exclude the bill from Rehab Assist, Inc. ($10,633.75) from the award of medical expenses. The Commission finds that the life care plan in this case is not reasonable and necessary, nor are the majority of the recommendations therein. The Commission is not persuaded that Brennan's expertise is germane to the circumstances in this case. Brennan testified that he has given over 300 depositions, and testified at jury trials on 55 or 60 occasions but he could not recall previously testifying at the Illinois Workers' Compensation Commission. (T. 11/18/19, 24-25) His life care plan is most often used for civil litigation. (T. 11/18/19, 57-58) It would certainly appear Brennan's expertise is uniquely suited to guardianship and personal injury cases, where the costs for ongoing and future medical can be converted to present cash value for settlement or other planning purposes.

For instance, Brennan testified that he surveyed vendors for the prescription medications and noted the prices for them as of July of 2017. (T. 11/18/19, 36-37) The Commission finds that charges for this service are not reasonable or necessary since the Petitioner's medications did not need to be priced. In a compensable workers' compensation case, the Respondent will be liable for all past, present and future reasonable, necessary and related medical expenses, subject to the fee schedule or contract negotiated fee, whichever is less, pursuant to §8(a) and §8.2 of the Act, however, the costs are payable as they are incurred. The Commission has no authority to commute the cost of future medical benefits, to which Petitioner is entitled, to an amount payable in a lump sum.

When there is a dispute, such as in the case at bar, the compensable medical costs will be determined at the time of litigation, or if parties choose, via settlement of the case, by the billed medical expenses. The amount that will be paid to the provider is based on the fee schedule or the employer's workers' compensation carrier's negotiated contract rate, or for some pharmaceuticals, based upon the actual charges incurred.

In addition, Brennan admitted there could be changes to medications thus the life plan is speculative in that regard. (T. 11/18/19, 56-57) In Petitioner's case, since the matter is litigated,

Petitioner will retain her rights under §8(a) to reasonable, related and necessary medical expenses subject to §8.2 and other relevant provisions of the Act. In the event the parties choose to engage in settlement negotiations, Petitioner could retain her §8(a) rights, subject to §8.2 and all other relevant provisions. Alternatively, the parties can agree to settle with provisions for future medical satisfied by funding a Medicare Set-Aside, in which case the projected cost of future medical will be governed by guidelines established by the Centers for Medicare and Medicaid Services, thus the Commission does not appreciate the necessity of Brennan's service.

Also, the estimated and projected cost of companion care in the subject case, premised on services the family members are doing now, is contrary to the law. (See *Rousey v. Industrial Comm'n*, 224 Ill. App. 3d 1096, 1101, 587 N.E.2d 26, 29, 1992 Ill. App. LEXIS 100, *8-9, 167 Ill. Dec. 144, 147 spouse's housekeeping services and supervision of employee were not necessary medical expense.)

Brennan agreed the life plan would also change based on variables such as whether or not Petitioner could drive, or take public transportation or use her left hand (T. 11/18/19, 46) Brennan testified PX27 was a summary sheet of time Petitioner's husband spent and activities he did for Petitioner. PX27, the Excel spreadsheet that Brennan relied upon, lacks foundation and further, the time entries in many instances appear to be inflated. Mileage for going to any family friend's funeral, family cemetery plot, family outing or family visits are not the type of transportation charges contemplated by the Act. Petitioner's husband testified that he put some of the charges in the spreadsheet "because I was questioned as to how much more activity I had to be involved in that I wouldn't be involved if my wife were able to live a normal life, if she could drive and do things on her own." (T. 11/18/19, 168)

Further, Petitioner's husband documented that bathing/drying his wife took 90 minutes per day, yet he testified that he merely helps her in and out of the tub, and she bathes herself. (T. 11/18/19, 95-96, PX 27). He testified that his wife "can't really get the mail," however the Commission notes that one of the surveillance videos captured her doing just that. (T, 11/18/19, 97; RX9; RX13)

Regarding a foundation for the expenses, Petitioner's husband testified that he created that spreadsheet within the last 10 days. (T. 11/18/19, 152, 160) However, he created a document that logged countless hours expended, meals and mileage claims without any contemporaneous receipts or records. (T. 11/18/19, 130-131, 152-153, 161, 168-169) Further he included many restaurants that they frequented as a couple and they would have gone to prior to the accident. (T. 11/18/19, 173) Those entries are not relevant to the issues at bar nor should be counted in the hours that he is spending giving his spouse "weekly assistance."(T. 11/18/19, 125)

A second spreadsheet was created, per Petitioner's husband's testimony, more contemporaneously. (T. 1/16/19, 14-15) These later accountings appear to be equally inaccurate i.e. "assist Mo with bath and nighttime attire" estimated at 79 minutes; "one load of laundry" estimated as 65 minutes of time. (PX42) This infers that he may be including the actual time it takes for the machines to wash the laundry. The Petitioner's husband testified he spends six hours of time on laundry per week. (T. 1/18/19, 97) As a basis for establishing time, the figures on the spreadsheet relied upon by Brennan are unreliable. The PX42 spreadsheet also included an entry documenting "rinse empty bottles and cans, dispose of recyclables" clearly a shared family

function.

Brennan testified that he had included home renovation for a walk-in shower that he estimated would cost $7,500.00 to $12,000.00. (T. 11/18/19, 86) Petitioner's house has two walk-in showers. (T. 11/18/19, 174) Brennan did not look into the cost of a safety bar that might accomplish the same goal. (T. 11/18/19, 86)

Other than the recommendation for a personal assistant, the remainder of the life care plan is no more than a reiteration of the medical care currently recommended by the treating and examining physicians.

While Brennan may be qualified to render opinions regarding personal injury cases, or for guardianship, his expertise does not translate to projections for reasonable and necessary medical care in this case. The Commission agrees that the Petitioner should undergo a plan of opioid weaning as recommended by Dr. Konowitz and psychological counseling with psychiatric oversight of medication as recommended by both pain management experts, however, notes that Petitioner has otherwise thrived under the care of her medical providers with no need for the subject, or prospective, revised life care plan. Therefore, the Commission vacates the Arbitrator's award of a revised life care plan.

Past and Prospective Personal Assistant Services

Brennan testified that Petitioner's counsel retained him to prepare a life care plan and as a part of that plan, Petitioner requires a personal assistant to assist her with such activities as grooming, shopping, housekeeping and meal preparation, but not skilled nursing care. He modeled the personal assistant/companion care on services that Petitioner's family members currently provide. (T. 11/18/19, 39) No medical provider up to that point had recommended that a personal assistant be provided and the Commission finds the recommendation to be contrary to the law and not reasonable under the circumstances at bar for the reasons discussed below.

The Commission notes that Dr. Candido testified that he never authored a recommendation that the Petitioner require assistance until Petitioner's attorney wrote him and requested responses to interrogatories. (RX5, 48; DepX2) In the reply letter to Petitioner's attorney, Dr. Candido stated "it is medically necessary that she have assistance for her personal grooming and hygiene to assure she does not become more depressed and despondent." (RX5, DepX2) The Commission notes that at least in that response, Dr. Candido simply opined that Petitioner needed assistance; when asked, he agreed that assistance had heretofore been from family members. (RX5, 46) Petitioner's family testified that they provided assistance to Petitioner, both her children and her husband testified. Dr. Candido agreed that a work buddy could essentially perform the same services in a work environment. (RX5, 72)

As the Arbitrator noted, in *Rousey*, a case in which the Petitioner sustained a traumatic brain injury, the Court upheld the Commission's denial of spousal compensation. The Commission notes the court in *Rousey* held that the very things Brennan suggested for an award of personal assistant services for Petitioner, do not form the basis for an award of compensation to a spouse in Illinois:

> A majority of cases have recognized the general rule that shopping, cooking, and other household services performed by a spouse or other family members are considered gratuitous and cannot form the basis for an award for attendant care services. *(DeLong v. 3015 West Corp.* (Fla. App. 1986), 491 So. 2d 1306.) The rationale for denying compensation for ordinary household duties when performed by a spouse is that a spouse performs such activities for both [***9] parties as part of the marital relationship. *(Currier v. Roman L. Hruska U.S. Meat Animal Research Center* (1988), 228 Neb. 38, 421 N.W.2d 25.) As one court observed, one spouse has agreed to care for the other "in sickness and in health.'" *(Spiker v. John Day Co.* (1978), 201 Neb. 503, 530, 270 N.W.2d 300, 314.) For this reason, a distinction has been drawn, for compensation purposes, based on the status of the individual performing those services. Although not necessary to the decision in *Burd,* this court embraced that concept when it stated that mere household duties provided by a spouse who is otherwise "obligated" to perform them by virtue of the marital relationship are not compensable, whereas a different result may obtain when an individual not legally or otherwise required to perform the services does so.

Rousey v. Industrial Comm'n, 224 Ill. App. 3d 1096, 1101, 587 N.E.2d 26, 29, 1992 Ill. App. LEXIS 100, *8-9, 167 Ill. Dec. 144, 147.

While Petitioner's husband is not seeking compensation, Petitioner is asking the Respondent to hire someone to assist in her personal grooming and for the other responsibilities that were itemized on the Excel spreadsheet, in order to relieve her husband, which, the Commission finds, is, in effect, a form of compensation to him. Although prescriptions and groceries can be delivered, putting away groceries, laundry, and undeniably other tasks that Petitioner's husband described must be assisted, however, Petitioner has not sustained her burden of proving that she requires a personal assistant to do those things.

The *Rousey Court* examined another case and established the criteria for compensating caretakers: "Significant to *Burd* were two factors, the type of duties and the status of the party rendering them. In that case, claimant required 24-hour-per-day nursing care because of his paraplegia, which his fiancée was not legally obligated to provide." *Rousey v. Industrial Comm'n,* 224 Ill. App. 3d 1096, 1992 Ill. App. LEXIS 100, *8, 167 Ill. Dec. 144, 146

In this instance, Petitioner has established that the type of duties include, but are not limited to, personal grooming assistance, opening containers, bottles, makeup, lifting and carrying, general household chores and driving. Petitioner's husband is rendering assistance in these areas. Petitioner's husband testified that he works out of his home, and on a busy day, four hours, but he is paid for a 40-hour week. (T. 11/18/19, 153-154) He further testified that he starts his day at 5:00 in the morning to try to get most of his written communications written and e-mailed and then he waits. *Id.* Thus, while the Petitioner's husband also testified he changed jobs, he has also admitted that his job allows him "to help her periodically through the day." (T. 11/18/19, 153)

The Commission acknowledges that Petitioner testified she does not drive anymore, (T,

11/18/19, 244, 246, 287). However, on February 26, 2017, Dr. Candido wrote that he had not recommended Petitioner operate a motor vehicle, "While she insists on doing so for very brief periods of time close to home, and while I comprehend the benefits of her of reducing her sense of isolation by doing so, I cannot medically advocate for her doing so." (PX5, DepX2, 12) After reviewing video surveillance of Petitioner driving, Dr. Candido authored an addendum letter to Petitioner's attorney that stated his opinions solicited in February 2017 remain unchanged. Dr. Candido also testified that he and Petitioner had many conversations that "go on for hours at a time" and that were not documented in his notes. (PX5, 64-66) The Commission infers from that and the following statement, that Dr. Candido understands Petitioner's reasons for driving. Dr. Candido testified on February 28, 2019, "Despite my proclamation that she ought not to operate a motor vehicle, a couple of times a week she feels compelled to do so because of her sense of isolation and her experience of cabin fever." (PX5a, 35)

Dr. Konowitz opined that Petitioner could drive (RX7, 13-14) despite Dr. Candido's opinion and the Marianjoy assessment, an opinion which comports with Dr. Konowitz's opinion that Petitioner's opioid use has lost its efficacy. (RX7, 26) Dr. Candido also concurs that Petitioner's opioid use has no bearing on her cognitive ability. (PX5, 19)

Therefore, given Dr. Candido's testimony and the fact that Petitioner has a driver's license that she retains at minimum for identification, the Commission is not persuaded that Petitioner never drives or never intends to drive. Petitioner could have traded her driver's license for a state identification card had she not wanted to have the option. Petitioner's husband also testified that he has two cars. (T. 11/18/19, 123)

Petitioner's daughters testified that Petitioner showers by herself, needs help dressing but can manage her socks. (T. 11/18/19, 185, 206) Again, Petitioner's house has two walk-in showers. (T. 11/18/19, 174) The Commission appreciates that Petitioner is maintaining her family traditions to the best extent possible, by participating with visits to friends, family outings, and even given the fact that she was driving independently. Dr. Konowitz opined that Petitioner does not require a personal assistant. (RX7, 35) When she arrived at his office on January 17, 2018, she reported that she arrived with no assistance. (RX6; RX7, DepX 5) In this respect, regarding the need for a personal assistant, the Commission finds that Dr. Konowitz's opinion is more credible than Dr. Candido's.

Therefore, based on *Rousey*, and the factors enunciated in *Burd*, the Commission vacates the Arbitrator's award of four hours of personal assistant services per day, seven days per week beginning August 1, 2017, through the last hearing of April 18, 2019, and for the same reasons, the award of prospective personal assistant services are vacated including, but not limited to increased personal assistant services awarded in conjunction with Petitioner's prospective opioid weaning.

Penalties and Fees

The Arbitrator awarded $71,065.71 in penalties under §19(k) of the Act, penalties that represented 50% of $142,131.41 or the unpaid TTD after August 28, 2015, through the date of hearing, April 18, 2019, less the credit for the TTD paid and the PPD advance paid by Respondent.

The Arbitrator also awarded attorney's fees, pursuant to §16, in the amount of $28,426.28 an amount representing 20% of the compensation owed to Petitioner as of the date of the arbitration hearing. Finally the Arbitrator awarded $10,000 in penalties under §19(l). Based on the record in its entirety including testimony, medical records and the surveillance evidence, the Commission finds that the Arbitrator's awarded penalties and attorney's fees under §19(k), §19(l) and §16 are not warranted.

Attorneys' Fees under Section 16

> Whenever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of the provisions of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional underpayment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his insurance carrier. *820 ILCS 305/16 (2013).*

Penalties under Section 19(k)

> In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay. *820 ILCS 305/19(k) (2013).*

In *Jacobo v. Ill. Workers' Comp. Comm'n*, the Court reviewed Illinois precedent for assessing penalties and attorneys' fees, finding penalties under Section 19(k) and attorneys' fees under Section 16 to be reserved for situations where the delay is premised on bad faith. The *Jacobo* Court explained:

> An award of penalties and attorney fees pursuant to Sections 19(k) and 16 are "intended to promote the prompt payment of compensation where due and to deter those occasional employers or insurance carriers who might withhold payment from other than legitimate motives." *McMahan v. Industrial Comm'n*, 289 Ill. App. 3d 1090, 1093, 683 N.E.2d 460, 463 (1997), *aff'd*, 183 Ill. 2d 499, 702 N.E.2d 545 (1998).
>
> The standard for awarding penalties and attorney fees under Sections 19(k) and 16 of the Act is higher than the standard for awarding penalties under Section 19(l) because Sections 19(k) and 16 require more than an "unreasonable delay" in payment of an award. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514-15, 702

> N.E.2d 545, 552 (1998). It is not enough for the claimant to show that the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 552. Instead, Section 19(k) penalties and Section 16 fees are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 553. In addition, while Section 19(l) penalties are mandatory, the imposition of penalties and attorney fees under Sections 19(k) and Section 16 fees is discretionary. *Id.*

Jacobo v. Ill. Workers' Comp. Comm'n, 2011 IL App (3d) 100807WC, 959 N.E.2d 772, 777-778.

Penalties under Section 19(l)

> If the employee has made written demand for payment of benefits under Section 8(a) [*820 ILCS 305/8]* or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d) [820 ILCS 305/8.2]. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. *820 ILCS 305/19* (2013)

The Arbitrator found Respondent's refusal to pay Petitioner weekly compensation benefits after August 28, 2015, lacked an objectively reasonable basis for the refusal. (ArbDec, 49) The Arbitrator characterizes the adjusters as using "tunnel vision" for adopting the opinion of the Respondent's expert and further the Arbitrator notes that the adjusters "went with" the expert's opinion "rather than examining all of the existing circumstances" in handling this claim. *Id.* The Commission disagrees and finds that Respondent's termination of TTD was based on a good faith belief the Petitioner had refused to return to work.

Petitioner's attorney, through commentary in the guise of objections at trial and throughout Dr. Candido's deposition, framed the controversy around the fact that the job was never identified, thus it must follow that the job was not a bona fide offer or legitimate. The Commission does not agree. Respondent's witness, Linda Follenweider, ("Follenweider") testified the "bed control" job would never be posted nor did it have a job description because it is one of many tasks under a general umbrella of the CN1 positions/duties that a nurse would perform in their facility, similar to "house screening" or "med pass." (T. 3/14/19, 57) Follenweider also testified to Respondent's critical need for qualified people to fill the "bed control" position, seven days per week. (T. 3/14/19, 54, 61) The Arbitrator mischaracterizes the Respondent's stipulation regarding Follenweider's testimony that the availability of the "bed control" position did not constitute a job

offer. The Arbitrator assumes that the stipulation meant that there is no viable job; however, the Commission interprets the stipulation to mean that Petitioner would still have to go through a process to have her restrictions reviewed to see if there was position that would be able to accommodate her at the time of the hearing.

Follenweider testified that Respondent has a process to determine if physician assigned restrictions translate practically based upon what the job requires, what the restrictions are, and what accommodations can be made. (T. 3/14/19, 33-34) In fact, the majority of Follenweider's testimony was about the process. Respondent can bring people back specifically based on the type of work available, i.e. for each job type or each type of service, there may be the ability to accommodate light duty. She typically does not base the decision on the specific name of the person that might qualify for the job, she is more typically asked to determine within that job classification and job title, whether she has the ability to accommodate the described restrictions. She never gets health information or files pertaining to an employee who returns. (T. 3/14/19, 33-34) The ability to accommodate is not based on the identity of the person but whether they have work based on the limitations they are provided. (T. 3/14/19, 35-36)

Follenweider testified that that Petitioner's job classification is a position called CN1, for a Professional Registered Nurse. She indicated the area worked in depends on the duties/tasks of work for CN1 positions. For instance, some CN1s pass med's, some may do some patient care, some case management. She stated the CN1 positions at Cermak pass med's or do vital signs or health service request forms, or bed control, which is surveillance to make sure that people are situated where they need to be cared for. Med pass would be giving medications, dose-by-dose; the registered nurse actually hands the patient the medications, verifies they got the right medicine at the right time to the right person, and documents it in the record. (T. 3/14/19, 38)

Bed control, specifically at Cermak in the jail, which is different than bed control duties in the hospital, looks at where a patient is housed and verifies it makes sense for the person's medical needs. In a hospital, if a person is discharged from the ICU, the bed control nurse would be behind the scenes looking for the appropriate bed assignment based on the patient's clinical needs. (T. 3/14/19, 39) Follenweider went on to describe the duties of bed control in detail and testified the census of detainees looked after by the bed control person was 5700 the day before the hearing. (T. 3/14/19, 43) A report is generated and the bed control staff creates a list, through cutting and pasting from the report, which is sent to Classification, a contact in the Department of Corrections, and lists the priority for movement. (T. 3/14/19, 45-46) Follenweider testified that there is no patient contact at all. Further, there's no typing required beyond opening a computer with your password and the use of a mouse. (T. 3/14/19, 51)

Follenweider testified that the position is permanent, seven days per week needs to be filled, available and that the position can accommodate restrictions. (T. 3/14/19, 53-55)

The Commission finds that Follenweider's description of the process and volume of work that Respondent has, and the fact that Respondent always has open CN1 positions is persuasive regarding the availability of a position matching Petitioner's restrictions including, but not limited to, that of the bed control job. Follenweider specifically answered on cross-examination that with respect to the bed control position she could accommodate restrictions of working four hours per

day with a personal assistant, no use of her left hand and no use of her right arm. (T. 3/14/19, 104)

The Commission does not agree with the Arbitrator's statement that "the fact that non-physician human resource employees and adjuster conceived the "bed control" task as doable does not mean it was appropriate from a medical perspective." Although those decisions may ultimately be reconsidered, adjusters, sometimes in conjunction with human resources, interpret physician appointed restrictions and limitations for injured workers everyday as part of their claims decision making process. The fact that the adjusters made a decision that the Commission does not agree with does not negate the legitimacy of their reliance on physician appointed restrictions nor is that the criteria upon which penalties are premised.

After the Petitioner was re-evaluated by Dr. Konowitz pursuant to §12 on April 23, 2015, Dr. Konowitz opined that Petitioner could work eight hours sedentary duty, with no use of her right arm and limited use of her left arm, maximum weight 20 pounds. (RX3, 13)

Jason Henschel, ("Henschel") testified that he was a claims adjuster for Respondent and had handled Petitioner's claim from its inception to about May 2018. (T. 1/16/19, 140-143) Henschel viewed RX17 and identified it as a letter he sent to Petitioner's attorney on July 23, 2015, advising that based on Dr. Konowitz's report dated April 23, 2015, Petitioner can work with restrictions which the Petitioner's department was able to accommodate. The Petitioner's attorney was instructed to have Petitioner contact Paris Partee at a specific telephone number for return to work instructions. The letter is noted to be copied to the Petitioner's department, the state's attorney, the pension department, and human resources, to the attention of Paris Partee, whom Petitioner was instructed to contact. (T. 1/16/19, 150) Petitioner's attorney stipulated that the letter was received. (T. 1/16/19, 156,) Henschel testified that the former attorney had contacted him regarding the letter on July 29, 2015, via email, informing Henschel that Petitioner had not returned to work based on driving restrictions. Thus, Petitioner did not return to work at that time. (T. 1/16/19, 160) Henschel testified that Petitioner spoke with Paris Partee, the director of Human Resources at Cermak Health Services on July 30, 2015. The Petitioner made no attempt to return to work at that time. (T. 1/16/19, 162) The Petitioner's attorney agreed that Petitioner did not go to an address at the Cermak Health Services in this time period and try to do a job. (T. 1/16/19, 166)

Henschel testified that the job opening was with Pamela Brown, the Director of Patient Care Services at Cermak Health Services. (T. 1/16/19, 170-172) Ms. Brown left her employment with Cook County in March 2018. (T. 1/16/19, 172)

Petitioner testified that she spoke with Paris Partee after the letter of July 2015. Petitioner told Partee, "something to the effect that, Paris, I'm in so much pain, I struggle with my normal daily activities. What job do you have that I could possible do? She told me: Report to Employee Health. I said: I have four fingers. I can't even get myself there to do a job. What is the job? Report to Employee Health again. And I asked her what the job was. She wouldn't tell me." (T. 11/18/19, 250-251)

PX62 is an email from a Senior Human Resources coordinator dated August 3, 2015 that verified that she spoke with Petitioner and told her she must report to EHS "for the RTW

assessment." The Petitioner was asked to verify if she made transportation arrangements for the next day. There is no corresponding EHS visit in August in evidence, which comports with Henschel's testimony. Petitioner testified that she saw a doctor at Employee Health in September and December. (T. 11/18/19, 251, 322)

Based on the reports contained in Petitioner's exhibit 60, the Commission finds that these September and December visits were not done to coordinate the return to work instructions per the claims division at the times potential jobs were identified; these visits were to provide documentation to the County Employees' Annuity and Benefit Fund of Cook County. (PX60, 178, 191) The Commission notes that a previous visit for the same purpose of providing documentation to the County Employees' Annuity and Benefit Fund of Cook County was documented on March 23, 2015. (PX60, 166) There is no evidence to suggest that those letters were copied to anyone except Petitioner.

Henschel testified that after the July 23, 2015 letter was sent, he attempted to bring Petitioner back to work again. He had obtained surveillance in September and October 2015 that showed Petitioner driving. (T. 1/16/19, 172) He sent the surveillance video to Dr. Konowitz for a §12 addendum report. (T. 1/16/19, 173) Dr. Konowitz indicated in his report Petitioner should continue with no use of her right arm and with no driving restrictions. (T. 1/16/19, 173-174)

Henschel testified that he contacted the department again after he received the September 15, 2015, §12 report from Dr. Konowitz to see if Respondent still had a job available and that required no use of the right arm. Respondent still had the position available. (T. 1/16/19, 174) Henschel said he sent the additional §12 report authored by Dr. Konowitz to Petitioner's prior attorney and advised that benefits were being terminated. (T. 1/16/19, 177) Petitioner did not return to work at that time. (T. 1/16/19, 182)

Petitioner was seen by Dr. Sefer on March 24, 2016, at Stroger Hospital Clinic. (PX60, 204) Henschel testified that another attempt was made to bring Petitioner back to work at the same job with Pamela Brown. (T. 1/16/19, 182) The job was at the Cermak facility and would start on May 2, 2016. (T. 1/16/19, 182-183) According to Henschel, Paris Partee contacted Petitioner on April 19, 2016, about this job. (T. 1/16/19, 185) Petitioner did not return to work after that. (T. 1/16/19, 186)

Petitioner testified that she did not recall if Paris Partee contacted her or left a voice message on April 19, 2016. Petitioner testified, "I believe Paris Partee had called a couple of times over the years saying you have to come back to work or they're going to basically lay me off or fire me." (T. 11/18/19, 320) Petitioner agreed it was possible that Paris Partee called her and left her a message on April 19, 2016. (T. 11/18/19, 320)

On June 16, 2016, a Stroger office note documents that Petitioner reported "somebody called her (and told her) that she has job at Cermak Health Unit." Dr. Sefer wrote that he was not aware of any nursing job at Cermak that any nurse can perform with one hand. (PX60, 213) The Commission finds that Dr. Sefer's note two months after-the-fact does not obviate Petitioner's obligation to follow instructions per Human Resources to coordinate return to work in April. Based on Follenweider's testimony regarding the number of jobs not posted that are under the

umbrella of CN1 positions, the Commission finds that Dr. Sefer could not be not aware of every job available within the Respondent's system, nor is it his function to make that determination.

The evidence in Petitioner's exhibit 60 (PX60) include multiple letter from the doctors at Employee Health Services (EHS) addressed to the County Employees' Annuity and Benefit Fund of Cook County, most of which are authored by Dr. Sefer. Three of the visits and letters, already referenced, occurred on March 23, 2015, September 11, 2015, and December 22, 2015. (PX60, 166, 178, 191) On June 15, 2016, Dr. Sefer again wrote the County Employees' Annuity and Benefit Fund of Cook County after seeing the Petitioner. The Enclosure included a Physician Statement for Disability Benefits date June 10, 2016 and the letter was copied solely the Petitioner. A subsequent letter dated June 15, 2016, was sent to Paris Partee, Director of Human Resources notifying her that the Medical Staff of CCHHS Employee Health Services performed a medical evaluation of this employee in response to a request for medial disability benefit coverage.

It appears to the Commission that the County's primary function in Petitioner's case, in 2016, was to interview the Petitioner for disability status, and to collect a note from her treating physician, as infrequently as every six months, to be submitted to the County Employees' Annuity and Benefit Fund of Cook County. (PX60, 228-note signed by Dr. Candido) The Attending Physician notes are not the County's physicians that are making a medical evaluation; the County's physicians are collecting "Attending Physician's" notes. (PX60, 219, 221, 226-228) Copies of the notes are sent to human resources for documentation noting that the determination as to whether to grant or continue this employee on disability is that of the County Employees Annuity And Benefit Fund of Cook County. EHS would then request that the Annuity and Benefit Fund verify the status of disability benefit coverage with this organization. The Commission acknowledges some earlier County Physician statements are signed by Dr. Sefer. For instance on December 22, 2015, Dr. Sefer recommended that Petitioner's period of disability based on evaluation was from 01/01/16 to 6/18/16, however, he recommended that she be reevaluated on 3/23/16 and 06/16. (PX60, 193) However, these visits are documented on the County Employees and Officers' Annuity and Benefit Fund of Cook County forms.

On March 24, 2016, Dr. Sefer's Stroger Hospital Clinic evaluation noted Petitioner's report of her treating doctor's evaluation and that her "MD opined that" she reached MMI. Dr. Sefer also noted that Petitioner "Explains to me meaning of "MMI". (PX60, 204)

These visits, in this case, are not medical evaluations for workers' compensation purposes because it is clear that her medical care is managed by her own doctor. Petitioner cannot rely upon these notes to justify refusal to cooperate with risk management for return to work. The Commission finds that Respondent has established that the Petitioner's communication regarding return to work for purposes of workers' compensation needs to be coordinated through workers' compensation and human resources and Petitioner's refusal to go, which might be premised on valid reasons, does not merit penalties for termination of TTD.

On December 22, 2016, Henschel spoke with Devon McBride, the Senior Human Resources coordinator at Cermak about the bed control position for Petitioner and it was still available. (T. 1/16/19, 189-190)

On December 21, 2016, an email was sent from Dr. Patricia Kelleher and copied to Dr. Sefer et.al. at the Employee Health Services sent via Securelock and in reference to Petitioner. The December 21, 2016, email states:

> Ms. Kosla's physician had indicated that she cannot return to modified duty and recommend that she is fully disabled until 6.9.17. We will forward the Disability Forms to the Pension Fund, *unless further information is available.* (Emphasis added) (PX60, 2337)

The actual EHS encounter that took place on December 9, 2016, is described and the period of disability requested is noted to Period of disability requested: 12/18/16 until 06/19/17. The letter states Petitioner's physician stated she is not able to return to modified duty and the date she is able is unknown, however, the Attending Physician Statement on the County Employees' and Officers' Annuity and Benefit Fund of Cook County form is signed by Dr. Candido, the Petitioner's treating pain management doctor. (PX60, 228) Dr. Candido's signature is also on June 10, 2016 form.

A second letter was authored by Dr. Vesna from the Cook County Health & Hospital Systems (CCHS) on December 22, 2016 and was address to the Senior Human Resources Coordinator, Ms. Devon McBride regarding the Petitioner. This letter again was notification that the CCHHS Employee Health Services performed a medical evaluation in response to a request for medical disability benefit coverage and noted the determination as to whether to grant or continue this employee on disability is that of the County Employees Annuity and Benefit Fund of Cook County. Dr. Vesna asked that they verify the status of disability benefit coverage with this organization.

On February 21, 2014, the EHS notes document that Petitioner was there to apply for disability. (PX60, 121) The Commission infers from that the Petitioner's visits to Employee Health Services thereafter were related to ongoing medical disability benefit coverage from the County Employees Annuity And Benefit Fund of Cook County. Follenweider's testimony made it clear that records between departments were not shared. The Commission therefore infers that the visits to Employee Health Services on March 23, 2015, September 11, 2015, December 22, 2015, June 15, 2016, and December 9, 2016, documented in PX60, were prepared for the sole purpose of sending those reports to the County Employees Annuity and Benefit Fund of Cook County and were the type of forms that were meant to be kept in the Employee's personnel file but are not summarily the type of medical opinions the adjusters were required to rely upon when making workers compensation determinations, especially in this case where the Petitioner's medical is managed by her own treating physician.

On December 28, 2016, Devon McBride wrote Jason Henschel and included Dr. Kelleher's report and notified Henschel that he received the report and it appears that Petitioner is to remain off work. Henschel replied "Per IME of Dr. Konowitz, Maureen can work with no right arm use and she can use public transportation or drive a car without restrictions or modification. He noted the difference of opinion between the treating doctor and the "IME doctor." He wrote that he was relying on Dr. Konowitz's opinion and that he did not understand the other restrictions assigned by the treating doctor that were for body parts not injured in the work accident such as stand, walk,

and that she cannot work sedentary duty at all.

Tekuila McGee testified that she is the claims adjuster that assumed handling Petitioner's claim after Henschel. McGee testified that she relies upon medical records provided by treating physicians as a factor she uses in decision making. (T. 1/16/19, 25) McGee also testified that she also relies upon a specialist to examine the patient and review medical records provided by the treating physician. Those doctors then give opinions to Respondent. (T. 1/16/19, 26) If litigated, she confers with defense counsel. (T. 1/16/19, 27) McGee went on further to reiterate, when determining medical necessity and reasonableness of treatment, an adjuster would use "IMEs and §12 exams, which is a review of the medical records from the treating physician."

The Arbitrator found that Henschel failed to thoroughly analyze Dr. Konowitz's opinions because when asked whether Petitioner could return to work, Dr. Konowitz answered, "no right arm work graded," with no further explanation. The Commission fails to appreciate how the determination of penalties hinges on whether or not Dr. Konowitz explained the word "graded." Further, there is nothing in the record that established that Henschel relied on the word "graded" to assume that Petitioner would eventually have the use of her right arm.

The Commission finds that Henschel clearly understood Petitioner to be restricted from using her right arm at work, and he considered that along with other factors in making his determination that Petitioner might be suited to do accommodated work. He advised Petitioner's attorney when he terminated her benefits. Henschel also made subsequent efforts to get Petitioner to make the appropriate appointments to discuss return to work.

The Commission notes that the claims adjusters had viewed and/or were aware of surveillance of Petitioner driving, shopping, going to lunch and therefore, in good faith, relied upon Dr. Konowitz's opinion as Petitioner appeared to be doing activities of daily living.

The Commission notes that Dr. Konowitz and Dr. Candido agree on Petitioner's diagnosis and treatment; however, their opinions differ with respect to Petitioner's continued opioid use, work restrictions, the Petitioner's ability to drive or use public transportation and the number of hours she could work They both essentially agree that Petitioner should have treatment for depression. (PX3, 18; PX5, DepX2, 18; RX 7, 26, 29) The Commission finds Dr. Konowitz credible when describing the reasons that the Petitioner should be weaned off opioids, thus the adjusters' reliance on his opinion regarding Petitioner's ability to work with no use of her right arm was not unreasonable.

Dr. Candido, the Petitioner's treating pain management doctor, also testified to several critical issues relevant to the issue of termination of TTD benefits. When asked by Petitioner's attorney hypothetically, if such a job existed, whether or not Petitioner could work in a sedentary position with no use of the right arm, Dr. Candido opined that Petitioner could potentially work up to four hours a day in a sedentary duty with no use of the right upper extremity and with minimal use of the left upper extremity, no lifting or carrying greater than five pounds and no repetitive use for ten minutes consecutively. (RX5, 41)

The Arbitrator also noted none of Respondent's witnesses refuted Petitioner's testimony

that Employee Health "is where you have to go" to be released to work. The Commission disagrees. The doctors at Employee Health relied on Petitioner's self-reported history and, in some instances, were merely obtaining from the Petitioner her treating doctor's work status reports to Employee Health so they could forward those forms to the County Employees' Annuity and Benefit Fund of Cook County as per the afore-referenced letters in PX60.

The Commission finds that Follenweider made it clear that appearances in Employee Health Services (EHS) and the functions of her department are separate and distinct and they do not share confidential health records. (T. 3/14/19, 85-91-92) Follenweider testified that she has interaction with EHS around "certain types of things, but typically around disability or returning to work, EHS does not work directly with me at all around those types of things. I work with HR." (T. 3/14/19, 95-96)

The Commission finds the Respondent's objection to the conversation between Petitioner and the physician at EHS regarding his opinion about available jobs was properly sustained. (T, 3/14/19, 255) Further, neither claims adjuster, Henschel or McGee testified that they relied on physician opinions from EHS. In fact, Henschel made it clear in his email on January 3, 2017 (PX60) that he was at that time trying to advise Dr. Kelleher from EHS that he also had a §12 opinion regarding Petitioner's work ability and that he, in his capacity at Risk Management, was relying upon that opinion.

Dr. Candido testified the Petitioner described a light-duty job to him. (RX5, 42, 50) This is instructive because the Petitioner's attorney maintained throughout the deposition that the accommodated job was never identified in the past. (RX5, 40) Thus, it appears the Petitioner made an assumption that an accommodated position would be "light duty" as Petitioner described to Dr. Candido and not sedentary, no use of the right arm, left-hand modified work. Dr. Candido testified that he was aware of the fact "that she refused to return to work, and she has never attempted to return to work since the date of accident."(RX5, 50-51) Dr. Candido stated that Petitioner is "cognitively unimpaired, so yes, she can dictate." (RX5, 52) Follenweider testified that the bed control position could accommodate Petitioner's restrictions, however, based upon Dr. Candido's testimony, it is apparent that Petitioner refused or was unwilling to consider any position. Taking that position thwarted the parties' communication. (RX5, 50-51)

Without minimizing Petitioner's concerns, the Commission notes that Petitioner did get out to shop, dine, sports events, family outings, and church services and do things Dr. Candido opined were justified for her mental health, but he also agreed, in general, it could be beneficial for Petitioner to return to work from a psychological standpoint. (RX5, 52)

The Commission finds the Arbitrator's finding of no objective reasonable basis for terminating benefits ignores the evidence and magnitude of controversy regarding Petitioner's unwillingness to even explore the Respondent's accommodated position. It is clear to the Commission that Respondent made legitimate overtures to get Petitioner to discuss potential return to work issue and accommodations. Petitioner had been spotted multiple times in surveillance driving in 2015, going to stores alone and doing activities of daily living albeit without the use of her right arm. (RX8, RX13) There is no evidence that the termination of Petitioner's TTD benefits was done in bad faith or for an improper purpose, certainly not vexatiously and thus does not merit

the imposition of penalties under Section 19(k) or the award of attorney's fees under §16.

In *Otto Baum Co. v. Ill. Workers' Comp. Comm'n*, (citations omitted), the court examined under what circumstances TTD may be suspended:

> "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." *Interstate Scaffolding, Inc.*, 236 Ill. 2d at 146, 923 N.E.2d at 274. *HN5* "The Act provides incentive for the injured employee to strive toward recovery and the [*8] goal of returning to gainful employment by providing that TTD benefits may be suspended or terminated if the employee refuses" medical services or fails to cooperate in good faith with rehabilitation efforts. *Interstate Scaffolding, Inc.*, 236 Ill. 2d at 146, 923 N.E.2d at 274 (citing 820 ILCS 305/19(d) (West 2004)). "Benefits may also be suspended or terminated [**587] [***705] if the employee refuses work falling within the physical restrictions prescribed by his doctor." (Emphasis added.) *Interstate Scaffolding, Inc.*, 236 Ill. 2d at 146, 923 N.E.2d at 274 (citing *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 166, 601 N.E.2d 720, 731, 176 Ill. Dec. 22 (1992), and *Hayden v. Industrial Comm'n*, 214 Ill. App. 3d 749, 574 N.E.2d 99, 158 Ill. Dec. 305 (1991)).

Otto Baum Co. v. Ill. Workers' Comp. Comm'n, 2011 Ill. App. LEXIS 1086, *7-8, 960 N.E.2d 583, 586-587, 355 Ill. Dec. 701, 704-705, 2011 IL App (4th) 100959WC

Termination of TTD benefits does not warrant penalties when in this instance, the Commission finds that the Respondent's job accommodation potential is credible, and Petitioner's unwillingness to even explore potential jobs with accommodation, thwarted any possible resolution of the issue. Although the Commission finds that Petitioner is entitled to TTD, for the disputed period, the Commission vacates the Arbitrator's award of penalties under §19(k) and attorney's fees under §16.

The Commission further finds that even more significantly, the Arbitrator's decision ignores the fact that the Respondent relied upon a credible §12 expert's opinion that Petitioner could return to full-duty sedentary work with no use of her right arm, and the Respondent had repeatedly made overtures to Petitioner to explore sedentary jobs that might have been suitable, however, Petitioner was not willing to explore job opportunities or even attempt to return to a sedentary, accommodated position, and therefore, termination of her benefits, under a reasonable standard, is justified. The issue of divergent medical opinions is a recurrent theme before the Commission and analyzed by the *Holland* court:

> When the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed." *Matlock,* 321 Ill. App. 3d at 173; see, e.g., *Ford Motor Co. v. Industrial Comm'n*, 126 Ill. App. 3d 115 (1984) (Commission's assessment of section 19(l) penalties reversed, where the employer disputed causation relying on a physician's report that indicated the claimant suffered from conditions that were unrelated to his work accident). An

> employer's belief is honest only if the facts in the possession of a reasonable person in the employer's position would justify it. *Board of Education of City of Chicago v. Industrial Comm'n,* 93 Ill. 2d 1, 10 (1982). The burden of proof is on the employer. *Mobil Oil Corp. v. Industrial Comm'n*, 309 Ill. App. 3d 616, 625 (200O).

USF Holland, Inc. v. Indus. Comm'n (Baker), 357 Ill. App. 3d 798, 805, 829 N.E.2d 810, 817, 2005 Ill. App. LEXIS 426, *14-15, 293 Ill. Dec. 885, 892.

The Commission notes also that Respondent paid a large PPD advance after TTD was terminated as further evidence of good faith.

The Commission does not agree that imposition of penalties under §19(l) was warranted. Therefore, the Commission vacates the Arbitrator's award of §19(k), §19(l) and §16 penalties.

Conclusions of Law

On page 47, the Commission strikes everything after the word "facilities" in the second full paragraph, and through the words, "afforded by Section 12 of the Act." The paragraph should read, "As for the claimed transportation-related expenses, the Arbitrator awards only those expenses relating to Petitioner's trips to various Respondent Employee Health facilities."

The Commission modifies the fifth paragraph on page 48, of the Arbitrator's Conclusions of Law, so the third and fourth sentences read, "If this physician recommends that the weaning be conducted in an inpatient setting, the Arbitrator awards all related medical expenses pursuant to §8(a), including reasonable transportation expenses. If the weaning is performed on an outpatient basis, the Arbitrator awards all related medical expenses pursuant to §8(a)." Following the last sentence in the fifth paragraph on page 48, the Commission adds the following sentence, "The life care plan is not awarded."

In the fourth paragraph on the first page of the Order of the Arbitrator's Decision, the Commission strikes everything in the second and third lines after the word, "facilities" and through the words, "afforded by Section 12 of the Act." The paragraph should read, "The Arbitrator awards only those claimed transportation expenses relating to the trips Petitioner and her husband made to various Respondent Employee Health facilities."

On the second page of the Order of the Arbitrator's Decision, the Commission strikes the first paragraph, beginning with the words, "In conjunction" and through the word "details."

On the second page of the Order of the Arbitrator's Decision, the Commission strikes the fourth sentence in the third paragraph (second bullet point), beginning with the words "The Arbitrator further awards" and through the words, "Dr. Konowitz."

For the foregoing reasons, the Commission vacates the Arbitrator's award of personal assistant services, both for four hours daily and the award of full-time personal assistant services should Petitioner participate in an out-patient opioid weaning program, and the Commission further vacates the Arbitrator's award of penalties under §19(k) and §19(l) and attorney's fees

under §16 and modifies the Arbitrator's Decision. Finally, the Commission vacates the Arbitrator's award of a revised life care plan.

The Commission further remands the case to the Arbitrator for further proceedings consistent with this Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on June 4, 2019, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of personal assistant services for four hours per day, seven days per week, from August 1, 2017, through the last hearing of April 18, 2019, and prospectively, is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the prospective personal assistant services awarded in conjunction with Petitioner's prospective opioid weaning, is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of a revised life care plan is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of §19(k), §19(l) penalties and §16 attorney's fees is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,666.16 per week for a period of 195 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 the medical, prescription and out-of-pocket expenses enumerated in PX37, pursuant to §8(a) and §8.2 of the Act, subject to the fee schedule, other than the Alexian Brothers Medical Center bill of $21,745.00, the Alliance laboratory bill of $283.15, the Elk Grove bill of $1,007.00, the Elk Grove Radiology bill of $340.00, the Rehab Assist bill of $10,633.75 and the claimed clothing related expenses of $272.12. Because the Commission declined to address PPD, the ruling is deferred on the claimed bill of $1,159.72 associated with the vocational services provided by Blumenthal and Associates. Respondent entitled to credit for any payments it made toward the awarded expenses. (Respondent is entitled to credit for $109,186.07 paid in medical bills, and is entitled to $28,769.07 credit under Section 8(j) of the Act 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 provide and pay medical expenses pursuant to §8(a) for the claimed adjustable king mattress, air flosser, Movantik and ongoing blocks necessary for nail cutting. The Commission awards those claimed transportation expenses relating to the trips Petitioner and her husband made to various Respondent

21IWCC0062

Employee Health facilities. The Commission declines to award Petitioner a walk-in shower or compounding creams.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay prospective medical in the form of medically supervised opioid weaning to be overseen by a pain management specialist or "addictionologist" other than Dr. Candido or Dr. Konowitz to be selected by agreement of the parties.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent provide and pay prospective medical in the form of psychological counseling and psychiatric oversight of psychiatric medication management, if necessary.

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.

Based upon the named Respondent herein, no bond is set by the Commission. *820 ILCS 305/19(f)(2)*. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 10 2021
KAD/bsd
O121520
42

Kathryn A. Doerries

Maria E. Portela

PARTIAL DISSENT

I concur, in part, with my colleague's affirmance and adoption of the Arbitrator's decision. However, I disagree with the majority's decision to vacate the Arbitrator's award of 1) four hours of companion care per day seven days a week, 2) full-time companion care should Petitioner participate in an outpatient opioid weaning program, 3) a revised life care assessment or plan, and 4) penalties and attorneys' fees pursuant to §19(l), §19(k) and §16 of the Act. As a result, I issue this partial dissent.

The evidence shows that Petitioner suffered an undisputed accident on 8/22/13 when she

fell while exiting work. (Arb.Ex.1). There is no dispute that she suffers from complex regional pain syndrome (CRPS) in her right arm and that she essentially has no functional use of her dominant right hand and arm due to that syndrome, a fact that Respondent's IME, Dr. Konowitz, does not refute. (Arb.Dec.[Addendum], p.46). The Arbitrator found that as a result Petitioner also suffers from causally related left thumb and index finger conditions due to overuse. (Id., p.46). With respect to her left thumb, Petitioner indicated that she currently wears an orthotic device on her left hand in addition to the sling she wears on her right arm. In describing her current ability to function, Petitioner noted that "[p]eople should actually tie one hand behind their back and tie their thumb up and see what it's like to function in life." (T.11/19/18, p.272).

Based on the evidence taken as a whole, including the testimony of Drs. Candido and Konowitz, as well as that of certified life planner Henry Brennan, Petitioner and Petitioner's family members, the Arbitrator awarded Petitioner companion care of four hours per day, including weekends, at $21.00/hour from 8/1/17 (when Petitioner's husband began his current job) through the hearing date of 4/18/19. (Arb.Dec.[Addendum], p.46). In my opinion, this was an entirely reasonable award, under §8(a) of the Act, given Petitioner's obvious need for personal assistance throughout the day, given her limitations as to manual dexterity, in the face of her husband's responsibilities outside the home with respect to his full-time job. And for that reason, I totally disagree with the majority's decision and rationale to vacate this aspect of the award.

Likewise, I take issue with the majority's decision to vacate the Arbitrator's award for full-time (i.e. 40 hours/week) companion care in the event that an equally-qualified, third pain physician or "addictionologist", agreed to by the parties, recommends that Petitioner's opioid weaning be performed on an outpatient basis. Once again, I believe that this was an entirely reasonable award under the circumstances based on Petitioner's ongoing need for personal assistance when she is at home.

In addition, I believe that given the complexity of this case, and the care and treatment involved, that the Arbitrator's award of a revised or new life care plan after the pressing issue of medication management is addressed makes perfect sense and would undoubtedly provide clarity and a path forward once Petitioner is finally weaned off these highly addictive opioids, or at least an attempt is made to do so.

Finally, the Arbitrator found that Petitioner was entitled to additional compensation in the amounts of $10,000.00 (statutory maximum) and $71,065.71 (50% of net unpaid benefits as of 4/18/19, or .5[$142,131.41]), pursuant §§19(l) and 19(k), respectively, and attorneys' fees pursuant to §16 of the Act in the amount of $28,426.28 (.2[$142,131.41]) based on Respondent's refusal to pay temporary total disability benefits from 8/28/15 through the hearing date of 4/18/19. The Arbitrator noted that "Respondent lacked an objectively reasonable basis for this refusal", and I wholeheartedly agree.

The evidence shows that Respondent paid TTD benefits through 8/27/15 but unilaterally cut off benefits thereafter based ostensibly on the opinion of its examining physician, Dr. Konowitz, and its claim that work within the restrictions outlined by Dr. Konowitz was available.

However, as the Arbitrator rightly pointed out, the adjustors in this claim "... can readily

be accused of 'tunnel vision' since they simply 'went with' Dr. Konowitz rather than examining 'all of the existing circumstances,' in handing this claim." (Arb.Dec., p.49). I would take it a step further and say that this behavior was the result of bad faith and amounted to a deliberate withholding of benefits without good and just cause. In fact, I would argue that this is precisely why we have the penalty/attorneys' fees provisions of §§19(k) and 16 of the Act, which, as the majority notes, was "intended to promote the prompt payment of compensation where due and to deter those occasional employers or insurance carriers who might withhold payment for other than legitimate motives." *McMahan v. Industrial Commission*, 289 Ill. App. 3d 1090, 1093, 683 N.E.2d 460, 463, aff'd, 183 Ill. 2d 499, 702 N.E.2d 545 (1998). It would have taken little additional effort to compare Dr. Konowitz's opinions with the available record. Instead, the adjustors chose to close their eyes to the fact that Petitioner was never released to return to work by the employer's physician at CCHHS, even though this was a prerequisite for any return to work and even though she presented to Employee Health Services for this very purpose on multiple occasions. It is also questionable whether suitable work even existed with Respondent, much less that it was rejected by Petitioner. Further, there is no evidence that Dr. Konowitz ever endorsed the so-called "bed-control" task Respondent claims was available, especially given Dr. Konowitz and others' belief that Petitioner was still in need of on-going care. Instead, the adjustors decided to conveniently interpret Dr. Konowitz's report in a way they saw fit, and in opposition to the overwhelming medical evidence in this case, in order to unceremoniously cut off TTD benefits that were rightfully due and owing to this Petitioner – a fact made even more egregious by Respondent's subsequent stipulation that Mrs. Kosla has no functional use of her dominant right hand and arm due to her chronic regional pain syndrome.

As a result, I would affirm and adopt Arbitrator Mason's thoughtful and well-reasoned opinion in its entirety, including the award for companion care, a revised life care plan and penalties/attorneys' fees. To hold otherwise eliminates a necessary support service for an injured worker in the home setting and disregards the very need for an equally essential roadmap for future care and treatment, and more or less condones the type of conduct the penalty provisions of the statute were designed to discourage.

For the above reasons, I issue this partial dissent.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KOSLA, MAUREEN
Employee/Petitioner

Case# **13WC033127**

COOK COUNTY
Employer/Respondent

21IWCC0062

On 6/4/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0274 HORWITZ HORWITZ & ASSOC
MITCHELL W HORWITZ
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

2337 INMAN & FITZGIBBONS LTD
KRISTIN THOMAS
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MAUREEN KOSLA
Employee/Petitioner

v.

COOK COUNTY
Employer/Respondent

Case # **13** WC **33127**

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

21IWCC0062

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 C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **11/19/18, 1/16/19, 3/14/19 and 4/18/19**. 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **8/22/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Respondent stipulated to causation insofar as Petitioner's right upper extremity chronic regional pain syndrome is concerned. For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner also established causation as to a left wrist overuse-related condition that resolved and as to her current overuse-related left thumb and index finger conditions.

In the year preceding the injury, Petitioner earned $**86,640.32**; the average weekly wage was $**1,666.16**.

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

Petitioner ***has in part*** received reasonable and necessary medical services.

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

Respondent shall be given a credit of $**114,825.95** for TTD (paid through August 27, 2015), $**0** for TPD, $**0** for maintenance, and $**70,722.74 for PPD advance, $109,186.07 in medical bills** for other benefits, for a total credit of $**294,734.76**.

Respondent is entitled to a credit of $**28,769.07** under Section 8(j) of the Act.

ORDER

Pursuant to the attached Findings of Fact and Conclusions of Law, the Arbitrator finds as follows:

- The Arbitrator awards Petitioner the medical, prescription and out of pocket expenses enumerated in PX 37, subject to the fee schedule, **other than** the Alexian Brothers Medical Center bill of $21,745.00, the Alliance Laboratory bill of $283.15, the Elk Grove bill of $1,007.00, the Elk Grove Radiology bill of $340.00, the Rehab Assist bill of $10,633.75 and the claimed clothing-related expense of $272.12. Because the Arbitrator declines to address permanency (see further below), she defers any ruling on the claimed bill of $1,159.72 associated with the vocational services provided by Blumenthal and Associates. Respondent is entitled to credit for any payments it made toward the awarded expenses.

  The Arbitrator also awards Petitioner the claimed adjustable king mattress, air flosser, Movantik and ongoing blocks necessary for nail cutting, for the reasons set forth in the attached decision. The Arbitrator declines to award Petitioner a walk-in shower or compounding creams, for the reasons set forth in the attached decision.

  The Arbitrator finds that Petitioner was entitled to four hours of personal assistant services per day, seven days per week, at the rate of $21 per hour, from August 1, 2017 through the last hearing of April 18, 2019. As explained in the attached decision, the Arbitrator uses August 1, 2017 as a start date because this is when Petitioner's husband changed jobs in deference to Petitioner's needs.

  The Arbitrator awards only those claimed transportation expenses relating to the trips Petitioner and her husband made to various Respondent Employee Health facilities to undergo return-to-work evaluations. The Arbitrator views these evaluations as akin to the examinations afforded by Section 12 of the Act.

In conjunction with the awarded prospective opioid weaning (see below), the Arbitrator awards certain prospective personal assistant services, again at the rate of $21 per hour. See the attached decision for details.

- Respondent stipulated Petitioner was temporarily totally disabled from August 23, 2013 through July 23, 2015. Arb Exh 1. Respondent continued paying temporary total disability benefits through August 27, 2015. The Arbitrator finds that, in addition to the stipulated period, Petitioner was temporarily totally disabled from July 24, 2015 through the last hearing of April 18, 2019, with Respondent receiving credit for the benefits it paid through August 27, 2015. The Arbitrator finds the TTD rate to be $1,110.78/week based on the stipulated average weekly wage of $1,666.16.

- The Arbitrator awards prospective care in the form of supervised opioid weaning, to be overseen by a pain management specialist/"addictionologist" other than Dr. Candido or Dr. Konowitz. The Arbitrator directs the parties to confer and select such a specialist. The Arbitrator also awards prospective care in the form of psychological counseling, preferably in conjunction with psychiatric medication management. The Arbitrator further awards a revised life care assessment, to be performed after opioid weaning, per Dr. Konowitz. See the attached decision for further details.

- The parties placed nature and extent in dispute. Arb Exh 1. However, the Arbitrator finds Petitioner is not at maximum medical improvement and thus it would be premature to address permanency.

- The Arbitrator finds Respondent liable for Section 19(k) penalties in the amount of $71,065.71 in Section 19(l) penalties in the maximum statutory amount of $10,000.00 and Section 16 attorney fees in the amount of $28,426.28, based on its unreasonable discontinuation of temporary total disability benefits. See the attached decision for additional reasoning and method of calculation.

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

6/4/19
Date

JUN 4 - 2019

Maureen Kosla v. Cook County Department
of Public Health
13 WC 33127

Summary of Disputed Issues

The parties agree that Petitioner, a registered nurse, sustained an accidental fall on August 22, 2013. Petitioner testified she injured her dominant right arm in this fall. She subsequently developed chronic regional pain syndrome in her right upper extremity. She also claims left thumb, index finger and wrist conditions secondary to overuse. Respondent does not dispute the CRPS diagnosis or need for restrictions of no right arm use but does dispute causation as to the claimed left-sided conditions. Respondent also disputes other restrictions imposed by Dr. Candido, the treating pain specialist selected by the nurse case manager.

The parties agree that, following the accident, Petitioner was temporarily totally disabled from August 23, 2013 through July 23, 2015. They also agree that Respondent is entitled to credit for the $114,825.95 in temporary total disability benefits it paid through August 27, 2015. Arb Exh 1. Respondent disputes Petitioner's claim for additional benefits after July 23, 2015, citing its second examiner, Dr. Konowitz, and claiming that work within the restrictions contemplated by Dr. Konowitz was available to Petitioner.

Other disputed issues include claimed companion care and transportation expenses, various claimed medical and out of pocket expenses, whether Petitioner should be weaned off of her current opioid regimen, prospective care, nature and extent and penalties/fees. Arb Exh 1.

Arbitrator's Ruling on Respondent's Motion to Bar

At the initial hearing, Respondent presented a motion to bar (RX 18) the report and testimony of Henry Brennan, a certified life care planner retained by Petitioner. Respondent's counsel argued that Brennan is not a physician and thus not qualified to address the question of whether companion care for Petitioner is reasonable and necessary under Section 8(a) of the Act. Respondent's counsel also maintained that Brennan's projections as to the future cost of such care are speculative in nature. T. 11/19/18, pp. 11-12. Petitioner's counsel pointed out that the physicians who have testified in this case agree Petitioner has no use of her right arm, that Petitioner also claims difficulty using her left thumb and that Brennan's experience as a guardian and life care planner for disabled individuals uniquely qualifies him to assist the Arbitrator in determining the type of care Petitioner requires.

The Arbitrator denied Respondent's motion and allowed Brennan to testify. T. 11/19/18, pp. 16-18.

Arbitrator's Summary of Trial Testimony

Henry Brennan testified he holds a master's degree in communication disorders. He obtained certification in life planning after taking a 128-hour postgraduate course, submitting a sample plan and passing an examination. T. 11/19/18, p. 21. For the past 25 years, he has owned and operated a company called "Rehab Assist, Inc." He currently employs 14 individuals. Rehab Assist, Inc. offers case management, guardianship and life care planning services. With respect to case management and guardianship, Rehab Assist, Inc. is typically appointed by a probate court. Rehab Assist, Inc. currently

acts as a guardian of the person in over 100 cases in Cook and various collar counties. T. 11/19/18, p. 22-23. Of those 100+ cases, about 10 to 15% involve individuals who became disabled due to an injury. T. 11/19/18, pp. 23-24.

Brennan indicated he has given over 300 depositions and has testified at jury trials on 55 or 60 occasions. He has not previously testified at the Illinois Workers' Compensation Commission. He obtains referrals from both plaintiffs and defendants. T. 11/19/18, pp. 24-25. He has written over 400 life care plans. PX 25B. He is not a physician and is not appearing to render medical opinions. T. 11/19/18, p. 27.

Brennan testified that Petitioner's counsel retained him to prepare a life care plan for Petitioner. He reviewed various treatment records, a driving rehabilitation clinical evaluation, independent medical examination reports and an Excel spreadsheet prepared by Petitioner's husband in the process of formulating his plan. T. 11/19/18, pp. 29-31. Based on his records review, he concluded that Petitioner sustained a right upper extremity injury that was initially treated orthopedically but that she eventually developed chronic regional pain syndrome, along with symptoms in her contralateral left hand, primarily the thumb. T. 11/19/18, pp. 33-35.

Brennan identified the life care plan he devised for Petitioner. On the first page, he recommends ongoing psychological counseling, based partially on Dr. Candido's recommendation. T. 11/19/18, p. 35. He visited Petitioner at her home, to discuss her medication regimen, so that he could survey pharmacy vendors to determine the cost of the various medications. The prices referenced in his plan are from July 2017. They relate to five medications: Movantik, Diazepam, Fentanyl, Zolpidem and Oxycodone. He also contacted a specialty pharmacy to determine the cost of a topical compound pain cream that Petitioner uses. T. 11/19/18, p. 37.

Brennan opined that Petitioner requires companion services to assist her with such activities as grooming, shopping, housekeeping and meal preparation, but not skilled nursing care. He priced out both a 12-hour per day option, modeling the services that Petitioner's family members currently provide, and a live-in option. He does not favor one option over another. T. 11/19/18, p. 47. With respect to the 12-hour option, he priced out hourly rates ranging from $21 to $26, based on a survey of the vendors listed in his plan. Such rates would be usual and customary for in-home companion care. They do not factor in driving-related expenses. T. 11/19/18, pp. 39-40. They would represent the value of the services provided to Petitioner to date by her husband and daughters. T. 11/19/18, p. 41. He projected a transportation cost of four round trips per week, at $25 to $35 per trip, to help Petitioner get to doctors' appointments and into the community. T. 11/19/18, p. 43. He based the need for driving services on Dr. Candido's recommendations. T. 11/19/18, p. 43.

In an offer of proof, Brennan testified that the activities outlined in PX 27 (the Excel spreadsheet) represent services provided by family members in the past. T. 11/19/18, p. 45.

Brennan acknowledged that, if he were to adopt Dr. Konowitz's opinions that Petitioner can freely use her left hand and drive or take public transportation without any limitation, the portion of his plan relating to projected transportation costs would be eliminated. T. 11/19/18, p. 46. If Petitioner has some function in her left hand, her need for companion services might decrease from 12 to 10 hours per day. T. 11/19/18, p. 47. She would still have significant limitations due to her ongoing pain, which is very real, and her fear that people not acquainted with her situation might accidentally brush up against her arm, causing that pain to increase. T. 11/19/18, p. 48.

Under cross-examination, Brennan testified that the documents in his file (PX 25A) include a letter he received from Petitioner's counsel, asking him to prepare a life care plan, and his fee agreement with Petitioner's counsel. T. 11/19/18, pp. 49-50. He obtained his life care planner certification through Intelicus and the University of Florida, after attending a 4-day course and completing evaluations. T. 11/19/18, p. 51. He submitted a draft of his life care plan to Dr. Candido and asked him to review it. Dr. Candido later sent the draft back to him. He did not submit a draft to Dr. Konowitz or otherwise ask for his input. T. 11/19/18, p. 54. He personally interviewed Petitioner on July 1, 2017. Petitioner's husband was present during the interview. No one else was present. T. 11/19/18, pp. 54-55. He is not a physician and cannot offer an opinion as to whether future modalities are reasonable or necessary. T. 11/19/18, pp. 55-56. He did, however, seek medical guidance from Dr. Candido in formulating the plan. T. 11/19/18, p. 56. He conceded that aspects of his projections could change if Petitioner improved or got worse in the future. T. 11/19/18, p. 57. He is typically asked to prepare a life care plan in the context of litigation. He has formulated life care plans in other workers' compensation claims but it is more typical for him to prepare them in personal injury cases. T. 11/19/18, pp. 57-58. He understands that a claimant who takes his case to trial before an arbitrator has the right to seek future medical care under Section 8(a). He does not know whether Petitioner has applied for Social Security disability benefits. He is familiar with Medicare set-asides. T. 11/19/18, pp. 59-60. He has prepared life care plans for Petitioner's counsel's firm on six or eight prior occasions. Throughout the course of his career, he has prepared such plans on hundreds of occasions. About 70% of the plans he prepares are for plaintiffs' lawyers. T. 11/19/18, pp. 60-61. He also reviews plans for defendants. About 90% of the depositions he has given were for plaintiffs. The same percentage applies to his trial testimony. T. 11/19/18, p. 62. He charged $7,481.25 to prepare Petitioner's life care plan. It took him about 26 hours to prepare the plan. He charges $285 per hour for research and plan preparation and $325 per hour for testifying. T. 11/19/18, pp. 63-64. He relied on a counselor, Ms. LeClaire, in projecting the need for psychological counseling. T. 11/19/18, p. 65. He relied on Dr. Candido's prescription with respect to the thumb spica splint projection. T. 11/19/18, pp. 66-69. In making the medication-related projections, he did not assume Petitioner would be weaned off of her opioid medication. T. 11/19/18, pp. 70-71. He did not make any calculations based on that assumption. He is aware of Dr. Konowitz's opinions as to whether Petitioner should be weaned from the opioids. He has no opinion as to whether Petitioner's opioid intake is high. That would be a medical opinion. Pain creams can be prescribed individually rather than as compounds. The cost would be less. T. 11/19/18, p. 73. He did not take into account Dr. Konowitz's opinion that compounding is not necessary in administering such creams. He does not know whether compounds are approved by the FDA. T. 11/19/18, p. 74. He included the compound version in his plan because Dr. Candido recommended it. It would be up to an individual to decide whether to obtain 12-hour or live-in companion care. A companion can be unskilled. He or she need not be a CNA. Given Petitioner's chronic regional pain syndrome, he does not know whether a companion could be obtained from the Illinois Department of Rehabilitation or Human Services. T. 11/19/18, pp. 75-76. He did not use Dr. Konowitz's opinions concerning Petitioner's home health care needs in devising his plan. He understands Petitioner does not have complex regional pain syndrome in her left hand. T. 11/19/18, p. 77. He also understands that Petitioner has some limited ability to use her left hand. T. 11/19/18, p. 77. With respect to that hand, Dr. Candido imposed a 5-pound restriction and an approximate 10-minute repetition restriction while Dr. Konowitz did not feel Petitioner required any left hand restrictions. T. 11/19/18, pp. 77-78. To his knowledge, the only leg problem Petitioner has is varicose veins. He does not believe this is accident-related. His plan contemplates costs for brachial plexus blocks for nail trimming purposes, per Dr. Candido's recommendation. He did not address any less expensive methods for stabilizing the right hand so that nail trimming could take place. T. 11/19/18, p. 79. His plan projects potential costs for

interventions such as a spinal cord stimulator, even though he is aware that Petitioner has repeatedly declined to pursue this. T. 11/19/18, pp. 79-80. He included this in the event Petitioner changed her mind whereas he assumed the status quo with respect to his other calculations. T. 11/19/18, p. 80. He included it per Dr. Candido's recommendation. He is not aware that Dr. Konowitz did not feel a stimulator would help Petitioner this late in the game. T. 11/19/18, p. 81. On his own, he recommended a home alert system. Dr. Candido agreed with this but it was his idea. T. 11/19/18, p. 81. He is aware that Petitioner was driving in 2015. When he met with Petitioner, she indicated her husband was doing the driving. He also read the Marianjoy evaluation recommending that Petitioner not drive. T. 11/18/19, p. 82. Underlying his transportation expense projections is the assumption that Petitioner will never be able to use public transportation. T. 11/19/18, p. 82. He is aware that, prior to the accident, Petitioner drove on her own or obtained a ride from a family member. Petitioner is in a different situation now, in his opinion, in that she may need to get somewhere quickly, due to her medical condition. She would be asking a family member to become available immediately. If Petitioner was going to be driven to a family event, unrelated to the accident, that is a different story. In making his projections, he is assuming Petitioner's left hand will not improve and she will continue to require the same amount of opioid pain medication. T. 11/19/18, pp.84-85. He has projected a cost of $7,500 to $12,000 for an accessible, walk-in shower. He is aware that Petitioner has no leg or back problems that would interfere with her ability to take a shower. He has not looked into any cheaper alternatives. T. 11/19/18, p. 86. He is assuming that Dr. Candido's reports are accurate. He is deferring to Dr. Candido because he has treated Petitioner for several years. T. 11/19/18, p. 87. To his knowledge, Petitioner is not confined to a wheelchair. No one has recommended wheelchair usage. T. 11/19/18, p. 88.

On redirect, Brennan testified that the initials "KDC" appear on a note dated June 16, 2017. He received this note from Dr. Candido. The initials represent the doctor's approval of his plan. He prepared life care plans for six to eight other clients of Petitioner's counsel's firm over a ten-year period. T. 11/19/18, p. 89.

James Kosla, Petitioner's husband, testified that he and Petitioner have been married for 33 years. He currently works as a vice president of marketing for a German automotive steel company based in South Carolina. Before his wife's accident, in 2013, he worked for another automotive steel company. This job involved extensive travel. He was away from home 40 to 50% of the time. T. 11/19/18, p. 92. He began working for his current employer in August 2017. T. 11/19/18, p. 93.

Kosla identified PX 27 as a multi-page Excel spreadsheet that he prepared at the request of Petitioner's counsel. The first page describes the physical assistance he provides to Petitioner. The next few pages list Petitioner's medical appointments during the five-year period since the accident. Another page lists the trips Petitioner has made to Respondent's public health department. The last page describes Petitioner's personal travel. T. 11/19/18, pp. 93-94.

Kosla testified he has to prepare food, periodically clean and "do a lot of laundry" because Petitioner is unable to perform these activities. When he is home, he also helps Petitioner take baths. She prefers baths over showers in terms of easing her right arm pain. If he is away, Petitioner will use a walk-in shower to the best of her ability. He does not have to wash Petitioner but he has to be present to help her get in and out of the bathtub and hand her a towel. They have a conventional bathtub. T. 11/19/18, pp. 94-96. Petitioner can dress herself to the extent of putting on stretchy items but is not able to use zippers, fasten bras, button items or put on boots. He has to help her with all of those activities. T. 11/19/18, p. 95. If he and Petitioner are going out to dinner or to a function, he also has to

open her make-up cases for her, put her jewelry on for her, rub body lotion where she cannot reach and trim her toenails and the nails on her left hand. When he is not around, Petitioner has to use her mouth to open make-up cases. He also has to retrieve and open the mail and write any necessary checks. He routinely cuts up Petitioner's food and opens containers and bottles for her. T. 11/19/18, p. 100. During the holidays, he takes care of all the gift wrapping.

Kosla testified that, before Petitioner's accident, he performed very little cleaning and no cooking. T. 11/19/18, pp. 96-97. For about six or eight months after the accident, Petitioner "still tried to do a lot of things on her own." During that time, her hand deteriorated to its present "atrophied and locked" position. It was in 2014 that he began providing the assistance he has described. T. 11/19/18, p. 102.

Kosla testified that, when he and Petitioner walk somewhere, he walks to her left, at her request, to prevent anyone contacting her right arm. He opens all the doors for Petitioner. If he accidentally makes contact with her right arm, she screams and may cry, if the contact is significant. Petitioner has "high anxiety about that arm" because contact leads to intense pain. T. 11/19/18, p. 104. He has not witnessed any significant contact and Petitioner has not fallen but even mild contact will result in about an hour of pain. Sometimes Petitioner will walk away because she does not want people to see her cry. Even if there is no physical contact, Petitioner cries every day "just thinking about" how her life has been destroyed. She deals with depression and anxiety. T. 11/19/18, pp. 106-107.

Kosla testified that Petitioner was very independent and active before the accident. She worked full-time as a nurse for Respondent and drove on her own with no issues. T. 11/19/18, p. 107.

Kosla testified that he, Petitioner and other family members attend a hockey game about once a year. They arrive very early and try to leave early or late to avoid crowds. When they walk, they surround Petitioner so that no one will contact her right arm. He and Petitioner go to restaurants frequently but seating is complicated. He has to cut her food and she wants to avoid air conditioning and servers. She tells him where to sit. He usually sits to her left. T. 11/19/18, pp. 110-111.

Kosla testified he changed jobs in 2017 because he was "traveling a lot and could see it was creating some problems with [Petitioner]." Sometimes he would have to be gone for a week and she was unable to function. When he was gone, she would not get dressed and would not eat well. He could only pre-prepare so much food. The food had to be wrapped in such a way that she could easily unwrap it. He rarely has to travel now. When he does travel, he tries to leave in the afternoon so she will see him in the morning and get assistance from him. If he has to be gone overnight, a friend or one of their daughters will sleep over. One of their daughters lives fairly close. T. 11/19/18, pp. 113-115.

Kosla testified he is aware there is surveillance of Petitioner driving in 2015. He has seen a couple of still photos from the surveillance videos. After the accident, Petitioner's driving was very "herky-jerky." She would have to reach over to shift gears. He cannot say he felt unsafe when riding with her but "her driving skills deteriorated." She drove in 2014 but only locally. She told him she drove to get out of the house. She made short runs to stores, pharmacies and doctors' offices. T. 11/19/18, p. 116. She last drove in early 2016. T. 11/19/18, p. 121. They sold her car to their daughter about a year and a half ago. Prior to that, the car "sat in the garage" for a year. T. 11/19/18, p. 122.

Kosla testified that Petitioner tries to remain in one position at night, due to her right arm pain. She "cannot roll onto her right side" and "does not sleep well at all." She complains if he moves or the

sheets move. T. 11/19/18, pp. 117-118. She has asked Respondent to provide an adjustable bed. He can give her a "half hug" but otherwise they have no physical contact. T. 11/19/18, pp. 120-121.

Kosla testified that Petitioner gets "very tired and cranky" after about four to five hours of activity. T. 11/19/18, pp. 118-119.

Kosla testified that Petitioner is "not very comfortable in any vehicle." Bumps are a major problem for her. He now drives very slowly. He owns two cars, one of which is sports car with a stick shift. Petitioner will not ride in that car. T. 11/19/18, pp. 123-124.

Kosla testified that Petitioner does not use her left hand much. She owns a brace, which allows her to perform light activities, but does not wear it much. The more she uses her left hand, the more her left thumb hurts. T. 11/19/18, pp. 124-125, 147. She uses her mouth to apply the brace to her hand. T. 11/19/18, p. 125.

Kosla estimated that, since about 2014, he has spent about 42 hours per week performing household chores and otherwise assisting Petitioner. PX 27. This is a conservative estimate, in his opinion. Until 2017, one of his daughters still lived at home so he "had more help." T. 11/19/18, pp. 126-127. At one point in 2014 and for several months in 2015, Respondent provided transportation services to Petitioner. On November 10, 2015, Respondent notified Petitioner it was discontinuing all transportation services. T. 11/19/18, p. 129. On his spreadsheet, he is claiming meal- and transportation-related expenses. He estimated he drove about 2020.5 miles while taking Petitioner to various medical appointments. T. 11/19/18, p. 132. On the last two sheets of the document, he totaled the miles he drove for personal trips. On one of those trips, he drove Petitioner to Omaha so she could see a friend. Before the accident, Petitioner "had her own social life" and drove on her own to visit friends. T. 11/19/18, pp. 133-134. On a number of other occasions, he drove Petitioner to Champaign, where one daughter attends school, and Cedar Rapids, where another daughter has lived for three years. Some of the other listed trips were to cemeteries, where relatives and friends are buried, churches and relatives. He also drove Petitioner downtown on 21 occasions so they could see their daughter Taylor, who lives downtown. On other occasions, he drove Petitioner to the United Center and Wrigley Field. On other occasions, he has driven Petitioner to a hair salon and to resale clothing shops. Petitioner "lost a lot of weight" after the accident and needed to buy special items such as shawls and capes that she can wear over her arm. T. 11/19/18, pp. 142-144.

Kosla testified that Petitioner has traveled via airplane since the accident but never alone. T. 11/19/18, pp. 144-145.

Kosla testified that, overall, he has driven Petitioner about 39,028 miles since the accident. He has spent about 999 hours driving her and sitting in his vehicle, waiting for her at various locations. T. 11/19/18, p. 146.

Kosla testified he is aware of Dr. Konowitz's opinion that Petitioner is capable of driving anywhere. Regardless, he would not ride with Petitioner because she "can't drive" and "panicked just trying to pull [the car] out of the driveway." T. 11/19/18, p. 148. He is also aware of the doctor's opinion that Petitioner could use public transportation and work eight hours per day. He disagrees. Petitioner "is in pain 24/7," is chronically fatigued and is "on heavy narcotics." Since the accident, he has never seen her remain active for 12 to 14 hours at a stretch. She has never remained awake for that long. T. 11/19/18, pp. 149-150. Before the accident, Petitioner did not need his assistance. She cooked,

cleaned, worked, had a social life and was very active with her children. The change has been devastating for her. T. 11/19/18, p. 151.

Under cross-examination, Kosla testified he and Petitioner prepared PX 27 within the last ten days. He previously did not keep track of his mileage or the hours he spent assisting Petitioner. He starts his own workday at 5 AM so that he can take care of his written communications before Petitioner gets up. His job is full-time but he works only four hours a day, at most. Petitioner has no set schedule. That is why he had to average some of the time he spends helping her. Before the accident, Petitioner did all of the shopping, retrieved the mail and made and changed the beds. T. 11/19/18, pp. 157-158. He has records of all the dates they went to medical appointment but otherwise he had to estimate the hours he spent. They did previously request transportation, which Respondent provided for a while, but otherwise did not submit requests for reimbursement to Respondent. He has very few receipts concerning the meal expenses he is claiming. T. 11/19/18, p. 161. He claimed $27 for each meal. He used MapQuest in determining the mileage. Early on, Petitioner drove herself to medical appointments. T. 11/19/18, pp. 162-163. Each time he had to drive Petitioner to CCHS [Cook County Health Services], and wait for her, it took a total of seven hours. He could pull up the toll receipts off a computer. T. 11/19/18, p. 166. The mileage between their house and CCHS is "a real number based on GPS." T. 11/19/18, p. 167. Some of the personal trips he listed on PX 27 are trips he would have perhaps gone on regardless of Petitioner's situation. It would have depended on his schedule. T. 11/19/18, p. 169. Some of the restaurants listed on PX 27 are restaurants he and Petitioner went to before the accident. T. 11/19/18, p. 173. Petitioner was able to tolerate the lengthy road trip to Omaha. T. 11/19/18, p. 173.

Under additional cross-examination, Kosla testified they have two walk-in showers but Petitioner prefers to take baths. T. 11/19/18, p. 174.

On redirect, Kosla testified that, while Petitioner is able to go out with family members to attend sporting events, she does so very rarely. Before the accident, they were "very active" and went out frequently. When they travel via car, they regularly make rest stops. There was never an occasion where he did not have to wait three hours for Petitioner at CCHS. T. 11/19/18, p. 178. He was not allowed into the building so he would wait in a lot and work off his cell phone or laptop. T. 11/19/18, p. 179. The claimed meal expense of $27 is an average. Petitioner prefers baths because the warm water relieves her arm pain and it is easier for her to get cleaner. T. 11/19/18, p. 180.

Taylor Kosla, one of Petitioner's daughters, testified. She has been a licensed attorney since November 2017. At the time of the accident, she was attending college in Champaign. Before the accident, Petitioner was "very happy." She was a "super mom" who "could handle everything while working and being a nurse."

Taylor testified she no longer lives at home but goes home once or twice a month to help Petitioner or take Petitioner shopping. If her father is out of town, she will spend the night with Petitioner. Petitioner can shower on her own but needs help getting dressed. Petitioner always wears loose-fitting clothing because her right arm is "extremely sensitive." Petitioner is not able to put on jewelry or gloves. Petitioner does not wear her splint all the time. If they leave the house, she (Taylor) has to help Petitioner with any doors. If they go to a store, Petitioner picks out the items she wants and she (Taylor) puts them in the cart. In preparation for the holidays, Petitioner told her where to put various decorations. She (Taylor) did "all the legwork" and decorated the tree.

Taylor testified that Petitioner does not use her left hand "much at all." Petitioner is alone at times. They leave food containers that she is able to open. To her knowledge, Petitioner is not left alone for more than 24 hours.

Taylor testified that attending a sporting event with Petitioner is "incredibly stressful for everyone." They have to "surround" Petitioner so that no one will hit her. Sometimes Petitioner will "react out of fear of someone hitting her and that triggers her pain." This "kind of ruins the time for everyone because [Petitioner] is in so much pain she is crying." If Petitioner's pain is triggered, she will walk away a little bit and cry on her own. Even after Petitioner returns to the group, "you can see the pain in her eyes." T. 11/19/18, pp. 189-190. Petitioner "sleeps a lot throughout the day and needs naps." Petitioner recently attended a baby shower for another daughter but hit a point where she was "done" and needed sleep. T. 11/19/18, pp. 191-192.

Taylor identified PX 28 as a spreadsheet she prepared at the request of Petitioner's counsel. The spreadsheet lists the hours she spent assisting Petitioner in 2017 and 2018. On two occasions, she has accompanied Petitioner on 3- to 4-day trips to Dallas so that Petitioner can get out of the cold weather and visit a friend. They are planning a third trip. She goes with Petitioner because Petitioner can no longer fly alone. She estimated spending a total of 39 hours in a year driving Petitioner to stores and helping her shop, 86 hours accompanying Petitioner on trips, 14 hours helping Petitioner around the house, 19 hours preparing for the holidays and 2.7 hours helping Petitioner with make-up and hair. T. 11/19/18, pp. 195-197.

Taylor testified that Petitioner "absolutely" cannot live alone. Petitioner "can't do anything by herself." Petitioner cannot put on clothes, cook for herself or feed herself. T. 11/19/18, pp. 197-198.

Under cross-examination, Taylor testified she loves Petitioner and has a good relationship with her. She would always speak the truth about her. She graduated from college in May 2014 and moved out of her parents' home in March 2015. She currently works full-time. She sees Petitioner once or twice a month, more during the holidays. Petitioner will attend a sporting event "once in a blue moon." T. 11/19/18, p. 202. She (Taylor) has no receipts for the mileage she claims. She never asked Respondent to reimburse her. T. 11/19/18, p. 202.

Jaclyn Kosmicki, another of Petitioner's daughters, testified she lives about three miles from Petitioner. She steps in and helps Petitioner when her father is out of town. In terms of getting dressed, Petitioner can put on socks and underpants but needs help putting on and fastening her bra. She also helps Petitioner put on make-up and dry her hair. She will prepare food that Petitioner can heat up later on. Petitioner did the cooking, cleaning and grocery shopping before the accident. T. 11/19/18, pp. 207-208. She (Jaclyn) owns an SUV and drives Petitioner to grocery stores and restaurants. Since the accident, they have eaten out a lot. A visit to a restaurant is "kind of chaotic" because Petitioner will choose a seat where no one will bump her right arm. If someone inadvertently bumps that arm, Petitioner will cry in pain and might go to the restroom for a few minutes. Petitioner will then return to the table but will be "just different" during the rest of the meal. A couple of weeks ago, Petitioner, she and three other family members went to a Hawks game. They enclosed Petitioner in a "bubble," with her father in the lead and another person to Petitioner's right covering Petitioner's right arm. Petitioner does not sleep well at night and thus naps a lot during the day. None of these behaviors existed before the accident. T. 11/19/18, pp. 213-214.

Under cross-examination, Kosmicki testified she moved out of her parents' house a year ago. She moved to a location fifteen minutes away so that she could continue to help out. She works full-time. She definitely sees Petitioner when her father is out of town. On average, she seeks Petitioner once a week or once every two weeks. It is typically her father who takes Petitioner to the grocery store. She might take Petitioner to a mall every once in a while. If she and Petitioner go out alone, without other family members, they go "at odd times." T. 11/19/18, pp. 215-216.

Petitioner testified she listened to the testimony of her husband and daughters. Their statements concerning the assistance they provide to her were accurate. T. 11/19/18, p. 218.

Petitioner testified she graduated from high school, obtained an associate degree in nursing from Triton and attended Northern Illinois for a year and a half. She stopped attending Northern because her mother became ill and she had three children to take care of. She went back to college on a part-time basis in 2008 and took more classes but did not finish due to her work schedule. T. 11/19/18, p. 219.

Petitioner testified she started working for Respondent in 1984. Initially, she worked part-time. She began working full-time in February 2008. As far as she knows, she is still employed by Respondent but she has not worked since the accident. T. 11/19/18, p. 220. She worked as a registered nurse at certain Respondent clinics, including family planning, STD, immunization and flu clinics. T. 11/19/18, p. 221. Her nursing job involved some lifting of medicine supply boxes. The boxes varied in weight, with the heaviest weighing 20 pounds. T. 11/19/18, p. 221.

Petitioner testified she was injured on August 22, 2013, while leaving work. It was almost completely dark out. She was carrying a heavy book bag and her purse in front of her. She exited the handicapped entrance and tripped over a small cone that she did not see. She later found out the cone was there because the cement underneath it was chipped. She fell and hit the cement. She was "sure [she] shattered [her] arm." It was her right arm that was injured. Paramedics took her to Northwest Community Hospital. T. 11/19/18, pp. 223, 303-304. She later signed an accident report (PX 31) indicating she struck her right arm, elbow, knee and hip when she fell. T. 11/19/18, p. 305.

Petitioner testified she is aware that Respondent does not dispute she has a complex regional pain syndrome in her right arm that has resulted in contractures and essentially no use of that arm. T. 11/19/18, p. 223. After the initial Emergency Room visit, she saw her primary care physician, Dr. Diaz. She also saw Dr. Diaz's partner, Dr. Behnke. She had seen Dr. Behnke before the accident. She went on to see Dr. Murray, an orthopedic surgeon, at Dr. Behnke's referral. She underwent therapy and injections at St. Alexius. She saw Dr. Patel, a pain physician, and then began seeing a different pain physician, Dr. Candido, in July 2014. She remains under Dr. Candido's care. It was Meg Elby, a nurse case manager, who referred her to Dr. Candido. She initially resisted the idea because she lives in Schaumburg and Dr. Candido is at Illinois Masonic. Elby continued to recommend Candido so she eventually agreed to see him. T. 11/19/18, p. 225. He was "wonderful" and she has continued seeing him. She has also been hospitalized at Alexian Brothers for a bowel obstruction related to opioid intake. She saw Dr. Biafora and also saw Dr. Bednar at Dr. Candido's referral. Dr. Bednar evaluated her left hand as well as her right arm. She saw Dr. Carroll once. She has seen Claire LaFrance for mental health care. She has seen Dr. Sefer at an employee health facility at CCHS. She has undergone therapy at Athletico and a driving assessment at Marianjoy. At Respondent's request, she saw Dr. Konowitz three times and Dr. Reilly once. T. 11/19/18, pp. 228-229. She has undergone many stellate ganglion blocks and is awaiting her 40th brachial plexus block. The brachial plexus blocks are performed so that a doctor

can attempt to open up her right hand, which is in a fist, and clip her nails. Her nails are "gross and black and smelly and soft." The blocks are "amazing." They completely numb her right arm and provide her with a period of time when she can be pain free. She is conscious during the blocks and observes them. T. 11/19/18, p. 231. Without the blocks, her nails would grow into the palm of her right hand. Her husband clips her toenails and the nails on her left hand. T. 11/19/18, p. 232. At one point, she tried using a large JAS device that had knobs. Turning the knobs was supposed to increase the extension of her arm but it was painful. On four or five occasions she obtained a compound cream that helped to an extent but then the adjusters denied refills. She was never able to get the cream after that. T. 11/19/18, p. 233.

Petitioner testified she is currently wearing a sling on her right arm. She wears this sling more in the winter, when cold air increases her pain, and when she is in a crowd. She might or might not wear the sling if she and her husband are going to a store. T. 11/19/18, pp. 233-234.

Petitioner testified she is also wearing an orthotic device on her left hand. She wears the device to relieve her left thumb pain, which increases with usage. She used to walk five miles a day before the accident. She was very fit. She tried to continue walking after the accident but she feels like she is a "mark" when she wears the orthotic device. A 10-year-old child could knock her down and take her purse. This has not happened but she is very afraid it will. Before the accident, she protected everybody and "did for" everybody. Now she is "the baby that everybody is taking care of and protecting." That "doesn't sit very well." T. 11/19/18, pp. 235-236.

Petitioner testified she has undergone therapy, injections and bracing for her left thumb condition. She wears the brace when she needs to use her left hand. When her husband is not home, she typically sits on a recliner, to reduce the weightiness of her right arm, which curves forward. She does not use the brace when she is reclining. T. 11/19/18, p. 237.

Petitioner testified she currently uses Fentanyl pain patches, Zolpidem for sleep, Percocet for pain and Movantik to avoid opioid-related constipation. In the past, she has tried Gabapentin, Lyrica, Valium, various anti-inflammatories, various anti-convulsants, Nucynta, Trazodone and topical pain compounds. T. 11/19/18, pp. 239-240.

Petitioner testified she has seen the surveillance videos, which show her driving. She drove in 2013, after the initial injury. At that point, her right arm hurt but she was able to start the car with her left hand and drive herself to medical appointments. She continued driving into 2014 but began driving less and less as her right arm contracted. When she drove, she drove locally. She continued to drive in 2015 but used only the four fingers on her left hand to hold and turn the steering wheel. Her left thumb pain started within a couple of months of the accident. The doctors attributed her left thumb problem to overuse. T. 11/19/18, pp. 242-243. Her doctors had recommended she not operate a motor vehicle but she needed to do so to pick up medication and buy new clothes. After the accident, her weight dropped from 144 or 145 to 112 pounds. In early November 2015, she stopped driving after a near collision. She was driving on Higgins Road when someone pulled out in front of her. The fear of not being able to grab the wheel to avoid a collision prompted her to stop driving. T. 11/19/18, pp. 244-245. Prior to this incident, she had tried to be very careful by driving only in good weather during the day but she realized she could not control the actions of other drivers. T. 11/19/18, p. 245. She still has a valid Illinois driver's license but uses it only for identification purposes. T. 11/19/18, p. 246. After she stopped driving, her car sat in her garage for over a year until one of her daughters bought it from her.

At Dr. Candido's recommendation, she underwent a driving assessment at Marianjoy in October 2016. The person who assessed her recommended that she not drive. T. 11/19/18, pp. 247-248. PX 6, PX 6a.

Petitioner testified she received a letter dated July 23, 2015 from Paris Partee, a human resources Respondent employee. In the letter, Partee extended an offer of one-armed work. She contacted Partee via telephone within a day or two of receiving the letter. Partee told her that Respondent had a light duty job for her and that her employment would be terminated if she did not report to Employee Health Services. She was "very upset" by this news. She told Partee she was in a lot of pain and struggling to perform daily activities. She asked Partee, "what job do you have that I could possibly do?" She also explained she had the use of only four fingers and could not get herself to a location to perform a job. Partee did not explain what kind of job was available. She simply indicated that Petitioner needed to report to Employee Health Services. To this day, no one has explained to her what kind of job was available. She appeared in front of the Arbitrator some years back, at which point she was represented by Donald Gallagher. At that meeting, no one representing Respondent identified a real job for her. T. 11/19/18, pp. 249-251. She returned to Dr. Sefer at Employee Health Services in September and December 2015. Her husband drove her to these appointments and waited outside for her. Sometimes the appointment lasted more than three hours. If the paperwork indicates she saw Dr. Sefer on September 11, 2015, she would have no reason to disagree with the date. Dr. Sefer, a female employee of Respondent, examined her on that date. No one else was in the examination room. Dr. Sefer looked at her right arm and left thumb. She told the doctor about her exchange with Partee. [After the Arbitrator sustained Respondent's hearsay objection, Petitioner's counsel made an offer of proof, with Petitioner testifying that Dr. Sefer told her she had not been provided with any prospective job description and did not believe Respondent truly had a light duty job for her. Petitioner further testified that Dr. Sefer questioned her ability to work in any nursing capacity if she was physically unable to wash her hands. T. 11/19/18, pp. 258-259.] Dr. Sefer did not release her to work. T. 11/19/18, p. 259.

Petitioner testified she would "absolutely" not be able to drive or take public transportation from her home in Schaumburg to a job downtown, work eight hours and then go home. She cannot drive and is fearful of people coming in close proximity to her arm, let alone touching it. There are many days on which she barely functions inside her own home. She will "stay in [her] pajamas from the day before because there is nobody to help [her] change" out of them. She is in pain 24/7. The pain becomes excruciating if anyone touches her arm. It takes her time to recover from being bumped. She becomes a "nasty person" when she is bumped. T. 11/19/18, pp. 260-262. After the accident, she went from an energetic, very athletic person to a "blob." If she manages to retrieve the mail from the mailbox, she cannot open the mail. She cannot fasten certain types of clothing. She purchased a plastic device called a "bra assist" to help her try to hook the fasteners on her bra. She also purchased a button hook but it "doesn't work" as it is intended to. She also bought a device called a "blow dryer stand." The dryer sits in a stand. She is able to turn the dryer on and off. T. 11/19/18, p. 266.

Petitioner denied being angry about her situation but admitted she is depressed. She sees a therapist for this. She "needs [her] life back" but knows this is "not a possibility." T. 11/19/18, p. 267. She does not know if there is any other kind of mental health care that would help her. She is "not going on more medicine." T. 11/19/18, pp. 266-268.

Petitioner testified her pain increases if air blows on her, hitting her arm. Cold air from air conditioning is "terrible." T. 11/19/18, p. 269. She is unable to open a bottle of water on her own. She

uses a circular Rubbermaid implement to gain leverage and help her grab objects. Sometimes she has sufficient dexterity to be able to pick a coin up off the ground. T. 11/19/18, pp. 269-270.

Petitioner testified her left thumb does not hurt when she is inactive. As soon as she tries to use her left hand, the pain begins, even if she is simply attempting to lift a lightweight object such as a paper clip. She can open an automatic umbrella by depressing the button but has difficulty holding the umbrella. She cannot close an umbrella. "People should actually tie one hand behind their back and tie their thumb up and see what it's like to function in life." T. 11/19/18, p. 272.

Petitioner testified she has "come a long way" in terms of being able to toilet herself. She "wound up with three urinary tract infections just learning how to wipe [herself] properly." She uses a spray bottle filled with water to help clean herself. T. 11/19/18, pp. 272-273.

Petitioner testified she passed a typing test "with flying colors" when she transitioned from part-time to full-time employment with Respondent. Now she can only use one finger to type. She can also "voice text." T. 11/19/18, p. 273.

Petitioner testified her "favorite thing in life" is to do things with her family but it is now very stressful for her to go to an event with family members. They go to an event maybe once a year. She loves her family but "cannot shake them." They are "all over [her]", trying to protect her right arm. She finds this embarrassing. T. 11/19/18, p. 274. When they attended a Hawks game, she slept on the way to the game and on the way back. It was difficult for her to sit throughout the game because of the weight of her arm. She is "used to reclining." Her posture has been affected by her injury because her right arm now "curves forward." Reclining helps relieve the pain in her shoulder, neck and back. T. 11/19/18, pp. 275-276.

Petitioner denied traveling alone by air since the accident. She has always had someone travel with her. T. 11/19/18, p. 276.

Petitioner testified that Dr. Candido has prescribed an adjustable bed for her. Her husband's testimony that she sleeps for only short intervals is accurate. Once she lowers herself into the bed, she cannot change position. She would "kill [her]self" if she rolled onto her right side. Any change in positioning increases her pain. She was able to sleep through the night before the accident. Now she turns on the television or goes downstairs to lie on the recliner after a brief interval of sleep. T. 11/19/18, p. 279. Her husband now sleeps on top of the sheets because the weight of a sheet bothers her right arm. When her husband slept under the sheets and happened to roll over, she would wake up immediately due to the added pain. T. 11/19/18, p. 285.

Petitioner testified her dentist has prescribed an air flosser for her because she wound up with three cavities last year, due to her inability to manually floss her teeth. Respondent would not agree to pay for the air flosser. T. 11/19/18, pp. 279-280.

Petitioner testified she does not believe she would be able to live alone because she needs help every day just to get through the day. Her husband recently went on a business trip. Before he left town, on a Tuesday, he prepared her breakfast and set up all of her remaining meals so that she simply has to microwave them. She used to cook but no longer does so. T. 11/19/18, p. 283. Her daughter stopped by on Tuesday and Wednesday and her husband returned on Thursday. There are times at which she is alone for 24 hours at a stretch. On those occasions, she is sometimes able to change her

clothes and take a shower on her own. She prefers to take a bath but does not bathe on her own. T. 11/19/18, pp. 281-282.

Petitioner testified that Dr. Candido never released her to work. T. 11/19/18, pp. 283-284.

Petitioner testified that Drs. Behnke and Candido treated her for a right hand infection in November 2014. She developed the infection because her nails grew into the palm of her right hand. T. 284. She underwent Emergency Room treatment on March 18, 2015 because she lacerated her right hand while attempting to clip her fingernails after undergoing a block. Her arm was numb due to the block and, until she saw the blood, she did not realize she had cut herself. T. 11/19/18, p. 286.

Petitioner testified that, prior to November 10, 2015, Respondent provided her with some transportation, especially to and from medical appointments. On November 10, 2015, an adjuster sent an E-mail indicating that no additional transportation would be provided. T. 11/19/18, pp. 286-287. She had stopped driving at that point and still needed help with transportation. Even if she could navigate steps at a train station and get herself on a train, using only four fingers, she could not tolerate the bumps or jarring. When she rides in the car with her husband the jarring of the driveway and potholes causes her pain. T. 11/19/18, p. 289. Respondent never offered her a job a few hours a day at its Rolling Meadows facility, which is only 11 miles from her home. T. 11/19/18, pp. 289-290.

Petitioner testified she was admitted to Alexian Brothers for a couple of days in June 2016 after she developed a bowel obstruction due to the use of narcotic medication. For a while, Respondent did not authorize Moventik, the medication that assists with opioid-related constipation. After July 2018, when Respondent stopped approving her prescriptions at Walgreen's, she ended up at the Emergency Room on two occasions because her pain increased and she started experiencing withdrawal symptoms. Prior to this, she had used pain patches consistently for five years. T. 11/19/18, pp. 291-293. She currently obtains her pain medication from Injured Workers Pharmacy. It is "like a miracle." The medication arrives at her home and she does not have to fight anybody to get it. T. 11/19/18, p. 293. In the past, she has used a compound topical pain medication, per Dr. Candido. This helped on the four or five occasions she used it but it was "tacky" and tended to make her clothes drag across her right arm. T. 11/19/18, p. 294.

Petitioner testified she sought psychological care from Claire LaFrance at the recommendation of Dr. Candido, Dr. Behnke and the doctors at Employee Health Services. T. 11/19/18, p. 295. If LaFrance's records reflect she feels frustrated because she went from being a caretaker to needing care, the records are correct. She believes Dr. Candido is correct in finding her incapable of taking public transportation. T. 11/19/18, p. 295. The injury and her inability to work have resulted in economic difficulties. Her husband was supposed to retire but did not do so, since she is no longer working. T. 11/19/18, p. 297.

Petitioner testified that Dr. Candido has not changed her medication regimen. Dr. Behnke currently fills her prescriptions because his office is closer to her home. It is Dr. Candido, however, and not Dr. Behnke who is prescribing the medication. Dr. Behnke is an internist, not a pain specialist. T. 11/19/18, p. 298.

Petitioner testified that news of her daughter's pregnancy made her feel sad rather than happy because she will not be able to hold or change the baby. T. 11/19/18, pp. 298-300.

Petitioner acknowledged that there has been discussion of her having a spinal cord stimulator implanted. She would never allow anyone to touch her spine because she has had friends and relatives who have had problems with stimulators. Too many things can go wrong. T. 11/19/18, p. 301. She continues to need and take pain medication, despite Respondent's denial. Dr. Candido has told her there is nothing that would work better than her current medication. T. 11/19/18, p. 302.

Petitioner testified she saw Brennan's life care report long ago. She would prefer to have family members assist her but she is sure she would accept whatever help was offered. T. 11/19/18, p. 302.

Petitioner testified she saw Steve Blumenthal in April 2017, at her attorney's request. T. 11/19/18, p. 305.

Petitioner identified PX 31 as an accident report she signed, using her right hand. The report describes her as having struck her right arm, right knee, right elbow and right hip when she fell. T. 11/19/18, p. 305.

Under cross-examination, Petitioner acknowledged having bilateral "tennis elbow" prior to the work accident. This condition stemmed from golfing. Dr. Lopez treated this condition. He administered an injection and she was then "fine." It probably never crossed her mind to mention this to the doctors who treated her after the accident. T. 11/19/18, pp. 307-308. When she saw Dr. Lopez on May 9, 2013, she rated her right arm pain at 7/10 and her left arm pain at 4/10. The pain was in her elbows. T. 11/19/18, pp. 308-309. She described her symptoms as moderate to severe and reported burning. T. 11/19/18, p. 309. Dr. Lopez injected her right epicondyle on that date. She had undergone two months of therapy prior to this visit and was also utilizing a band on her right arm. T. 11/19/18, pp. 308-310.

Petitioner initially did not recall having any difficulty performing routine activities before the work accident. She did not disagree with Dr. Lopez's note of May 9, 2013, which described her as having difficulty cleaning and vacuuming. The "tennis elbow" made it difficult to push and pull a vacuum. T. 11/19/18, pp. 310-311. The injection helped the right elbow "and the other elbow took care of itself." She stopped golfing. T. 11/19/18, p. 311. When she had "tennis elbow," she probably had difficulty putting on shoes and socks and cooking, to the extent it would have been difficult for her to lift a pot of hot water. T. 11/19/18, p. 311. If Dr. Lopez's note of May 9, 2013 states she reported having difficulty with cooking, she "probably did have that issue." She has not purchased an adjustable bed. She previously underwent varicose vein treatment. Her legs are currently fine. She has no restrictions relative to her lower extremities. T. 11/19/18, pp. 312-313. She can use a phone, via voice commands. She can use her two good fingers to move a computer "mouse" and "hunt and peck." T. 11/19/18, p. 313. She is not currently working and has not attempted to return to work since the accident. T. 11/19/18, p. 314. The letter of July 23, 2015 directed her to contact Paris Partee to arrange to return to work. She contacted Partee on approximately July 30, 2015. She told Partee she could not return due to her pain and inability to travel to the workplace. T. 11/19/18, p. 316. Respondent never provided her with a job description. T. 11/19/18, p. 317. She did report to Employee Health Services, as required, on several occasions. Employee Health Services "is where you have to go and they release you back to work." T. 11/19/18, p. 318. Dr. Candido advised her not to drive any distance. T. 11/19/18, p. 318. The surveillance obtained in September and October 2015 showed her driving but she only drove locally. She does not recall Paris Partee calling her on April 19, 2016 and leaving her a voice mail message. She believes Partee called a couple of times over the years telling her she had to return to work or face the possibility of being laid off. T. 11/19/18, p. 320. It is "possible" Partee asked her to return to a sedentary job with no use of the right arm. She went to Employee Health each time she was asked to

go. T. 11/19/18, p. 321. At the end of each Employee Health visit, she received papers which she then delivered to human resources. No one affiliated with Respondent told her to begin an accommodated job on May 2, 2016. She has "absolutely not" looked for other jobs since the accident. She struggles to get through normal daily activities. T. 11/19/18, p. 325. She is not currently receiving Social Security disability benefits. She called a Social Security office and was told she has not worked enough time to qualify. T. 11/19/18, p. 326. She is undergoing psychological care but is not taking any antidepressants. She does not recall whether anyone recommended she take this medication. She would not disagree if records show she received temporary total disability benefits from August 23, 2013 through August 27, 2015. T. 11/19/18, p. 327. She later received permanency benefits. T. 11/19/18, p. 327. She does not believe she ever formally applied for Social Security disability benefits but she believes a man completed a form via telephone and told her she did not qualify. T. 11/19/18, pp. 329-330.

On redirect, Petitioner reiterated that Dr. Candido did not release her to work. The bilateral elbow problems she had in the past were not disabling. She continued to work full-time. Blumenthal did not recommend that she re-enter the workplace. T. 11/19/18, p. 331. She saw Dr. Sefer at Employee Health on several occasions in 2016 and 2017. Dr. Sefer did not release her to work. T. 11/19/18, p. 333.

At this point in the hearing, the Arbitrator conducted a viewing of Petitioner's right arm and part of her right hand. The Arbitrator observed that the arm is curved inward and very close to Petitioner's body. The Arbitrator was not able to see the nails on Petitioner's right hand. T. 11/19/18, pp. 334-335.

At a continued hearing, held on January 16, 2019, **James Kosla** was recalled, over Respondent's objection, for the purpose of updating information concerning the hours he and other family members have spent caring for Petitioner. He identified PX 42 and 43 as an Excel spreadsheet he created concerning the hours he and his three daughters have spent since November 19, 2018. In December 2018, the hours totaled 99. T. 1/16/19, pp. 8-9. For the most part, the caretaking his daughters provided took place in his presence. The time estimates are "very conservative" in his opinion. The need for care arises each day and he cannot take the time to document everything. T. 1/16/19, p. 12. [With respect to PX 42 and PX 43, the Arbitrator sustained Respondent's objection to the portion of those exhibits that relates to caretaking provided by the three daughters. T. 1/16/19, p. 13.

Under cross-examination, Kosla testified he uses a watch to time the caretaking activities. He did not record the actual start and finish times for each task due to time restraints. He has a job of his own and is not a professional bookkeeper. He devised the spreadsheet and would be willing to use any alternative document that Respondent could come up with. T. 1/16/19, p. 14. He fills in the time as he can, depending on his own work schedule. T. 1/16/19, p. 15.

The Arbitrator sustained Respondent's objection to Petitioner providing additional testimony concerning the assistive devices she identified at the initial hearing. Petitioner's counsel then made an offer of proof, with Petitioner identifying photographs of those devices. T. 1/16/19, pp. 17-20. PX 41 A-G [rejected by the Arbitrator].

Tekuila McGee, a Respondent employee who handles workers' compensation claims, testified pursuant to Petitioner's subpoena. McGee testified she works in Respondent's risk management department. She makes decisions concerning claimants' requests for temporary total disability benefits, medical care and vocational rehabilitation. T. 1/16/19, p. 24. She has handled Petitioner's claim since at least May 2018. T. 1/16/19, pp. 24-25.

McGee testified she relies on treatment records, IMEs and utilization review in making decisions concerning medical care. T. 1/16/19, pp. 26, 34, 37-38. If a treating physician and IME disagree as to the need for care, and the case is being litigated, she consults with defense counsel in making the decision whether to authorize the care. T. 1/16/19, pp. 27-29.

McGee initially testified she has handled Petitioner's claim for a few months. She is familiar with Petitioner's file. Respondent's IME, Dr. Konowitz, agrees with Dr. Candido's opinion that Petitioner has lost 100% use of her right arm. Dr. Konowitz does not believe that Petitioner's claimed left thumb condition is related to the work accident. She believes Dr. Konowitz testified the left thumb is not related. She has not read any summary of Dr. Konowitz's deposition testimony. T. 1/16/19, pp. 41-43. After Petitioner's counsel read some of this testimony out loud, McGee testified she cannot say whether Dr. Konowitz opined that part of the left thumb condition could be causally related. T. 1/16/19, pp. 45-48. She would have to read "the entire report" and discuss it again with defense counsel to reach that conclusion. T. 1/16/19, pp. 49-50. As of the time she walked into the hearing, Respondent's position as to the left thumb was based on Dr. Konowitz's report. T. 1/16/19, p. 50. Respondent's system is to "consult with defense counsel regarding exposure." The decision is made collectively. T. 1/16/19, p. 54. Respondent uses the treatment records and Dr. Konowitz's report to project exposure and future risk. T. 1/16/19, p. 57. She has not seen Brennan's life care plan (PX 25). T. 1/16/19, p. 57. She is not aware of Respondent having prepared any such plan. T. 1/16/19, p. 58. She would know if such a plan existed. T. 1/16/19, p. 58. She is not familiar with Petitioner having requested an adjustable hospital bed. T. 1/16/19, p. 60. She has not reviewed the transcript of testimony taken on November 19, 2013. T. 1/18/19, p. 61. She has no information as to what transpired at that hearing. T. 1/18/19, pp. 61-62. She is also unfamiliar with Petitioner's request for an air flosser. T. 1/18/19, p. 65. She is aware that surveillance of Petitioner was conducted in 2015. She has an idea of what the surveillance showed. She is not aware of any other surveillance having been conducted via a previous adjuster. T. 1/16/19, p. 66. She knows what the term "ADL" means. She is aware that Petitioner is claiming companion care, as recommended by Dr. Candido, but "no script was provided" to Respondent. T. 1/16/19, pp. 68-70. She has not reviewed Dr. Candido's July 31, 2018 deposition or any of the attachments to the deposition. T. 1/16/19, pp. 70-71. A different adjuster handled Petitioner's claim when Dr. Candido issued his 2017 report and it would be more appropriate for him to address this. T. 1/16/19, pp. 72-74. McGee testified she "never said [she] was denying" the claim for companion care. She probably took over the handling of the claim in late 2018. With respect to an E-mail of May 22, 2018 [PX 51] that was addressed to her, requesting authorization of the flosser, she responded on May 24th, indicating that the previous adjuster, Jason Henschel, already informed Petitioner's counsel that the flosser was denied in an E-mail of May 17, 2018. T. 1/16/19, pp. 82-83. She recalls the E-mail of May 22, 2018 but cannot recall exactly when she took over the file. The file was assigned to her as of at least May 2018. T. 1/16/19, p. 84. She does not currently have access to the attachment referenced in the E-mail but the previous adjuster responded to the request for the air flosser. By the time Petitioner's counsel sent her an E-mail on May 22, 2018, Henschel had already denied the air flosser. T. 1/16/19, pp. 88-90. The prescribing physician could have appealed the denial. She is aware that Dr. Candido says Petitioner cannot return to full duty. However, the IME has said Petitioner can return to light duty. T. 1/16/19, p. 94. There is nothing beyond what the two doctors have said about Petitioner's work capacity that plays into her thinking. T. 1/16/19, p. 96. She understands that Petitioner is right-handed. She is aware of some of the activities that Petitioner claims to be unable to perform. T. 1/16/19, pp. 97, 100. She is also aware that Respondent offered a return to work, at Stroger Hospital, and that Petitioner refused this offer, as well as offers of two other positions at Cermak. T. 1/16/19, p. 100. She is not aware of Petitioner having trouble with zippers, donning/removing coats, adjusting jewelry, putting on make-up, opening cans and

bottles, using scissors or attaching paper clips. She is "not aware of the specifics." T. 1/16/19, pp. 105-107. The report from the IME, stating that Petitioner can return to light duty, could make her doubt some of Petitioner's claims. T. 1/16/19, pp. 106-107. [At this point in the hearing, the Arbitrator suggested that Dr. Candido issue a written prescription for the services he is recommending. Respondent's counsel indicated she did not believe this would cause Respondent to change its position since those recommendations are set forth in the doctor's deposition transcript.] T. 1/16/19, pp. 111-112.

McGee testified that, when she was out in the hall, talking with Respondent's counsel during a break, she indicated she needs to get back to work. Respondent's counsel did not tell her to say anything. T. 1/16/19, p. 113.

McGee testified she has not previously seen Blumenthal's rehabilitation-related reports. She is familiar with the services provided by a vocational rehabilitation counselor. To her knowledge, Respondent does not have a vocational opinion that contradicts Blumenthal's. T. 1/16/19, p. 115. Blumenthal mentions Dr. Candido's opinions but not Dr. Konowitz's. He is "considering only one side of the coin." T. 1/16/19, p. 118. "All factors would be considered . . . but we would stand by the IME report." T. 1/16/19, p. 120. She cannot say she would continue to rely on that report because she does not know what was testified to on November 19, 2018. T. 1/16/19, p. 120. If a transcript of the hearing was made available to her, she would consult with defense counsel as to whether to read it. T. 1/16/19, p. 121. Because Petitioner's claim is being litigated, she would prefer that Dr. Candido go through defense counsel rather than her to secure authorization for treatment. She is not aware that Petitioner has to have a doctor clip the fingernails on her right hand. T. 1/16/19, pp. 123-124. She is aware that Petitioner's right hand is clawed. T. 1/16/19, p. 124. She does not understand why Petitioner would need permission to schedule visits with her treating physician. Respondent does not tell her she can or cannot schedule appointments. T. 1/16/19, p. 126. She is aware that Petitioner is on medication. Respondent addresses treatment outcomes. Respondent does not tell claimants they cannot schedule appointments with their doctors. T. 1/16/19, pp. 127-129. "There is no protocol that says that we have to provide written authorization for a visit for the employees to have a visit with [their] treating physicians because it's a regular visit." We do not direct care. T. 1/16/19, p. 131. Respondent's counsel then indicated that, because the trial is still pending and the treating and examining physicians differ as to how future treatment should be handled, Respondent is not required to continue to authorize care. T. 1/16/19, p. 133. The Arbitrator then recommended that Respondent timely provide authorization for routine care that has never previously been disputed. T. 1/16/19, p. 135.

In response to questions posed by Respondent's counsel, McGee testified she is considering the five IME reports and can potentially consider the UR reports as well. The job offers pre-date her handling of the claim. It would be best for the previous adjuster, Jason Henschel, to address this issue. T. 1/16/19, p. 138.

Jason Henschel testified he has worked as a claims adjuster for Respondent since May 2011. T. 1/16/19, p. 141. He investigates workers' compensation claims, reviews medical records and bills and arranges for surveillance. T. 1/16/19, p. 141. He arranges for claimants to return to work. T. 1/16/19, pp. 141-142.

Henschel testified he handled Petitioner's claim from the inception until about May 2018. Only he and McGee have been assigned to Petitioner's claim. T. 1/16/19, p. 143. He reviewed Petitioner's file before appearing at the hearing. T. 1/16/19, p. 144.

Henschel testified Petitioner began working for Respondent in July 1984. As of the accident, she worked full-time as a Clinical Nurse 1. Petitioner has not returned to work since the accident. T. 1/16/19, p. 146.

Henschel identified RX 17 as a letter he sent to Petitioner's prior counsel on July 23, 2015. In this letter, he advised counsel that Respondent was terminating the payment of benefits based on its ability to accommodate the restrictions outlined in Dr. Konowitz's report of April 23, 2015. T. 1/16/19, pp. 150-151. In that report, Dr. Konowitz found Petitioner capable of working with no use of the right arm. T. 1/16/19, p. 151. [At this point in the hearing, Petitioner's counsel stipulated that Petitioner testified she called Paris Partee in response to Henschel's letter.] T. 1/16/19, p. 156.

Henschel testified that Petitioner's former counsel, Mr. Gallagher, contacted him via E-mail on July 29, 2015, in response to his letter. Gallagher indicated that Petitioner did not return to work based on her driving-related restrictions. T. 1/16/19, p. 160.

Henschel testified that, to his knowledge, Petitioner called Paris Partee, director of Human Resources at Cermak Health Services, on July 30, 2015. It was Partee who had the potential job. T. 1/16/19, p. 162. Petitioner did not return to work after she contacted Partee. T. 1/16/19, p. 162. The job was at Cermak Health Services, 2800 South California, in Chicago. T. 1/16/19, p. 163. [At this point in the hearing, Petitioner's counsel stipulated that Petitioner never went to any Respondent location to attempt to return to work. T. 1/16/19, pp. 166, 180.] The contact person at Cermak was Pamela Brown, Director of Patient Services at Cermak. T. 1/16/19, p. 172. Brown stopped working at Cermak in approximately March 2018. T. 1/16/19, p. 172.

Henschel testified he obtained video surveillance of Petitioner in September and October 2015. The footage showed Petitioner driving. T. 1/16/19, p. 172. He sent the disks to Dr. Konowitz. After the doctor reviewed the footage, he again found Petitioner capable of working with no use of the right arm. He saw no need for any driving-related restrictions. T. 1/16/19, p. 173. Henschel testified that, after he received Dr. Konowitz's report of September 15, 2015, he contacted Cermak and determined that the job was still available. T. 1/16/19, p. 173.

Henschel testified he contacted Petitioner's former counsel, Mr. Gallagher, after receiving Dr. Konowitz's report of September 15, 2015. He sent the report to Mr. Gallagher via E-mail. T. 1/16/19, p. 176. He also advised Mr. Gallagher that benefits were being terminated based on the report and job offer. T. 1/16/19, p. 177. Petitioner did not return to work for Respondent thereafter. T. 1/16/19, p. 182.

Henschel testified he again attempted to bring Petitioner back to work, to the same job, in April 2016. Pamela Brown had the job available. T. 1/16/19, p. 182. Petitioner was to start the job on May 2, 2016, at the Cermak location. Henschel acknowledged he does not recall how he knows that Paris Partee called Petitioner on April 19, 2016. After April 2016, no additional attempts to bring Petitioner back to work. T. 1/16/19, p. 186.

Henschel testified he spoke with Devon McBride, Senior Human Resources Coordinator at Cermak, on December 22, 2016.

Henschel testified he has not spoken with anyone at Respondent concerning the "bed control" position since he stopped handling Petitioner's claim in May 2018. T. 1/16/19, p. 190

Under cross-examination, Henschel acknowledged that, during the time he handled Petitioner's claim, Respondent accepted that Petitioner has chronic regional pain syndrome affecting her right arm. T. 1/16/19, p. 191. Dr. Konowitz said that Petitioner was not able to use her right arm. T. 1/16/19, p. 193. Henschel did not recall what restrictions, if any, Petitioner had with respect to her left upper extremity. T. 1/16/19, p. 195. He relied on Dr. Konowitz's report of September 15, 2015, stating that no driving-related restrictions were needed. T. 1/16/19, p. 195. The October 2015 surveillance footage showed Petitioner driving on three separate days. T. 1/16/19, p. 196. He does not know the duration of the driving shown in this surveillance. He does not recall that Petitioner was driving using four fingers. T. 1/16/19, p. 199. He decided to rely on Dr. Konowitz's opinion that Petitioner could drive safely. T. 1/16/19, p. 200. When he attempted to have Petitioner return to work, he was aware she would need to travel from Schaumburg to downtown Chicago. T. 1/16/19, p. 202.

At a continued hearing, on March 14, 2019, **Linda Follenweider** testified on behalf of Respondent. Follenweider is a registered nurse and licensed advanced practice nurse. T. 3/14/19, p. 15. She began working for Respondent in 2005 or 2006. At that point, she worked remotely as an asthma clinical director for three and a half years T. 3/14/19, pp. 8-9, 17. She then worked elsewhere. In March 2015, she resumed working for Respondent on a consultant basis. In November 2016. At that point, she was interim Chief Operating Officer for Correctional Health. She accepted the position the following May and became interim Director of Nursing at the same time. T. 3/14/19, p. 8.

Follenweider testified that, as Chief Operating Officer, she handles all health services offered in the adult jail and the juvenile detention center. Some of her duties are personnel-related. She completes paperwork concerning disability claims. Since 2015, her duties have included reviewing employees' restrictions to determine whether they can be put back to work. T. 3/14/19, p. 20. She also completes incident reports. T. 3/14/19, p. 31.

Follenweider testified that, at some point within the last four to six months, Sandy Navaro, an attorney in Respondent's General Counsel office, mentioned Petitioner's claim to her during a meeting. T. 3/14/19, pp. 25-26.

Follenweider testified she has not seen Petitioner's personnel file. To her knowledge, Petitioner's job at Respondent was classified as a "Clinical Nurse 1" position. The duties associated with this position vary, depending on patients' needs and the clinical area where the nurse works. T. 3/14/19, p. 37. At the Cermak jail, CN1 nurses might pass medication, take vitals or perform "bed control." The jail is "just shy of 100 acres" and has eight living areas, some of which have 24/7 nursing care. T. 3/14/19, p. 39. As of the day before the hearing, there were 5,700 detainees at Cermak. T. 3/14/19, p. 43. A nurse performing "bed control" reviews electronic medical records three times a day and prepares reports to ensure that detainees are housed in areas where they could obtain care appropriate to their needs. T. 3/14/19, p. 40. At the beginning of the shift, the "bed control" nurse receives an E-mail indicating where all the patient detainees are housed. For privacy reasons, the patients are divided into "M" and "P" categories according to their medical needs. T. 3/14/19, pp. 42-43. For example, a detainee categorized as "M-3" needs "detox housing." T. 3/14/19, p. 45. "Bed control" is a "huge patient safety issue" in that detainees have to be housed where their needs can be met. A detainee who is at risk of going through withdrawal must be based in one specific area where nurses can perform screenings. T. 3/14/19, p. 44. A "bed control" nurse must be able to look at a

report, which is transmitted three times per day, and determine, for example, whether a detainee categorized as "M-3" is in the right spot or needs to be transferred out of the general population. T. 3/14/19, pp. 45-46. The "bed control" job involves clinical decision making. T. 3/14/19, p. 46. From a physical perspective, it involves using a computer "mouse" to "cut and paste" items in the report, deleting detainees' protected medical information along the way, E-mail those items to "DOC", a/k/a "the sheriff side," which is in charge of detainee transfers, and then follow up to make sure that detainees have been moved to the proper locations. T. 3/14/19, p. 47. A "bed control" nurse sits in a cubicle on the first floor of Cermak, where the medical records department is located. The area has natural light. A bathroom and kitchen are nearby. T. 3/14/19, p. 49. The address is 2800 South California. T. 3/14/19, pp. 50-51.

Follenweider testified that a "bed control" nurse has no patient contact whatsoever. The job involves typing only to the extent that the nurse has to enter his or her password to activate the computer. It primarily involves using a "mouse." T. 3/14/19, p. 51.

Follenweider testified that the "bed control" job is currently available. A person who held the job just retired. Another person is performing the job, with coverage from other nurses. "Bed control" can be an assigned task as well as a full-time job. The "CN!" position is a permanent, full-time position. "Bed control" needs to be performed seven days per week. A "bed control" worker does not have to be a registered nurse. CMTs, or "certified medical technicians," and nurse supervisors have performed the job. The job is "so critical for patient safety" that Cermak's medical director "has made sure to look at it." T. 3/14/19, p. 53.

Follenweider testified the "bed control" job is sedentary in nature. T. 3/14/19, p. 53. Since it "just" involves mouse usage, a person with no use of the right arm could perform the job if he or she could operate the "mouse" with his or her left hand. T. 3/14/19, p. 56.

Under cross-examination, Follenweider reiterated that "bed control" is one task associated with the "CN1" position. Nurses at Cermak do not rotate through "bed control" because the collective bargaining agreement prohibits such rotation. T. 3/14/19, pp. 56-57. Follenweider testified she would be able to produce a written description of a "CN1" job but no such description exists for the "bed control" position. T. 3/14/19, p. 57. Cermak's electronic medical record system has the capacity to create a "grid" to show the location of detainees based on their "M" and "P" classifications. The "grid" might show that three detainees with "M-3" status are housed in the general population. The "bed control" worker "double clicks" on that and a box comes up, showing the names of the three detainees. Detainees are "sometimes in bad shape" on arrival at Cermak. They have to be screened. A detainee with a medical condition sees a physician or a physician assistant. A detainee with a mental health condition sees a mental health specialist or psychologist. T. 3/14/19, p. 61.

Follenweider acknowledged that a "bed control" job, per se, would never be posted on Respondent's website. She is unable to comment on whether nurses complete their training so that they can pursue careers in "bed control." T. 3/14/19, p. 63. A person assigned to "bed control" for a shift works four days, eight hours per day. T. 3/14/19, pp. 65. Since coverage is needed every day, people perform the "bed control" job on the weekends too. T. 3/14/19, p. 66. It typically takes a "bed control" worker two to two and a half hours to respond to the initial morning E-mailed report. Once "DOC" responds, the worker has to look at that response and make sure the detainees are being moved appropriately. T. 3/14/19, p. 67. It is difficult to say whether the job is "busy," in the conventional sense, but it requires vigilance. Cermak has to be "reactive" rather than "proactive" because it does not

have control of movement the way a hospital does. T. 3/14/19, p. 70. The morning "bed control" shift is "important and critical." T. 3/14/19, p. 70. If a catastrophic "call off" occurs, with employees calling off work, Cermak's medical director will perform "bed control" herself because of its critical patient safety function. T. 3/14/19, p. 71. The Excel spreadsheet that is transmitted to the worker in the morning can be printed off the computer. The spreadsheet alerts the worker to the detainees who are "housed inappropriately." T. 3/14/19, pp. 72-73. It is up to the worker to triage those detainees and alert DOC to those who are "the most critical to move" versus those whose move can be delayed. T. 3/14/19, p. 75. The "cut and paste" function is done via a "mouse," not manually. T. 3/14/19, p. 77. Beyond typing in a password, the worker might have to type in comments where appropriate. T. 3/14/19, p. 78. The 7:00 AM to 3:00 PM shift is the busiest. T. 78-79. The nurses at Cermak understand the significance of the "bed control" task. The person performing the task "closes loops" by ensuring, for example, that a detainee in the hospital undergoes a test or X-ray that a physician has ordered. T. 80. The worker could interact with co-workers in the adjacent medical records department as much or as little as he or she wants. T. 3/14/19, p. 81. The only mandatory interaction is the E-mail communication required of the job. T. 3/14/19, p. 81. If the worker becomes concerned about an emergent transfer, he or she can call, using the phone at the desk. The CN1 salary applies, whether the nurse is passing medications or performing "bed control." Petitioner is a CN1, to her understanding. T. 3/14/19, p. 84. She would receive CN1 wages if she performed "bed control." T. 3/14/19, pp. 84-85.

Follenweider testified that, when she reviews return-to-work options, she does not have access to the person's medical records. When an employee is on disability, whether stemming from a work accident or not, she completes a form listing what the employee's job entails. It is someone in employee health who reviews the restrictions imposed by that employee's physician. She might receive an inquiry from human resources asking whether an unidentified person could perform a certain job. She likes the fact she never learns the person's name. She does not review any employee medical records, for privacy reasons. T. 3/14/19, p. 91. She interacts with employee health services, or EHS, to an extent but not with respect to workers' compensation or return to work issues. As to those issues, she interacts with human resources. T. 3/14/19, pp. 95-96. When she first learned of the claim from Sandy Navaro, she was given a document that Navaro created with questions as to the "bed control" job. She does not know whether she is the right person to answer a question asking whether the "bed control" job could be performed at a location other than Cermak. T. 3/14/19, p. 99. She cannot answer the question of whether the "bed control" job could be modified so that it could be performed by a person accompanied by an assistant. T. 3/14/19, pp. 101-102. She wants to be respectful of Petitioner's privacy. If she could be told what ADL needs to be accommodated, she could answer the question. If a physician said that Petitioner could attempt working four hours a day with a personal assistant, with no use of the right arm and use of the left hand for up to 10 minutes at a time, Respondent could accommodate these restrictions. Respondent would have to cover the other four hours of the eight-hour shift. T. 3/14/19, pp. 104-106.

Arbitrator's Summary of Medical Records

Due to the volume of records in evidence, the Arbitrator focuses primarily on the records bearing on the disputed left-sided complaints and the efficacy of the opioid regimen.

After the August 22, 2013 accident, Petitioner was transferred by ambulance to the Emergency Room at Northwest Community Hospital. Paramedics noted a quarter-sized abrasion on the elbow and a complaint of tingling in the fingers. They also noted a pain rating of 5/10. At the hospital, Petitioner reported tripping over a parking cone in a lot at work forty minutes earlier, falling onto her right elbow

and right knee. Hospital personnel noted a 1.5 cm laceration to the right elbow and a 1 cm abrasion to the right knee. They described Petitioner as anxious and "refusing to use right elbow." Right elbow X-rays showed no joint effusion and no fracture. The Emergency Room physician diagnosed a bone bruise and laceration. At discharge, Petitioner was given prescriptions for Hydrocodone and Flexeril and directions to follow up with her primary care physician. PX 12.

Petitioner saw Dr. Diaz in follow-up on August 24, 2013. The doctor noted healing of the right elbow abrasion and ecchymoses over the lateral aspect of the right hip. She prescribed right hip X-rays. PX 15. Petitioner returned to Dr. Diaz on August 28, 2013. The doctor noted that Petitioner's right hip pain had resolved but that she was still experiencing right elbow pain. She indicated Petitioner reported pain shooting to her hand with elbow flexion and extension. She also noted a complaint of pain at the base of the head. On examination, she noted some edema of the right elbow. She described the elbow as very tender to touch. She refilled the Norco and Flexeril and provided Petitioner with an orthopedics referral. PX 15.

Petitioner first saw Dr. Murray, an orthopedic surgeon, on September 3, 2013. He noted a history of the accident and subsequent care. On right elbow examination, he noted a 3-4 cm laceration over the olecranon. He also noted diffuse tenderness over this area as well as mild tenderness about the medial and lateral humeral epicondyles. He prescribed Ultram and physical therapy. He directed Petitioner to remain off work and return in two weeks. PX 9. On September 17, 2013, Petitioner rated her pain at 7/10 and indicated she "feels that she cannot work with her right hand." Dr. Murray prescribed Naprosyn and additional therapy. He kept Petitioner off work. PX 9. Dr. Murray noted improvement in the range of motion on October 8, 2013 and anticipated Petitioner being able to return to work in three weeks. PX 9. At a subsequent visit, on October 29, 2013, he prescribed a right elbow MRI "to assess bone marrow edema or other joint-related issues that may be related to a diagnosis of CRPS [chronic regional pain syndrome]." He continued to keep Petitioner off work. PX 9. The MRI, performed on November 5, 2013 showed a non-specific bone marrow edema pattern in the proximal ulna, "likely due to post-traumatic condition." PX 9. A week later, Dr. Murray noted significant loss of motion in the right elbow. He indicated the MRI results could be consistent with an early CRPS. He continued to keep Petitioner off work and directed her to continue therapy. PX 9. On December 17, 2013, Dr. Murray noted a pain rating of 6/10. He described Petitioner as "very guarded with respect to the arm and elbow." He referred Petitioner to Premier Pain and continued to keep her off work. PX 9. On February 20, 2014, following some blocks performed by Dr. Patel, Dr. Murray started Petitioner on Lyrica. He continued to keep Petitioner off work. PX 9. Dr. Murray noted "significant improvement" and a 2/10 pain rating on March 20, 2014. On a form bearing that date, however, he noted a complaint of "overuse of lt hand due to rt arm being bad." He continued to keep Petitioner off work. PX 9. On April 21, 2014, he noted a two-month history of left thumb pain and a right-sided pain rating of 7/10. He described Petitioner as wearing a splint on her left hand. He described Petitioner as "very frustrated with her ongoing complaints." On examination, he noted "exquisite focal tenderness with light touch" and pain with any motion at the right shoulder, elbow or wrist. He described Petitioner as holding her right hand in a "somewhat clenched position." He obtained X-rays of the fingers of the left hand. He noted no significant abnormalities on review of the films. With respect to the left thumb, he diagnosed MCP joint synovitis. He recommended a customized left thumb splint and additional therapy. He continued to keep Petitioner off work. PX 9. Dr. Murray's last note of May 27, 2014 reflects ongoing left thumb complaints relieved by brace usage and "exquisite" right hand pain. The doctor noted that Petitioner was unable to tolerate anyone touching her right hand. He indicated her right hand almost resembled a claw. He recommended that Petitioner stay off work and see a hand specialist. He

indicated that EMG/NCV testing might also be beneficial, although difficult for Petitioner to tolerate. He described Petitioner as having a significant complex regional pain syndrome. PX 9.

At Dr. Murray's referral, Petitioner saw Dr. Patel at Premier Pain Specialists between January 7, 2014 and May 2014. Dr. Patel administered right-sided stellate ganglion blocks during this period, with Petitioner reporting significant improvement after the first block and less improvement thereafter. On April 22, 2014, Dr. Patel noted a significant increase in Petitioner's right upper extremity symptoms secondary to reaching for a pot in her kitchen two to three weeks earlier. He described Petitioner as crying, "very distraught" and having difficulty sleeping. He also noted that Petitioner reported being diagnosed with left thumb tendinitis which she attributed to overuse of her left hand while compensating for the right arm. He administered another block, increased the Nucynta dosage and transitioned Petitioner from Lyrica to Topamax. He continued a previously prescribed compounding cream, prescribed Trazodone and recommended that Petitioner continue therapy and see Dr. Lofland, a pain psychologist. He noted a subthreshold value on psychometric testing. PX 10. By May 20, 2014, Petitioner had seen Dr. Lofland and discontinued therapy due to lack of progress. [The Arbitrator notes that no records from Dr. Lofland are in evidence.] Dr. Patel indicated her function was continuing to worsen. He noted she did not want to pursue a spinal cord stimulator. He performed a urine drug screen. On May 27, 2014, Dr. Patel noted that Petitioner had not followed up with Dr. Lofland "as she feels she does not need a psychologist." He also noted a "baseline of burning pain" and severe right hand and arm cramping. He indicated that Petitioner "does not seem open to many of the approaches we discussed." PX 10.

Between February 13, 2014 and May 27, 2014, Petitioner underwent occupational therapy at St. Alexius Medical Center. A discharge summary dated May 27, 2014 describes Petitioner as "cont[inuing] to regress in OT since incident in beginning of April 2014." The incident is not otherwise described. The therapist recommended continued pain management and a "psych consult for behavioral therapy." PX 7.

On March 20, 2014, Dr. Barnett wrote to Dr. Behnke, describing treatment he rendered for epigastnum pain of four months' duration. He noted that the pain worsened when Petitioner "developed RSD in right arm and was forced to put her compression stockings on [in connection with varicose veins] with one hand around Thanksgiving time." Dr. Barnett indicated he did not appreciate a hernia. PX 7.

On May 15, 2014, Dr. Behnke noted that Petitioner was scheduled to see "Dr. Olfandt" [presumably Dr. Lofland], a pain psychologist, the following day. He described Petitioner as refusing anti-depressants and denying suicidal ideation. [As noted above, no note from Dr. Lofland is in evidence.]

On June 3, 2014, Petitioner saw Dr. Biafora, a hand specialist, at Dr. Murray's recommendation. The doctor recorded a history of the work accident and subsequent care. He noted that Petitioner described her right wrist and hand complaints as worsening two months earlier when she attempted to reach out to grab an object that was falling from a shelf. He indicated that Petitioner reported some improvement secondary to six ganglion stellate blocks. On examination, he noted internal rotation of the right shoulder, flexion of the right elbow to 90 degrees, flexion of the right wrist to 80 degrees and clenching of the right fist. He also noted trophic changes. He described the nature of Petitioner's condition as "not clear." He obtained X-rays which showed no bony abnormalities to explain the contractures. He recommended EMG/NCV testing to rule out brachial plexopathy.

Dr. Biafora also noted pain at the left thumb CMC joint, with positive grind. He indicated that Petitioner described this pain as starting a few months earlier secondary to overuse. PX 11.

On June 10, 2014, Petitioner underwent care at the Emergency Room at Alexian Brothers Medical Center. Petitioner provided a history of the work fall and complained of worsening right hand, elbow and arm pain, as well as a right hand contracture, starting two months earlier. Petitioner also reported that her nails were growing into her hand and that her pain medication was not helping her. Petitioner was given Dilaudid and Valium intravenously. She reported improvement. At discharge, she was directed to continue her medications and follow up with Dr. Patel. PX 8.

Dr. Patel administered additional blocks after the June 10, 2014 Emergency Room visit. PX 10.

At Respondent's request, Petitioner saw Dr. Reilly of M & M Orthopaedics for purposes of a Section 12 examination on July 21, 2014. Dr. Reilly examined Petitioner and reviewed her records. He diagnosed complex regional pain syndrome in the right upper extremity. He attributed this condition to the work fall and elbow trauma. He described Petitioner as having no use of her right upper extremity and obviously in need of further care. He found Petitioner unable to work. He noted that Petitioner reported having driven. He indicated this "would be an issue regarding insurance coverage if she is one-handed." PX 21.

Petitioner first saw Dr. Candido, a pain physician, on July 24, 2014. The doctor's note of that date sets forth an account of the work fall and subsequent care. Petitioner complained of 9-10/10 pain in the right elbow down to the right hand. She reported taking Norco "mostly daily" along with Nucynta BID. The doctor also noted a complaint of left hand pain. On examination, he noted a right wrist drop along with a right hand deformity, swelling and redness with shining of the skin up to mid forearm. He described Petitioner as "very sensitive to light touch." He diagnosed CRPS type 2 "following an injury to ulnar nerve (elbow) and wrist drop due to radial nerve injury." He prescribed Fentanyl patches, 25 mcg/hr every 72 hours, Gabapentin, a brachial plexus block, hydrotherapy and passive movement of the right hand and arm. He indicated Petitioner would likely benefit from a spinal cord stimulator.

At Respondent's request, Dr. Konowitz, a board certified internist and pain management physician, examined Petitioner and reviewed her medical records on August 13, 2014. He recorded a history of the work accident. He noted an average pain rating of 7/10 in the right hand, elbow and shoulder affecting sleep. He indicated that Petitioner derived relief only when reclining with her arm against her body. He described Petitioner as using Fentynal patches, compounding cream, Norco and a variety of other medications. He described inconsistent behavioral responses as absent. He conducted a "special" examination specific to chronic regional pain syndrome, noting right arm hyperalgesia, allodynia and edema.

Dr. Konowitz diagnosed complex regional pain syndrome. He viewed the work fall as causing a right elbow injury, with Petitioner later developing a "secondary complex regional pain syndrome." He found a "significant level of disability with limited right arm function." He did not identify any pre-existing condition. He recommended 3T MRI imaging of the right shoulder, brachial plexus and elbow, medication management, consideration of a spinal cord stimulator and Lidoderm and Pennsaid for a "left wrist overuse syndrome" not mentioned elsewhere in the report. He found Petitioner capable of performing sedentary duty 8 hours per day, with "no right arm use" and use of the left arm limited to a maximum of 20 pounds. He opined that Petitioner "cannot operate a motor vehicle."

Petitioner underwent MRIs of her right elbow and right shoulder on September 3, 2014.

On September 19, 2014, Dr. Candido noted a constant pain rating of 5/10 and indicated "this can be 10/10." He administered a brachial plexus block. He refilled the Fentanyl patches and Norco.

Petitioner began a course of occupational therapy at Athletico in September 2014. A note dated December 13, 2014 reflects that Petitioner was unable to quantify her improvement but was no longer experiencing "10/10 screaming pain." On February 11, 2015, the therapist noted a complaint of 10/10 left thumb pain, with this pain having increased "since [Petitioner] stopped using her right arm." The therapist noted decreased left thumb and left hand strength. On May 22, 2015, the therapist indicated that Petitioner reported decreased pain and sensitivity in her right arm and hand, secondary to therapy, but that "her ability to use her right hand has not improved at all." On June 17, 2015, the therapist noted that Petitioner was now reporting left elbow and left second digit pain as well as ongoing left thumb pain. The therapist described Petitioner as reporting "she knows she is over working her left arm and hand but she does not have an option." On July 17, 2015, the therapist noted a complaint of worsening left thumb pain. She indicated that Petitioner reported being unable to use her left hand one day due to this pain. On July 31, 2015, the therapist indicated Petitioner was reporting "consistently high pain levels in her left thumb." Petitioner was discharged from therapy in late September 2015, with the therapist noting "slow progress."

On October 7, 2014, Dr. Candido noted that "overall pt feels there has been minimal improvement of pain long-term but block helped for 11 hours and swelling has greatly decreased." He increased the Fentanyl dosage to 50 mcg.

On November 7, 2014, Dr. Candido described Petitioner as 68 inches tall and weighing 128 pounds. He indicated she was "anxious and thin." He noted that the left thumb trigger point injections had provided total pain relief and that the last block provided a week of pain relief. He also noted a pain rating of 6-7/10. He indicated Petitioner had been taking Keflex due to a right hand infection. He described the regimen of cream, Fentanyl patches and Norco as providing "some relief." He administered another block.

On February 17, 2015, Petitioner reported nausea to Dr. Candido secondary to starting a higher dose (75 mcg) Fentanyl patch the previous day.

Petitioner saw Dr. Bednar, chief of the hand service at Loyola, later in the day on February 17, 2015. Dr. Bednar recorded a history of the work accident. He noted that Dr. Candido had told Petitioner that tendon transfers might help relieve her right finger contractures. He also noted a complaint of left thumb pain diagnosed as tendonitis by Dr. Murray.

Despite the fact that Petitioner had undergone a block earlier that day, Dr. Bednar had difficulty extending Petitioner's right elbow and wrist. He also noted that severe pain precluded Petitioner from moving her fingertips away from her right palm. He described her thumb as against the index finger. He noted severe maceration of the skin of the right thumb. He could not move the fingers far enough to be able to visualize the skin of the right palm. On the left side, he noted that most of the tenderness appeared to be at the thumb CMC joint. He described the Finkelstein maneuver as negative.

Dr. Bednar indicated he had a "long discussion" with Petitioner, telling her that "tendon transfers would not be an option for her until she had passive range of motion of the digits back." He recommended that she continue participating in therapy to try to improve the range of motion. If no improvement took place, and the main issue was hygiene, he could perform tendon releases but "with this [Petitioner] would not regain the ability to grasp or pinch." He indicated Petitioner was "very distraught at hearing this."

With respect to the left thumb, Dr. Bednar addressed causation as follows:

> "[Petitioner] states that she had no pain of this thumb prior to the injury on the right side. I think it is likely that [Petitioner] has arthritis of the thumb which has been aggravated by overuse secondary to inability to use the right hand."

Dr. Bednar recommended that Petitioner continue seeing Dr. Candido. PX 16.

On February 25, 2015, Petitioner again complained of nausea secondary to the increased Fentanyl intake but reported that this dose was providing better pain relief than the 50 mcg. Dr. Candido added Ambien to Petitioner's medications.

At Respondent's request, Dr. Konowitz re-examined Petitioner on April 23, 2015. On this occasion, the doctor described Petitioner as anxious and exhibiting a "depressed affect." He again noted no inconsistent behavioral responses. He again diagnosed complex regional pain syndrome, right arm. He described the prognosis for recovery as guarded. He described the extent of Petitioner's disability as "total disuse of right extremity associated with pain." He recommended an additional three months maximum of brachial plexus blocks, up to six, along with "training for spinal cord stimulator." He recommended that Petitioner decrease the Fentanyl patches to 50 mcg and then transition to Butrans 10 with Clonidine patch. He recommended that Petitioner discontinue opioids for up to 90 days and utilize Butrans, "with possible supplementation of Tramadol, if needed" to address an "opioid tolerance that has occurred". He also recommended a "left thumb removable splint and physical therapy concomitant with right hand therapy." He characterized the treatment to date as reasonable and necessary for the injuries sustained. In response to a question asking whether Petitioner could return to work, he answered "no right arm graded." He did not find any restrictions to be needed with respect to left arm or lower extremity usage but found a consultation with a hand surgeon to be appropriate. He indicated he would need a job description to be able to comment on Petitioner's specific work capacity. RX 3.

By June 17, 2015, Petitioner was using higher dosage [100 mcg] Fentanyl patches. She reported a pain level of 6/10. Dr. Candido noted the presence of a nurse case manager. He noted that Petitioner did not want to proceed with spinal cord stimulator placement because she wanted to avoid any invasive spinal procedure.

On July 31, 2015, Dr. Candido noted complaints relative to the right upper extremity and left thumb. He indicated Petitioner rated her right arm pain at "now 5-6/10 on average" and her left thumb pain at 5-10/10. He noted that Petitioner was still awaiting approval for a left upper extremity brace. He indicated that Petitioner's regimen of Fentanyl patches, Norco and Ambien was bringing her pain down by two points on a 0 to 10 scale. He indicated that Petitioner "does not qualify for work even in the light duty capacity due to severe pain, allodynia, hyperalgesia and no use of the RUE." He went on

to state she was unable to resume working "due to inability to utilize public transportation as she cannot be in a position where her RUE might be struck or moved." He administered a right interscalene block.

Dr. Carroll, a hand surgeon, evaluated Petitioner on September 9, 2015. He wrote to adjuster Jason Henschel the same day. He noted that Dr. Candido referred Petitioner to him. He described the care rendered by Drs. Candido and Bednar.

On examination, Dr. Carroll noted that, even though Petitioner had undergone a right elbow block that day, she displayed a limited arc of motion. He also noted limited right shoulder motion, 90 degrees of flexion contracture in the right wrist and a "tight flexion in [the] hand." On left hand examination, he noted pain at the metacarpophalangeal joint of the left thumb and CMC joint. He recommended EMG/NCV studies, to be performed under Dr. Candido's direction. He also recommended a thumb spica splint for the left thumb and one more injection. He further recommended at least four to six more blocks, pain management and observation of the left thumb.

Dr. Carroll found Petitioner unable to work using her right arm. He also indicated she should not perform any forceful grasping on the left. He related the need for the right-sided care to the work accident. PX 17.

On September 11, 2015, Wasay Ahmed, M.D., an Employee Health physician, saw Petitioner for purposes of a disability evaluation. Dr. Ahmed described Petitioner as having no use of her right hand or arm, having contractures of the right shoulder, elbow and hand, as well as the left thumb, wearing a sling on her right arm and "crying all through the interview." He assessed Petitioner as having severe chronic regional [sic] syndrome and severe flexure contractures. He found "disability 9/19/15 to 12/31/15." His plan was "refer to HR and supervisor." PX 60, pp. 187-188. [The Arbitrator notes Respondent raised no objection to the subpoenaed Cook County records that comprise PX 60.]

Dr. Konowitz issued an addendum on September 15, 2015, after reviewing Dr. Candido's note of July 28, 2015 and approximately fifteen minutes of surveillance footage obtained on September 1 and September 13, 2015. He found Petitioner capable of returning to work with a restriction of no right arm use. He also found that Petitioner could use public transportation or drive a car without restrictions or modifications. He indicated that driving without the assistance of another person was documented in the video. RX 4.

On October 1, 2015, CorVel issued a report certifying the neurological consultation recommended by Dr. Carroll but non-certifying the EMG/NCV studies, per a review conducted by Dr. Makda, who is identified as an orthopedic surgeon. PX 17.

On November 3, 2015, Dr. Konowitz issued another report, after reviewing surveillance footage obtained on October 8 and 9, 2015. He found Petitioner capable of returning to work with a restriction of "no right arm use with initial return to work" and "graded adjustment of right hand use in future." He again found Petitioner capable of driving a personal vehicle or using public transportation. RX 5.

On December 18, 2015 and March 16, 2016, Dr. Candido noted that Petitioner rated her current pain at 7/10 but indicated it was "tolerable with Valium and Norco." He also noted that Petitioner's pain was 15/10 at its worst. At both visits, he described Petitioner as "severely debilitated with this pain," indicating it was affecting her daily life. PX 13.

Dr. Sefer of Respondent evaluated Petitioner on December 21, 2015. Dr. Sefer wrote to Respondent's Employees' Annuity and Benefit Fund the following day, referencing a disability form completed by Dr. Candido and finding Petitioner unable to work. Dr. Sefer recommended a period of disability from January 1, 2016 through June 18, 2016. PX 60, pp. 191-196. Attached to these documents is a form completed by Kathy Dunn, Petitioner's supervisor, outlining Petitioner's typical nurse duties and indicating that no modified work was available. PX 60, pp. 197-198.

Dr. Sefer of Respondent found Petitioner to be at maximum medical improvement and "permanently disabled to work" on March 16, 2016. PX 60, pp. 203-204.

On May 27, 2016, Paris Partee, identified as Petitioner's supervisor, completed a form outlining the physical requirements of Petitioner's nursing job and indicating that modified duty was available in the form of a "position at Cermak in nursing." PX 60, pp. 212-213.

On June 3, 2016, Petitioner was admitted to Alexian Brothers Medical Center, through the Emergency Room, for progressively worsening abdominal pain. The admitting physician noted a history of CRPS and a history of a colon resection in 2010, secondary to diverticulitis. The physician also noted that Petitioner had weaned herself off Norco during the preceding ten days "since it was not helping." Petitioner underwent abdominal and pelvic CT scanning in the Emergency Room. These scans showed a possible small bowel obstruction. Chest X-rays showed left upper and lower lobe infiltrates. Petitioner was given Dilaudid for pain and started on antibiotics for pneumonia. The discharge summary reflects that, "by 6/6/16, [Petitioner] was tolerating general diet well and it was felt that her symptoms were all related to ileus from the pneumonia." She was sent home with antibiotics and directions to undergo a follow-up chest CT scan. PX 8.

Clarice Lafrance, RN, LCPC, conducted a psychiatric diagnostic interview of Petitioner on June 9, 2016. LaFrance noted complaints of reduced appetite, disturbed sleep, irritability, depressed mood, crying spells and "difficulty accepting diagnosis." She listed Petitioner's current medications. She described Petitioner's current and past history as negative for substance abuse or dependence. She diagnosed adjustment disorder with depression. She recommended individual psychotherapy. At a subsequent session, on June 30, 2016, she described Petitioner as tearful and "so angry over her limitations." On January 19, 2017, she described Petitioner as "tearful throughout session." On February 2, 2017, she indicated that Petitioner felt "very hopeless and irritable." On February 23, 2017, she indicated that Petitioner's spouse was out of town on a work trip and that it was harder for Petitioner to get around without him. On April 13, 2017, she noted that Petitioner reported "difficulties that arise when she is home alone." PX 18.

On June 10, 2016, Petitioner returned to Dr. Candido and reported pain radiating from her right shoulder down to her hand, rated "7-15/10." She described the pain as "unbearable" and indicated her nails were growing into her skin. She reported having been hospitalized and indicated she was off Norco but still using the Fentanyl patches and taking Percocet and Ambien. The doctor indicated he was unable to assess the strength, reflexes and range of motion of the right upper extremity "because pt refused due to severe allodynia and hyperalgesia throughout the RUE."

On June 10, 2016, Dr. Sefer of Respondent re-examined Petitioner, noting "additional weight loss" and "complete contracture of small joints of right hand, wrist and elbow and shoulder." Dr. Sefer

described Petitioner's dominant hand and arm as "not functional." She went on to state: "I am not aware of any nursing job at Cermak that any nurse can perform with one hand." PX 60, p. 213.

On August 16, 2016, Dr. Candido issued slips prescribing a topical compound cream, a driving assessment at Marianjoy and a right interscalene block. There is no accompanying office note.

On October 17, 2016, Petitioner underwent a driving assessment at Marianjoy Rehabilitation Hospital. The occupational therapist who conducted the assessment noted a referral from Dr. Candido. The therapist also noted the presence of Petitioner's husband. She indicated that Petitioner last drove a vehicle "last week." PX 6a. She documented a pain rating of 8/10. She described fine motor control as "diminished with left hand with primitive grasping of pen/pencil." She indicated that Petitioner frequently stood and moved about during the assessment. She also noted facial grimacing and periods of crying, noting that Petitioner reported having minimal sleep the preceding night. After a driving trial on campus, at slow speeds, she concluded that Petitioner "does not appear safe to drive at this time secondary to decreased function of upper extremities, slow processing and perceptual impairments." She noted that lack of sleep, along with several of Petitioner's medications, could adversely affect driving performance. PX 6, PX 6a.

On December 9, 2016, Devon McBride, identified as Petitioner's supervisor, completed a form outlining the physical requirements of Petitioner's nursing job and indicating that modified duty was available in the form of a "position at Cermak in nursing." PX 60, p. 230.

On December 22, 2016, Dr. Sefer of Respondent completed a form indicating Petitioner was unable to use her right hand or arm "at all" and that "adequate accommodations were not found." Dr. Sefer recommended the following period of disability: December 18, 2016 through June 19, 2017. PX 60, p. 234.

On February 23, 2017, Dr. Behnke described Petitioner as in "severe distress and chronically ill." He also noted Petitioner was "crying at times."

On June 14, 2017, Dr. Candido noted a pain rating of 8/10. He administered a right interscalene injection and recommended Botox injections into the right upper extremity.

Petitioner returned to Dr. Murray on June 27, 2017, secondary to left index finger and left thumb complaints. Dr. Murray noted having seen Petitioner in the past for chronic regional pain syndrome. After examining Petitioner and obtaining X-rays of the left hand fingers, he diagnosed "trigger finger, left index finger" and basilar thumb arthrosis. He prescribed therapy, indicating Petitioner was a candidate for home-based therapy "given her inability to drive with her right hand with her significant contractures." PX 7.

Petitioner resumed care with LaFrance on November 21, 2017. La France indicated that Petitioner "reported sadness for not being able to do much for herself and hates the dependence this has created." La France also indicated that Petitioner's husband had deferred retirement due to her situation and lack of income. She noted that this had created "tension in the marriage." She noted that Petitioner was taking pain medication but no psychiatric medication. She recommended weekly counseling. Petitioner saw her on about six or seven occasions thereafter, through March 19, 2019.

At Respondent's request, Dr. Konowitz re-examined Petitioner on January 17, 2018. In his report of that date, he noted global pain over the right upper extremity "with a consistent pain score of 9-10/10." He described the reported effects of that pain as "nausea, drowsiness, depression, constipation, sleep problems and anxiety." He also noted a complaint of left thumb pain, with Petitioner reporting she had recently refused additional injections because "the last injection triggered marked swelling."

After re-examining Petitioner and reviewing numerous updated records, Dr. Konowitz again diagnosed complex regional pain syndrome involving the right arm. He again attributed the development of this syndrome to the work accident. He saw no evidence of any pre-existing condition or accident. He did not relate the reported left thumb arthritis to the work accident. He recommended additional treatment in the form of "opioid withdrawal by addictionologist." He described Petitioner's current regimen as ineffective and causing numerous side effects. He recommended that Respondent offer Petitioner an "inpatient/outpatient" Suboxone treatment program, specifically referencing Alexian Brothers. He indicated Petitioner would be at maximum medical improvement if she did not opt to pursue such a program. With respect to the option of a spinal cord stimulator, he noted that stimulators "placed later in the disease state" are less effective. He found Petitioner "not capable of full duty" and capable of "sedentary duty with no right arm use." He indicated that "in depth psychological testing" would be needed to determine whether there was any evidence of malingering or secondary gain. He indicated that Petitioner's ability to drive would have to be assessed after the Suboxone treatment but that there was "no reason not to use public transportation and/or private options." He indicated that Petitioner's medication and its side effects influenced the results of the Marianjoy driving assessment. He characterized the treatment to date as reasonable, necessary and related to the work accident. He found no medical evidence that the recommended adjustable bed would change Petitioner's function or be related to the accident. He indicated that Brennan's life care plan should be "re-done after medication management is addressed."

On June 22, 2018, Petitioner returned to Dr. Candido and reported "constant RUE pain from the shoulder down to the hand, with increasing flexion contracture at her R wrist." The doctor noted she was taking Norco, Ambien and Valium and using Fentanyl patches 100 mcg/hr. He also noted Petitioner's weight was down to 119 pounds.

Dr. Candido administered another interscalene brachial plexus block on July 18, 2018.

On July 28, 2018, Petitioner presented to the Emergency Room at Alexian Brothers, indicating she had run out of Fentanyl patches and needed something for pain. Petitioner reported having been unable to fill her Rx due to insurance problems. Ricky Shah, a physician's assistant, noted deformity and atrophy of the right upper extremity

On July 31, 2018, Petitioner returned to the Emergency Room at Alexian Brothers, requesting one more Fentanyl patch "due to her new insurance not being active yet." Petitioner indicated she needed the medication to avoid withdrawal. On examination, Ricky Shah, P.A. noted atrophy of the right upper arm and deformity of the right hand. Shah described these conditions as "chronic due to CRPS."

On August 30, 2018, Petitioner saw Dr. Behnke. The electronic records reflect one purpose of the visit was to "sign papers for pain contract." No contract is in evidence.

On September 28, 2018, Petitioner returned to Dr. Candido and reported "constant burning pain in the right upper extremity that feels 'like the arm is on fire.'" Petitioner rated her current pain at 5/10 but indicated the pain could be "as bad as 20/10." She reported severe pain with any palpation and indicated "even the wind can provoke immense pain." Dr. Candido noted he was unable to perform a sensory examination of the right upper extremity. He noted a significant decrease in the range of motion of that extremity with an elbow contracture and severe contracture of the right wrist and fingers of the right hand. He administered a right intra scalene brachial plexus nerve block. He performed a urine toxicology screening, indicating he would review the results with Petitioner at the next visit. [No results appear in PX 4].

Petitioner saw Dr. Candido again on December 14, 2018. Petitioner complained of constant sharp pain radiating from her right shoulder down to her right hand, rated 9/10. Dr. Candido noted that Petitioner "refused to be examined." He described Petitioner as suffering from debilitating pain. He noted that Petitioner had been obtaining controlled substances from Dr. Behnke but that he could no longer prescribe these medications. He indicated Petitioner denied running out of narcotic medication. He noted that Petitioner would now be seeing him for this medication, referencing an opioid contract. [The contract does not appear in PX 13a]. He administered an interscalene brachial plexus block.

Arbitrator's Summary of Medical Testimony

Dr. Kenneth Candido testified by way of evidence deposition on July 31, 2018. Dr. Candido testified he focuses on anesthesiology and pain management. PX 5, p. 4. He identified Candido Dep Exh 1 as his current CV. He is on staff at Advocate Illinois Masonic Medical Center and is a clinical professor at the University of Illinois College of Medicine. PX 5, p. 5.

Dr. Candido testified he treats patients with chronic regional pain syndrome, or CRPS. CRPS is a chronic pain condition associated with some type of injury or condition that leads to a cascade of events affecting the sensory and motor systems and sometimes the sympathetic nervous system. PX 5, pp. 5-6.

Dr. Candido testified he has treated Petitioner since July 2014. He identified Candido Dep Exh 2 as two reports he generated concerning Petitioner. When Petitioner fell on August 22, 2013, she "landed upon the flexed right arm and elbow." She later began seeing Dr. Patel, who diagnosed complex regional pain syndrome. Petitioner worsened thereafter and developed severe contractures of her right wrist and elbow, along with severe hypersensitivity of the entire right arm, despite Dr. Patel's efforts. PX 5, pp. 8-9. The contractures are a "very severe sequelae not found in the majority of CRPS patients." When contractures occur, they are "pretty much synonymous with a very severe level" of the disease. PX 5, pp. 9-10.

Dr. Candido testified he attributes Petitioner's left thumb tendinitis to overuse stemming from the right arm disability. In February 2015, he noted Petitioner was having difficulty opposing the fourth and fifth fingers with the left thumb. PX 5, pp. 10-11. He referred Petitioner to Dr. Bednar, director of the hand service at Loyola. In his opinion, Dr. Bednar's causation opinions support his own. PX 5, pp. 12-13. After four years of observing Petitioner, he recommended that she avoid lifting or carrying over five pounds with her left hand and avoid using her left hand and arm for more than ten minutes at a time. PX 5, p. 13. Based on the Jamar dynamometer testing he has performed, he knows Petitioner cannot use the left hand or arm "for greater than five pounds." When he watched the surveillance footage, he observed Petitioner pushing a roller cart and grabbing a wheeled suitcase that had gotten

away from her. He did not see her doing anything exceeding about a five-pound limitation. PX 5, pp. 14-15. Petitioner has reported to him that she has difficulty with routine activities. She needs help in order to button a shirt, fasten a belt or tie her shoes. PX 5, pp. 16-17. She also cannot cut her nails. This is "not just a cosmetic issue" because, if those nails dig into her flesh, causing an abrasion, she could develop a life-threatening bacterial infection. At Petitioner's request, he cuts her nails. PX 5, p. 16.

Dr. Candido acknowledged that the surveillance videos show Petitioner driving, against his and other physicians' advice. While Petitioner did not pass a driving assessment at Marianjoy, in October 2016, there was no evidence that her opioids affected her cognition. She performed within normal limits on cognitive tasks. PX 5, p. 19. She would still be unable to drive if she did not take narcotics. PX 5, p. 19.

Dr. Candido testified that he is currently prescribing Zolpidem or Ambien, Valium, Fentanyl patches and Percocet, or Oxycodone with Acetaminophen, for Petitioner. He has also prescribed a compound topical gel, which Respondent has not authorized. He is very conservative in the prescribing of compound medications but such medications make sense for Petitioner, given her inability to use her right arm. For five years, he has discussed the possible benefit of a spinal cord stimulator with Petitioner but she has clearly indicated she does not want to have anything implanted in her spine. She has known individuals who have experienced failures of such devices. PX 5, pp. 22-23.

Dr. Candido acknowledged that Petitioner's pain ratings have remained high despite her opioid regimen. Regardless, he believes the opioids have made a difference for her because, when she runs low, she has had to seek emergency treatment. PX 5, pp. 24-25. Withdrawing, under medical supervision, or changing her to a different class of opioids, "is not necessarily going to do anything to improve [Petitioner's] condition." Suboxone has been efficient in some cases but for individuals who are constantly or chronically escalating their medication use. In his experience with Petitioner, he does not think he has ever, or at least not recently, escalated her medication use over many years. PX 5, p. 26. Suboxone is still a narcotic but it has "less ability to stimulate the center of the brain which is associated with opioid liking." If recovering drug addicts were asked to rate various narcotics, they would say they do not like Suboxone or Buprenorphine. These medications still work to manage pain, however. PX 5, p. 27. He does not recommend that Petitioner go through a supervised withdrawal "based on the historic precedent of her seeking emergency medical treatment when she has run short." PX 5, p. 27. It is reasonable for Petitioner to seek such treatment because she is not seeking relief from withdrawal. PX 5, p. 28. Petitioner would still be disabled and unable to drive if she were on Suboxone. PX 5, p. 28. In his opinion, Petitioner has not demonstrated any of the features of opioid addiction, including drug seeking, cravings, early refills or escalation of her medication use. That is "always a risk." PX 5, p. 29. Petitioner would experience a withdrawal reaction if the opioids were abruptly discontinued but she is not addicted. Addiction is a neurophysiological, biological and psychiatric condition and a "dysfunctional process." Petitioner has "not been dysfunctional in the use of opioids." PX 5, pp. 29-30.

Dr. Candido testified he has considered Petitioner to be permanently disabled since the time of her first visit, in July 2014. The only person who has suggested she can work is Dr. Konowitz. PX 5, p. 31.

Dr. Candido testified he prescribed an adjustable king mattress for Petitioner in 2017 (Candido Exh 4) because he believes she needs some type of supportive bed which conforms to her body type. Petitioner has told him she has slept in a recliner on many days. PX 5, p. 32. Petitioner is one of only two or three patients for whom he has prescribed such a mattress. PX 5, p. 33. He is not a dentist but the fact that Petitioner's dentist has prescribed an air flosser for her makes sense in view of her inability

to use the upper extremities. Flossing requires the use of both hands. PX 5, p. 33. He concurs with Dr. Behnke's Zolpidem or Ambien prescription. PX 5, p. 33.

Dr. Candido testified it would be acceptable for Petitioner to use public transportation if she were the sole passenger but no one can predict the number or type of individuals a person might ride with. If someone jostled Petitioner's arm, that would likely lead to her seeking emergency care. PX 5, p. 34. Due to her condition, Petitioner will require psychological care, a thumb spica splint, a right arm sling, assistance with hygiene and activities of daily life, pain management, urine toxicology screenings and a walk-in shower. PX 5, pp. 35-37.

Dr. Candido testified Petitioner's entire right arm is "hemiplegic," meaning that arm has a complete absence of function. A formal pain management program, such as the one at Marianjoy, could be useful for Petitioner, although it would not change the outcome at all. PX 5, p. 39. Via biofeedback and imagery training, it could help Petitioner live with less pain-related stress. PX 5, p. 39.

Dr. Candido testified Petitioner is not capable of working an eight-hour day. She could potentially work up to four hours with "not just sedentary duties but no use of the right upper extremity and minimal use of the left upper extremity" as previously outlined. PX 5, p. 41. She might be able to work in a call center, using headphones, but only if she could take breaks and work about four hours a day. PX 5, p. 41. He has never seen a description of any proposed job and thus agrees with Petitioner not appearing to attempt a job. PX 5, pp. 41-42.

Under cross-examination, Dr. Candido testified he performs certain surgeries dealing with pain relief. The only type of upper extremity or hand surgery he would perform would be the implantation of a peripheral nerve stimulator. PX 5, p. 43. Petitioner is limited not only by pain but a complete contracture of the right arm, both at the elbow and the wrist. She cannot move the fingers of her right hand. PX 5, p. 44. All pain complaints are subjective. Petitioner "has never reported having good days" but it is hypothetically possible. CRPS can spread to other extremities but he has not seen spreading in Petitioner's case. PX 5, p. 46. Petitioner occasionally drives to a pharmacy or does light shopping but by and large she is restricted in all of her duties. For the most part, she is confined to her home. PX 5, p. 48. Before he issued a report to Petitioner's counsel, he did not recommend formal assistance for Petitioner but "this is a very unique case." Petitioner told him Respondent was asking her to work eight hours per day, five days per week. He "absolutely refused to acknowledge that would be acceptable for her." PX 5, p. 50. He is aware that Petitioner has not attempted to return to work since the accident. Work could occupy Petitioner's time and potentially benefit her from a psychological perspective. PX 5, p. 52. Petitioner can speak and is cognitively unimpaired so she could dictate. She could use a computer "mouse" with her left hand if it were for less than ten minutes at a time. PX 5, p. 52. With appropriate accommodations, Petitioner could return to work. PX 5, p. 53. Against his advice, Petitioner continues to drive very brief distances and for no more than 15 minutes at a time. He has not reported to the Secretary of State that she should not be driving. PX 5, p. 56. He is not aware of any such requirement. PX 5, p. 57.

Dr. Candido testified it is mandatory for Petitioner to undergo periodic brachial plexus blocks about six times per year. This allows him to address her arm and clip her fingernails. PX 5, p. 57. The blocks also provide periods of very substantial pain relief. PX 5, p. 61.

Dr. Candido testified that most people who take opioids over time develop some degree of tolerance. Each time he has attempted to adjust her medication downward, Petitioner has not tolerated

this well. He has not recommended a very gradual reduction, over time, because "if it is not broken, why try to fix it?" PX 5, p. 60. Petitioner might benefit from the type of nerve graft surgery being performed by a very few individuals, including Dr. McKinnon, but "even that surgery is extremely risky." Petitioner does not want to proceed with this kind of surgery. Topical compounded gels make sense for Petitioner, given her limited dexterity. PX 5, p. 63. The typical individual moves 100 times per hour while sleeping so it is very difficult to maintain a specific posture. Petitioner has used pillows and wedges without success. PX 5, p. 64. He does not know why his records do not mention this because he has discussed it with Petitioner. PX 5, p. 66. He has injected Petitioner's left thumb on multiple occasions. PX 5, p. 67. He does not believe the left hand problems could have occurred regardless of the accident and overuse. PX 5, p. 68.

On redirect, Dr. Candido testified Petitioner could not tolerate eight hours of job activity on a daily basis. She could possibly tolerate four hours. PX 5, p. 69. Petitioner's pain affects her ability to focus and retain information. PX 5, p. 69. There is no medical reason to reduce Petitioner's medication, even by 10%. PX 5, p. 70.

Under re-cross, Dr. Candido testified there is no potential for Petitioner to work for more than four hours, even if she did well at that level. Petitioner is a "very unique case" since she has eating- and hygiene-related issues. PX 5, p. 71.

On further redirect, Dr. Candido testified Petitioner would "absolutely" need someone to assist her during a four-hour workday. She might need a personal assistant to help with toileting, dressing, etc. PX 5, p. 71.

Under additional re-cross, Dr. Candido testified Petitioner could obtain assistance from a "work buddy" if Respondent were to provide her with one. PX 5, p. 72.

Dr. Howard Konowitz testified by way of evidence deposition on August 29, 2018. RX 7. Dr. Konowitz identified Konowitz Dep Exh 6 as his current CV. He has practiced anesthesia and pain management since 1987. He is licensed in both Illinois and Wisconsin. He is board certified in internal medicine and anesthesia, with subspecialty boards in pain management. RX 7, p. 5.

Dr. Konowitz testified he focuses on the care and treatment of patients who are in acute or chronic pain. He conducts two to three independent medical examinations per week, on average. RX 7, pp. 6-7.

Dr. Konowitz testified he examined Petitioner on August 13, 2014. He remembers the case by reading his reports but has no other recollection of Petitioner. RX 7, p. 8. He reviewed Petitioner's records at the time of the examination. The "pertinent positive," in terms of examination findings, was a "flexed right arm with a wrist drop and mild right hand edema." RX 7, pp. 9-10. Light touch was globally increased for the right arm. He noted no inconsistent responses. He also noted hyperalgesia and allodynia. He diagnosed Petitioner with chronic regional pain syndrome. He also diagnosed left wrist overuse syndrome which was "compensatory to" the work accident. He recommended Lidoderm and Pennsaid for the left wrist. RX 7, pp. 10-11. He found Petitioner capable of performing sedentary duty with no right arm use. RX 7, p. 11.

Dr. Konowitz testified he re-examined Petitioner and reviewed additional records on April 23, 2015. His diagnosis did not change. He found the chronic regional pain syndrome to be secondary to

trauma. He saw no need for left arm or lower extremity restrictions. He recommended a restriction of "no right arm work." RX 7, pp. 12-13.

Dr. Konowitz testified he issued a third report on September 15, 2015, after reviewing surveillance footage obtained on September 1 and 13, 2015. The videos showed Petitioner driving "without assistance with another person." He did not recommend any restrictions relative to Petitioner's driving or ability to take public transportation. He continued to say she could work with no use of the right arm. RX 7, p. 13.

Dr. Konowitz testified he authored a fourth report dated November 3, 2015, after reviewing additional surveillance footage obtained on October 8 and 9, 2015. Petitioner could be seen in the driver's seat, handing something out the window with her right hand, buckling with her right hand and accepting something with her right hand. On this date, he recommended no right arm usage with initial return to work and "graded adjustment of right hand use in the future." RX 7, p. 15. He felt Petitioner could drive, despite her medication, because she had used the medication on a long-term basis, adjusting to it over time, and "demonstrated use of a vehicle." RX 7, pp. 15-16. He has recommended on many occasions that Petitioner discontinue her current opioids "because of efficacy, not because of side effects." In his experience, many patients who undergo weaning report that the weaning caused no change in their pain state. RX 7, p. 16. Additionally, there are studies showing that opioids may worsen a neuropathic pain state. RX 7, p. 17. Petitioner does not require any modification of her car because "she was able to drive in the videos without adaptation." RX 7, p. 17. Some patients require such modifications but Petitioner does not. RX 7, p. 17.

Dr. Konowitz testified he examined Petitioner a third time on January 17, 2018. Petitioner exhibited the same posturing of the right arm and there were temperature, skin color and tropic changes in the right arm. RX 7, p. 18. The left wrist range of motion was normal. Petitioner was now complaining of her left thumb, not her left wrist. He diagnosed left thumb arthritis. He felt the previous left wrist problem was secondary to overuse but the left thumb arthritis was not. RX 7, p. 22. He found Petitioner capable of working eight hours per day at a sedentary job with no right arm usage. RX 7, p. 23. He saw no need for restrictions relative to the left hand or arm. RX 7, p. 23. He again concluded that Petitioner's opioid use should be addressed. One way to wean opioids is to use Suboxone. Other treaters might opt to reduce the opioids by 25% per month. RX 7, p. 24. You "can't just stop opioids because the body is used to" them but you can use Suboxone to provide a "soft landing" and "prevent withdrawal side effects." RX 7, p. 24. Weaning without Suboxone usage can be performed over four months. Dr. Candido will have a weaning protocol since he has weaned patients. No one can argue that Petitioner's current regimen is effective since she is reporting scores of 9/10 despite being on the equivalent of "hundreds [sic] of morphine." RX 7, p. 26. Weaning will occur at some point. The current CDC guidelines do not condone this type of usage. RX 7, p. 27. If Dr. Candido testified there is no reason to reduce Petitioner's pain medication, he would disagree. RX 7, p. 27. Petitioner has developed a physical dependence, as all people do. Petitioner's presentation is "very consistent with other patients who are not getting the benefit out of the opioid treatment." RX 7, p. 27. [The Arbitrator sustained Petitioner's Ghere-based objection to questions concerning the use of compound medications, RX 7, pp. 28-31.]

Dr. Konowitz opined that Petitioner should "finish off" the interscalene brachial plexus blocks. These blocks have not effectively controlled Petitioner's chronic regional pain syndrome. Additionally, there are risks associated with the blocks. As for using a block to open Petitioner's hand and cut her nails, the block involves freezing the entire arm. You could potentially do this a better way. Interdigital

blocks could be used, for example. Repetitive, long-term blocks can cause scar tissue and tracks. Dr. Candido is "technically performing the blocks fine" but he remains concerned about the number of injections into the same spot. RX 7, pp. 32-33.

Dr. Konowitz testified that Petitioner does not require an adjustable king mattress as a result of the accident. He has never prescribed such a mattress. RX 7, p. 34. He has also never recommended an air flosser to any of his patients. RX 7, p. 34. Normally, he does not recommend personal assistants for his one-armed patients. He does not believe Petitioner requires such an assistant. Petitioner can use her left arm and both legs. Her neck is not restricted. RX 7, p. 35. Petitioner does not require a walk-in shower. She is capable of stepping in and out of a bathtub. RX 7, p. 35. Petitioner is capable of taking public transportation. RX 7, p. 36.

Dr. Konowitz testified that Petitioner has sustained permanent disability to her right arm due to the accident. RX 7, p. 36.

Under cross-examination, Dr. Konowitz testified that Petitioner marked both her left thumb and wrist on a pain diagram when he first examined her. He is aware of Dr. Behnke's causation opinion but does not agree with it. RX 7, p. 39. He did not document any left wrist or left thumb examination findings in his first report. RX 7, p. 39. He is aware that the chronic regional pain syndrome involves Petitioner's dominant arm. Theoretically, Petitioner's left thumb arthritis could have been aggravated by overuse but the examination was consistent with tendinitis. Petitioner's left-sided symptoms occurred after she lost the use of her dominant arm. RX 7, p. 43. There is thus some causal relationship. RX 7, p. 43. It would be illogical to advise Petitioner to avoid using her left hand and arm because, without use, an arm begins to atrophy. He would not restrict Petitioner beyond what he would restrict another person in her age range. RX 7, pp. 43-44. Petitioner "can use the left hand unrestricted." It would be okay for Petitioner to use that hand to type, drive, or manipulate a "mouse." RX 7, pp. 45-46. As for the splint recommendation, "you do not use that splint for life." You "do not over-splint arthritis." RX 7, p. 46. Topical Pennsaid, which he previously recommended, works in the vast majority of patients. RX 7, p. 47. You can still use a painful joint but the pain should not be ignored. RX 7, p. 48. He would not restrict Petitioner from driving based solely on a single report concerning the thumb. RX 7, p. 49. He recommended that Petitioner stop the opioids and "have her fully functional at driving." Other patients drive while taking opioids but, for Petitioner, he would stop the medications. RX 7, p. 50. When he first examined Petitioner, he recommended she use the left arm up to 20 pounds. RX 7, p. 52.

Dr. Konowitz opined that all the treatment to date was reasonable, necessary and related to the work accident. RX 7, p. 53. That treatment would include compound creams. RX 7, p. 54. Only certain pharmacies formulate compounds. Major chains will not do it. RX 7, p. 55. He has stopped prescribing compounds because of problems relating to the ingredients. "You just don't know what you're getting." RX 7, p. 56. There was also a period during which intense overpricing of compounds occurred. RX 7, p. 56.

Dr. Konowitz testified that Suboxone "has some problems" because heroin users can end up on it. He has used Butrans many times in weaning patients. Suboxone and Butrans are both opioids but "the receptors are totally different than those in Fentanyl or Nucynta or Morphine or Norco." If Petitioner had walked in his office as a patient, he would have recommended weaning at the first visit. All treaters make their own choices. RX 7, p. 59. The only breach of standard of care that is approaching is with the duration of Petitioner's opioid usage and the current CDC guidelines. RX 7, p. 59. Dr. Candido is "right up to the edge" and "would not want to probably go further." Pain physicians have

some extra license but that does not mean the CDC guidelines are wrong. RX 7, p. 60. "The reality is that when you wean [patients] off [opioids], the pain scores are either the same or better." RX 7, p. 61.

Dr. Konowitz acknowledged he does not anticipate any improvement of the function of Petitioner's right arm. He saw one video in which Petitioner used that arm but he still restricted its use "because of the disease state." RX 7, p. 62.

Dr. Konowitz acknowledged that, in April 2015, Respondent asked him to comment on a specific job, referencing a job description that was supposedly enclosed, but he received no such enclosure. To date he has not received any job description. RX 7, pp. 63, 87. He believed the October 2015 surveillance showed right hand usage but, on re-watching the videos, during his deposition, he acknowledged he was mistaken. He agreed that the October 8 and 9, 2015 videos showed no use of the right arm other than a transient raise of the right hand. RX 7, p. 68. Petitioner reported multiple symptoms, including anxiety, depression, memory loss and difficulty concentrating, to him. RX 7, p. 70. Petitioner's right arm is sensitive to touch. Tolerance and addiction are two different disease states. Petitioner is a tolerant but not addicted patient. RX 7, p. 73. A spinal cord stimulator might have altered the outcome if it had been implanted early on but he would agree 150% that delayed implantation would not be helpful. A patient who wants to have a stimulator implanted has to undergo a psychological assessment. Petitioner is not the first patient to decline to undergo implantation. RX 7, p. 74. Dr. Candido's opinions do not prompt him to change his own. He has read the Marianjoy assessment. It did not prompt him to conclude Petitioner should not drive. RX 7, p. 78. He has never restricted a CRPS patient from using public transportation. RX 7, p. 78. Petitioner should be active and avoid isolating herself. RX 7, p. 78. Patients of his whose CRPS is as severe as Petitioner's take public transportation to get to his office. RX 7, pp. 79-80. CRPS is not a common disease but it is common in a pain practice such as his. RX 7, p. 79. Petitioner is "not too severely handicapped to drive" but her "medications could be adjusted to optimize that." RX 7, p. 81. The depression, constipation and memory loss that Petitioner reported "are all opioid-related." Those "all go away when you stop the opioids." RX 7, p. 82. The right arm symptoms are due to the CRPS while other symptoms are opioid-related. RX 7, p. 82. Petitioner "needs to be treated differently." He disagrees with Dr. Candido's opinion that Petitioner is limited to working four hours per day, with limited left arm use and the help of a personal assistant. RX 7, p. 83. Petitioner's left hand is "not a CRPS hand." Dr. Candido is imposing significant restrictions on the "non-CRPS hand." Patients who have no usage of one arm "modify. . . to take care of everything" and "do a very good job of having a quality of life." RX 7, p. 85. He has patients who use Lyft to get to work, based on a fixed monthly rate, but Petitioner can drive. RX 7, p. 86. Splints should be used intermittently. In Petitioner's case, a splint was not a permanent, long-term solution for the thumb. RX 7, p. 87.

On redirect, Dr. Konowitz testified he does not need a job description to place restrictions. RX 7, p. 91. The fact that Petitioner was actually using her left arm, not her right, on the videos does not prompt him to change his restrictions. RX 7, p. 91.

Dr. Kimberly Middleton testified by way of evidence deposition on January 25, 2019. RX 27. Dr. Middleton testified she is board certified in family medicine. She is licensed in Illinois and Indiana. RX 27, pp. 4-5. She attended medical school at the University of Illinois at Chicago, graduating in 1997. She underwent fellowship training in maternal-child health at West Suburban Hospital thereafter. RX 27, p. 5. She worked as a maternal-child physician for six years and then as both an occupational medicine physician and a family medicine practitioner. RX 27, pp. 6-7. Middleton Dep Exh 1. She also works for Vein Clinics of America, a company that performs vein procedures. RX 27, p. 22. She has been

performing utilization reviews for over six years. RX 27, p. 8. In Petitioner's case, Claims Eval hired her and CorVel retained Claims Eval. RX 27, p. 9. Claims Eval is accredited under URAC. RX 27, p. 9. She currently devotes less than 5% of her time to utilization reviews. RX 27, p. 10.

Dr. Middleton testified she generated a report in Petitioner's claim on September 19, 2019. She has not generated any other reports concerning Petitioner. RX 27, pp. 10-11. The amount she is paid to generate such a report depends on the length of the report. She believes she was paid less than $100 for the report she generated in Petitioner's claim. RX 27, p. 11. She performs between two and six utilization reviews per month. It probably took her four to five hours to prepare the report in Petitioner's claim. RX 27, p. 12. She reviewed about 103 pages of records in Petitioner's claim. The records she reviewed related to the medications under review. RX 27, pp. 13-14. She reviewed Dr. Konowitz's reports as well as Dr. Candido's records. She also reviewed Dr. Behnke's records. RX 27, pp. 29-30. She underwent phone-based training in URAC when she started working for Claims Eval. She has since been recredentialed. RX 27, p. 14. She has never read the URAC guidelines. She is not a pain management physician but, as an occupational medicine physician, she has worked closely with pain medicine specialists. RX 27, p. 15. When a CRPS patient came in through her occupational medicine practice, she would usually refer that patient to a pain management specialist or neurologist. RX 27, p. 16.

Dr. Middleton testified she is familiar with Official Disability Guidelines [ODG]. She has read portions of them. She was last employed in occupational medicine in December 2016. She provides services at MidMed, which just added a laser wellness center, and for "Missing Ink," a tattoo removal company. RX 27, pp. 18-19.

Dr. Middleton testified she has probably seen several hundred CRPS patients over the 21-year course of her practice. She has diagnosed the condition in her occupational medicine practice. RX 27, pp. 20-21. She does not provide medication management for patients with CRPS. RX 27, p. 22. She does not hold any teaching positions and is not on staff at any hospitals. RX 27, p. 23. She does not provide narcotic medication management at MidMed Services. She does provide narcotic medicine at Vein Clinics of America but "it's very rare." RX 27, p. 24. She is not an expert in the treatment of CRPS but she would say she is experienced. RX 27, p. 24. In the report she signed (Middleton Dep Exh 2), she attested she has the certification that typically manages the condition under review. She also attested she is currently providing direct patient care in this field of expertise. RX 27, p. 25.

Dr. Middleton acknowledged she did not review every medical record in this claim. Where she referred a CRPS patient out for care, she retained a "co-management position." RX 27, p. 28. She did not discuss the claim with the physicians who authored the records she reviewed. RX 27, p. 30. She based her conclusions on the ODG guidelines and her own knowledge. RX 27, p. 31. She non-certified the Fentanyl patches because "the records failed to support the need for it." There was a "lack of documentation on the efficacy" and a "lack of drug monitoring." There was "no urine drug screen." There was no recent pain management contract, no risk assessment and no documentation of improvement of pain and function. RX 27, p. 32. She "would have expected very clear documentation" on all of these. The urine screens are supposed to be performed to make sure the patient is taking that opioid alone and no other drugs. That is normally done every six months. She saw no documentation that the Fentanyl patches were benefiting Petitioner. Petitioner was "still in such severe pain." RX 27, p. 34.

Dr. Middleton testified she non-certified the Movantik because "there was no documentation of improvement of constipation." RX 27, p. 35.

Dr. Middleton testified she non-certified the Oxycodone-Acetaminophen for the same reasons she non-certified the Fentanyl patches. She also felt Petitioner should not be on both the patches and the Oxycodone-Acetaminophen. RX 27, p. 36. She saw no evidence of an opioid agreement or random monitoring to ensure that Petitioner was not obtaining narcotics from other providers. RX 27, p. 36. She also non-certified the Zolpidem or Ambien. That medication is to be used on a short-term basis for the treatment of insomnia. It is habit-forming, which is why you do not want to keep a patient on it for a long time. RX 27, pp. 37-38.

Dr. Middleton acknowledged she has never met Petitioner or treated her. RX 27, p. 39.

Under cross-examination, Dr. Middleton acknowledged that Petitioner's treating physicians documented pain complaints. RX 27, p. 40. However, there was no documentation as to how Petitioner responded to the pain medication. RX 27, p. 41. There is no evidence of drug-seeking behavior.

Dr. Middleton testified that, in her opinion, it is irresponsible to not perform urine screenings on a patient who is in chronic pain and taking multiple opioids because there are several cases where people have died due to opioid overdose. RX 27, p. 43. The ODG guidelines call for a treatment plan tailored to the patient but there is no real documentation of a plan in Petitioner's records. RX 27, p. 45. A signed pain contract is "nationally recommended." RX 27, p. 46. She reviewed 103 pages of records. RX 27, p. 46. Those records provided enough information for her to determine that the treatment was not consistent with national recommendations. RX 27, p. 48. She does not believe the care of Petitioner was necessarily safe. RX 27, p. 49. There was insufficient information in the records for her to be able to determine whether the opioids were necessary. RX 27, p. 50.

Dr. Middleton acknowledged that opioid usage can cause bowel obstructions. She was not aware Petitioner ended up with such an obstruction. She non-certified the Movantik because there was "no documentation of failure of first-line treatment." She did not opine that the medication is unnecessary. RX 27, p. 52. Records indicating Petitioner was unable to sleep due to pain would affect her opinion but she would still like to know whether Petitioner was benefiting from the Zolpidem/Ambien or developing a tolerance to it. RX 27, p. 53. ODG guidelines are not sanctioned by the state of Illinois. They are guidelines used by companies that work for insurance carriers. RX 27, p. 55. Other guidelines, including the California Medical Board guidelines, recommend that controlled substances be monitored monthly, quarterly or semi-annually. RX 27, p. 56. The guidelines do not take into account the uniqueness of a patient's circumstances. RX 27, p. 57. A patient would have to be weaned off opioids. RX 27, p. 58. The ODG guidelines allow for extenuating circumstances. RX 27, p. 58. A patient whose CRPS is so bad that her arm and hand have retracted could have such circumstances. RX 27, p. 58.

On redirect, Dr. Middleton testified that, while there is no evidence of Petitioner abusing opioids, there is also no indication that she was asked questions to determine whether she was in fact abusing them. RX 27, p. 59. If a patient shows no improvement over an extended period while taking opioids there should be a recommendation to wean the patient off that medication. RX 27, p. 60. There was nothing in the records she reviewed to show that Petitioner was assessed in terms of how she was handling the opioids. RX 27, p. 60. Colace and Mutamucil would be "first line" treatments for constipation. There is no documentation of Petitioner having tried these treatments. RX 27, p. 60.

Dr. Candido gave a supplemental evidence deposition on February 28, 2019, in response to Dr. Middleton's testimony.

Dr. Candido testified that interventional pain physicians do not rely on ODG guidelines. Instead, they rely on guidelines promulgated by the American Society of Interventional Pain Physicians. He is a member of the board of directors of this organization. PX 5a, p. 6.

Dr. Candido opined that some cases of chronic regional pain syndrome [CRPS] are so severe that guidelines would not apply to them. Evidence-based guidelines would not apply to Petitioner, who has "the worst case of CRPS" he has dealt with in 35 years. PX 5a, pp. 7, 16.

Dr. Candido opined that Dr. Middleton does not have the requisite training or qualifications to comment on any pain condition. PX 5a, pp. 10-12. From what he understands, Dr. Middleton is an occupational or family medicine physician who refers out patients like Petitioner to qualified individuals to manage pain. PX 5a, p. 15. In his opinion, it is reasonable and necessary for Petitioner to use Fentanyl. He disagrees with Dr. Middleton's testimony as to the lack of records, in the form of drug screening and monitoring, to support ongoing Fentanyl usage. No patient in his practice ever receives opioids without signing an opioid agreement. This agreement is updated at least one time per year. He reviews the Illinois Prescription Drug Monitoring Program website for all of his patients to ensure they are not receiving prescriptions elsewhere. PX 5a, pp. 17-18. Additionally, all of his patients undergo random urine toxicology monitoring. A patient who has been on a long-term opioid regimen who displays no known side effects undergoes less frequent monitoring. PX 5a, p. 19. He also takes a patient's mental status and respiratory rate into consideration when checking for possible overuse of medications. He knows that Petitioner has undergone urine toxicology monitoring because he has "personally escorted her to the restroom on more than one occasion for that purpose." PX 5a, pp. 19-20. For Dr. Middleton to say that monitoring should occur at six-month intervals is "arbitrary and capricious." PX 5a, p. 20. His office checks the Illinois Prescription Drug Monitoring Program website at each and every visit Petitioner makes. PX 5a, p. 21.

Dr. Candido testified it remains his opinion that the use of Fentanyl for Petitioner in the dosages he has ordered is medically reasonable and necessary. PX 5a, p. 21. Fentanyl is "80 to 100 times more potent than morphine on a milligram-to-milligram basis" but, used in a controlled-release preparation, it provides a nice background analgesic for individuals who have moderate to severe levels of chronic pain for whom the use of immediate-release medications should be reserved for either break-through pain or flare-up pain or incident-related pain, as in the present case." He would not modify any part of Petitioner's regimen based on Dr. Middleton's opinions. In 2016, the CDC came out with guidelines stating that family physicians such as Dr. Middleton should not be prescribing opioids to patients for more than five to seven days. PX 5a, pp. 22-23. The CDC said this because "they believed that people who practice family medicine . . . did not have the training, experience, certifications or knowledge upon which to use opioids reliably, reasonably and responsibly." PX 5a, p. 23.

Dr. Candido opined that Petitioner has responded to Fentanyl "in the sense that her pain has not escalated." Petitioner "hasn't made marked improvements on Fentanyl but certainly hasn't gotten worse in terms of her day-to-day functioning." PX 5a, p. 24.

With respect to Petitioner's Percocet usage, Dr. Candido disagreed with Dr. Middleton's non-certification based on the lack of monitoring/screening documents and the fact Petitioner was also using

Fentanyl. Dr. Candido testified he does not know what chart Dr. Middleton reviewed but all of his patients, including Petitioner, are assessed via the database. He also "personally know[s] of multiple urine toxicologies that have been conducted on [Petitioner's] behalf." The "first indication of a problem with opioids" is a behavioral change. He has carefully assessed Petitioner's behavior and has not noticed any indication of aberrant use of opioids. PX 5a, pp. 25-26. Additionally, Oxycodone, which is an immediate-release short-acting opioid, is a standard medication in the armamentarium of pain physicians because it provides for relief of break-through type of pain or flare-ups of pain or incident-related pain in contradistinction to Fentanyl," which is an extended-release medication. Dr. Middleton's opinion that urine drug screenings would be required every six months, with or without cause, is "arbitrary and capricious and not supported by any peer-reviewed literature." PX 5a, p. 27. Dr. Candido also disagreed with Dr. Middleton's conclusion that the Percocet has not been beneficial to Petitioner. Although Petitioner's upper extremity condition has worsened, "she maintains her functionality" and has not been hospitalized for pain. Nor has she had to seek emergency care on a recurring basis due to untreated pain. If Petitioner's drugs were removed, she would probably have to be in a custodial setting having her pain managed via an intravenous infusion. PX 5a, pp. 29, 32. When Petitioner has not received her medication, she has ended up in the Emergency Room. PX 5a, pp. 29, 32. Petitioner's intake has been 50% of the CDC guidelines and not excessive, as Dr. Middleton testified. PX 5a, p. 30. Opioids cannot cure Petitioner but they have allowed her to "maintain some level of activity on a daily basis." PX 5a, p. 33. Petitioner "remains active to the extent that she can." Despite his "proclamation that she ought not to operate a motor vehicle, a couple of times a week she feels compelled to do so because of her sense of isolation and her experience of cabin fever." PX 5a, p. 35. Petitioner has always been "completely appropriate," behavior-wise, during her office visits. PX 5a, p. 36. No mental cloudiness has been documented. PX 5a, p. 37. Of the six known side effects of narcotics, Petitioner has manifested only constipation, for which she takes Movantik. All the information Dr. Middleton would have required, in the form of vital signs and mental status checks, should have been in the chart. PX 5a, p. 40. It was "irresponsible" for Dr. Middleton to characterize Petitioner's care as "not safe." The ODG guidelines, which she cites, "cannot take into account the uniqueness of each patient's clinical circumstances." PX 5a, p. 42.

Dr. Candido testified he "undoubtedly" has a pain agreement with Petitioner. He physically assessed Petitioner at each visit. The first thing one notices with unsafe opioid prescribing is a reduction in the respiratory rate. Petitioner's rate has "always been within reasonable standards." PX 5a, p. 43. Dr. Middleton's opinions do not prompt him to modify any part of Petitioner's treatment plan. PX 5a, p. 44.

Dr. Candido testified he disagrees with Dr. Middleton's non-certification of Movantik because it has worked for Petitioner. Petitioner tried "first-line treatment," starting with prune juice, before moving on to Movantik. He did not bring his records to the deposition and cannot say what those records say as to the need for Movantik. If his note of January 27, 2017 says Petitioner had failed several over the counter constipation medications, that sounds accurate. PX 5a, p. 46.

Dr. Candido testified he also disagrees with Dr. Middleton's denial of Zopidem or Ambien for sleep. At some hospitals, Ambien is being used to manage chronic pain. Even using Ambien, Petitioner is only able to sleep two to three hours because any arm movement or contact immediately causes arousal. PX 5a, p. 50. He considers Petitioner's CRPS to be an "extenuating circumstance" that brings her outside of the ODG guidelines. PX 5a, p. 52.

Under cross-examination, Dr. Candido testified his opinion as to opioid weaning would not change if Petitioner was instructed to go to the Emergency Room by her attorney. He assumes that the opioid agreement Petitioner signed is in his chart. If his subpoenaed records do not contain that agreement, he cannot say why. Petitioner signed the agreement in his presence. PX 5a, p. 54. He would also assume the toxicology results would be in his records. He has treated Petitioner since July 24, 2014. He recalls escorting Petitioner to the bathroom twice but he does not know the actual number of urine screenings his staff did. PX 5a, p. 56. He reviewed the website searches when Petitioner came in. He does not know whether screenshots of the searches appear in his chart. He would disagree that Petitioner has exceeded the amount of time on pain medication. He would wean Petitioner off opioids only if something superior, which has not yet been developed, were available. There are always risks associated with long-term use of any medication. With opioids, the concern is for the possibility of hormonal shifts. There is also anecdotal evidence that immune function could change with long-term opioid use. In Petitioner's case, she has not manifested either of these contingencies. PX 5a, p. 60. The ODG guidelines apply to family practitioners, not him. PX 5a, p. 62. He does not use the American Society of Pain Disability guidelines.

Arbitrator's Credibility Assessment

Petitioner and her husband gave differing accounts as to when Petitioner stopped driving. Petitioner testified she gave up driving in November 2015, after a near-collision. Her husband testified she continued driving into early 2016.

The foregoing testimony was not credible. Anne Hegberg, the occupational therapist who evaluated Petitioner's driving skills at Marianjoy on October 17, 2016 described Petitioner as having last driven the previous week and "restrict[ing] her driving to short trips, nice weather and no tollway as well as when she is having a 'good day'." Hegberg noted that Petitioner's husband "was present throughout the evaluation." PX 6a, p. 3. In February 2019, Dr. Candido testified that Petitioner was continuing to drive against his advice.

Petitioner's propensity to ignore medical advice and lie about a subject tangential to her claim is very concerning. However, the fact she has continued driving, perhaps to the present day, does not mean it has been safe for her to do so. Nor does it eliminate the stipulated chronic regional pain complex involving her dominant right arm. Respondent's second examiner, Dr. Konowitz, testified he observed "transient motion" of Petitioner's right hand in one of the surveillance videos (RX 7, p. 68) but "still restricted" Petitioner's right arm usage "because of the disease state." RX 7, p. 62. While he found Petitioner capable of driving, based on the surveillance, he undercut that finding when he acknowledged that opioid weaning would likely enhance Petitioner's driving performance and that a driving assessment should be performed after the weaning has taken place.

The Arbitrator has considered the surveillance footage in assessing Petitioner's credibility. The initial footage dates back to the fall of 2015. Some of that footage shows Petitioner briefly using her left hand to put items in the trunk of a car, carry bags into a store, converse on a cell phone, pick up shoes, grab the handle of a wheeled suitcase that is rolling down a driveway and retrieve mail. On a number of days in September and October 2015, investigators viewed Petitioner for periods varying between four and eight hours and apparently saw no activity, since videos from those days were not offered into evidence. On three days in October 2015, Petitioner can be seen operating a vehicle through a Walgreen's drive-through facility and on the road. The footage is not lengthy. RX 8-10. While it is regrettable that Petitioner continued driving, against medical advice, putting herself and others at risk,

there is no evidence indicating she used her right hand or arm to perform any task or used her left hand for any strenuous activity. The footage obtained in March and April 2017 is very brief. The most significant portion shows Petitioner leaving a restaurant, with her right arm obscured under a coat or shawl, and using her left hand to open and close a vehicle door. RX 11-12.

The Arbitrator also notes that, in his initial reports, Dr. Konowitz, noted no inconsistent behavioral responses. He has never wavered from his opinion that Petitioner has a significantly disabling pain condition involving her dominant right hand and arm. In his last report, dated January 17, 2018, he declined to comment on whether Petitioner could be malingering or motivated by secondary gain, indicating that "in depth psychological testing" would be needed to determine this. RX 6.

Although the Arbitrator finds Dr. Konowitz more persuasive than Dr. Candido as to the need for opioid weaning (see further below), some of Dr. Konowitz's other opinions simply make no sense. For example, his testimony that Petitioner, in her current state, is capable of safely operating an unmodified vehicle is very much at odds with his concession that she has permanently lost the use of her dominant right upper extremity. The testimony is also at odds with the doctor's original finding, on August 13, 2014, that Petitioner "cannot operate a motor vehicle." RX 2. It also conflicts with his January 17, 2018 opinion that a driving assessment should take place after Petitioner is weaned off her current opioids. RX 6. At his deposition, Dr. Konowitz testified, all in one breath, that Petitioner is "not too severely handicapped to drive" but "her medications could be adjusted to optimize that," i.e., her driving ability. RX 7, p. 81. From a public safety perspective, a person with sub-optimal driving skills should not be driving. Dr. Konowitz was also less than persuasive when he conceded that Petitioner suffers from depression and memory loss (which he attributed solely to her opioid regimen, RX 7, p. 82) but could nevertheless function at a workplace eight hours a day. The Arbitrator finds it significant that Dr. Konowitz was not asked to comment on the feasibility of Petitioner performing a job requiring medical decision-making. There is no evidence suggesting he endorsed Petitioner as a candidate for the "bed control" tasks that Follenweider described as involving "critical" patient safety functions.

While Dr. Candido has treated Petitioner over an extended period, and clearly has Petitioner's confidence, his credibility on the issue of her opioid usage was significantly undermined by the complete absence of urine toxicology results in his chart. [Contrary to Dr. Middleton's assertion, the very lengthy charts [PX 4 and 13a] do contain one reference to a toxicology screening, on September 28, 2018, along with three pages of prescription monitoring records, but those records cover only the periods of June 27, 2016 through January 16, 2017 and February 23, 2018 through September 25, 2018.] When Dr. Candido testified a second time, after Dr. Middleton's deposition, he was fully aware that Petitioner's opioid usage, as well as his own charting, had come under closer scrutiny yet he did not have his records available and based his responses solely on his memory. He recalled escorting Petitioner to the bathroom but did not testify to any urine screening results. PX 5a, p. 46. He testified he did not believe he increased Petitioner's opioid dosage over time but the Fentanyl dose did in fact increase from 50 to 100 mcg. He testified it is reasonable for Petitioner to seek Emergency Room care when she runs short of opioids because she is seeking pain relief rather than "relief from withdrawal" (PX 5, p. 28) but some of the Emergency Room records reflect she sought patches to avoid withdrawal symptoms. He also lost authority, in the Arbitrator's view, when he characterized Petitioner as "maintaining her functionality" on her current dosage. That characterization is completely at odds with LaFrance's records, which describe Petitioner as a tearful, very depressed, barely functional individual. It is also at odds with his own note of September 28, 2018, which reflects Petitioner complained of "persistent constant burning pain" in her right arm, "5/10 currently but can be as bad as '20/10'." PX 4. Dr. Candido's last note of December 14, 2018 undermines his claim of close monitoring and creates a whole new set of problems

for the Arbitrator since it indicates that, up to that point, Petitioner had been obtaining her narcotic medication from Dr. Behnke rather than from him. [This appears to be the case, based on medication receipts in Dr. Behnke's chart and the website screenshots, which list Dr. Behnke, rather than Dr. Candido, as the prescribing physician.] It is only in this note that Dr. Candido mentioned an opioid contract, although no such contract is in the exhibit. He described Petitioner's pain as 9/10 and 10/10 and noted she refused to be examined. PX 13a. Dr. Candido testified Petitioner requires Percocet, in addition to the extended-release Fentanyl, "because it provides for relief of break-through type of pain or flare-ups of pain or incident-related pain." Petitioner did not acknowledge obtaining any such relief. She dreads being out in public, due to fear of being jostled, and experiences extreme reactions, as her family members acknowledged, if anyone touches her right arm or comes close to doing so. Dr. Candido also claimed that Petitioner has demonstrated no alterations that would prompt him to conclude she has a physiological or psychological problem with opioids. Petitioner, however, testified to significant weight loss along with a negative change in her outlook and ability to interact with others. This testimony finds support in LaFrance's records, the driving assessment and Dr. Sefer's notes. That the change is due in part to Petitioner's undisputed right arm condition is clear but, at this point, it is very difficult to separate the effects of that condition from the effects of the opioids. It appears to the Arbitrator that Petitioner's psychological state has devolved over time. She sees herself as a "mark" and views strangers as intent on stealing from her if she happens to venture out alone. She needs help yet finds that need embarrassing. The Arbitrator concludes that Petitioner has little to lose, in terms of pain control [see Dr. Konowitz's deposition, RX 7, p. 61], and potentially something to gain from a closely monitored change in regimen.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between her undisputed work accident and consequent regional pain syndrome and her claimed left hand and wrist conditions of ill-being?

Respondent stipulated to causation insofar as Petitioner's right upper extremity chronic regional pain syndrome condition is concerned. Respondent disputes Petitioner's claim of left wrist and thumb conditions resulting from overuse.

The Arbitrator finds that Petitioner established causation, via an overuse theory, as to a left wrist condition that required care but subsequently resolved. Petitioner did not testify to ongoing left wrist complaints. The Arbitrator further finds that Petitioner established causation via overuse as to her current left thumb and index finger conditions. In so finding, the Arbitrator relies on the following: 1) the fact that the undisputed chronic regional pain syndrome condition involves Petitioner's dominant right hand and arm, with that scenario enhancing the likelihood of overuse of the non-dominant contralateral side; 2) the March 20, 2014 form in Dr. Murray's records, which reflects a two-month history of left thumb pain secondary to "overuse of lt hand due to rt arm being bad" (PX 9); 3) Dr.Konowitz's August 13, 2014 recommendation of treatment in the form of Lidoderm and Pennsaid for a "left wrist overuse syndrome" (RX 2); 4) Dr. Bednar's opinion of February 17, 2015 that Petitioner's left thumb arthritis was aggravated by overuse secondary to inability to use the right hand" (PX 16); 5) the 2015 Athletico therapy records (PX 19), which document left thumb and later left index finger complaints due to "over working the left arm and hand" secondary to the inability to use the right hand; and 6) Dr. Konowitz's concession, during his deposition, that overuse could "theoretically" have aggravated an underlying condition of left thumb arthritis (RX 7, p. 42.).

Is Petitioner entitled to temporary total disability benefits from July 24, 2015 through April 18, 2019?

On July 23, 2015, Jason Henschel, a Respondent claims adjuster who testified before the Arbitrator, sent Petitioner's former counsel a letter indicating that temporary total disability benefits were being discontinued "based on the IME report from Dr. Howard Konowitz which indicates that [Petitioner] can work with restrictions, which [Petitioner's] department is able to accommodate." Henschel advised Petitioner's former counsel to have Petitioner contact Paris Partee via telephone "for return to work instructions." He indicated that Dr. Konowitz's report would be E-mailed shortly. RX 17.

The Arbitrator finds that Respondent, acting through Henschel, mischaracterized the opinions Dr. Konowitz expressed in his report of April 23, 2015. In that report, the doctor found Petitioner capable of "no right arm work graded," with no further explanation. In response to a question asking him to comment on an allegedly enclosed job description, he declined to comment, making it clear that he received no such enclosure. He also recommended significant care in the form of weaning "to address opioid dependence that has occurred." He specifically endorsed Dr. Candido's recommendation of a hand surgery consultation for the left thumb, although he felt Petitioner's chronic regional pain syndrome "remains too active for surgical intervention." RX 3, p. 20. At no subsequent point did Dr. Konowitz back off of his recommendation of weaning. Henschel should have recognized that, since Dr. Konowitz did not find Petitioner to be at maximum medical improvement, Respondent was liable for ongoing benefits, under Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010).

As for the separate issue of availability of work within the restrictions put forth by Dr. Konowitz, the Arbitrator views the proposed Cermak jail "bed control" task as inappropriate for Petitioner, in her current state, for reasons having nothing to do with its physical requirements. As Follenweider emphasized, "bed control" at a detention center such as Cermak is a task with significant liability potential in that it involves "clinical decision making" and "huge patient safety issues." A person performing the task must use clinical judgment to determine whether a detainee with specific medical needs is housed in an area where those needs can be met. For example, a detainee who is at risk of withdrawal must be kept in an area where he can undergo screenings. T. 3/14/19, p. 44. Petitioner is currently opioid-dependent due to her stipulated chronic pain syndrome. She herself is at risk for withdrawal symptoms, as evidenced by her Emergency Room records. It would be illogical, if not hazardous, for her to attempt to monitor others in the same condition. Dr. Konowitz admitted as much when he testified that Petitioner is experiencing depression and memory loss secondary to her opioid regimen. RX 7, p. 82. As noted elsewhere in this decision, Dr. Konowitz never endorsed the "bed control" task.

Is Petitioner entitled to reasonable and necessary incurred medical expenses?

Petitioner claims various incurred medical and prescription expenses along with $1,515.93 in out of pocket expenses.

With respect to the claimed medical and prescription expenses, the Arbitrator has examined the itemized bills and receipts in PX 37 and has compared them with the treatment records in evidence.

The Arbitrator declines to award the claimed Alexian Brothers Medical Center inpatient bill of $21,745.00 along with the Alliance Laboratory , Elk Grove and Elk Grove Radiology bills relating to Emergency Room and inpatient care rendered in early June 2016. Petitioner failed to meet her burden of proving that the need for this care stemmed from the work accident and/or treatment relating to that accident. While the records mention Petitioner's use of opioids, and while there is testimony reflecting

that opioid usage can lead to constipation and bowel obstructions, the discharge summary reflects that Petitioner complained of diarrhea and vomiting, not constipation, and believed she was suffering from diverticulitis. Petitioner reported having undergone a colon resection in 2010 secondary to diverticulitis. The discharge summary also reflects Petitioner was diagnosed with pneumonia after chest X-rays showed lung infiltrates. Dr. Behnke, who dictated the summary, wrote that Petitioner's symptoms, "were all related to ileus from the pneumonia." Petitioner did not offer any opinion indicating that the pneumonia, whether due to aspiration or a virus, resulted from the pain medication she took as a result of the work accident. The Arbitrator would have to engage in speculation to assume that Petitioner developed a lung condition secondary to her CRPS and/or CRPS-related medication.

The Arbitrator also declines to award the claimed bill of $10,633.75 from Rehab Assist, the company operated by Petitioner's first witness, Henry Brennan, a life care planner. The Arbitrator views his charges as litigation-related.

The Arbitrator defers any ruling on the claimed $1,159.72 bill of Steve Blumenthal, a vocational expert retained by Petitioner, having previously found that it would be premature to consider the issue of permanency, given the need for opioid weaning.

The Arbitrator awards the remaining medical and prescription expenses outlined in PX 37, subject to the fee schedule and with Respondent receiving credit for any payments it made toward these expenses. The Arbitrator recognizes there is a potential inconsistency between her award of the recently incurred Injured Workers Pharmacy opioid expenses (14,234.41) and her award of opioid weaning per Dr. Konowitz. While the Arbitrator finds Dr. Konowitz persuasive on this issue, she does not fault Petitioner for continuing to follow Dr. Candido's protocol up to the point when proofs were closed. It was Respondent's nurse case manager, not Petitioner, who selected Dr. Candido in the first place. Moreover, pain physicians can vary in their recommendations, as Dr. Konowitz acknowledged.

The Arbitrator also awards the claimed out of pocket expenses, other than the $272.12 clothing-related charge.

Is Petitioner entitled to companion care and an award of expenses associated with the care provided by family members since the accident? Is Petitioner entitled to transportation expenses?

Before addressing the complex issue of companion care, the Arbitrator again notes that Respondent does not dispute the diagnosis of chronic regional pain syndrome and agrees Petitioner has no functional use of her dominant right hand and arm due to that syndrome.

The Arbitrator, having considered the testimony of Dr. Candido, Dr. Konowitz, Henry Brennan, Petitioner and Petitioner's family members, along with the relevant appellate decisions, including Rousey v. Industrial Commission, 224 Ill.App.3d 1096 (4th Dist. 1992) and Burd v. Industrial Commission, 207 Ill.App.3d 371 (1991), awards Petitioner four hours of companion care per day (including weekends), at the rate of $21/hour, from August 1, 2017 through the hearing of April 18, 2019. The Arbitrator uses August 1, 2017 as the start date for this award because this is the approximate date on which Petitioner's husband, Jim Kosla, began his current job. Kosla credibly testified he switched jobs because he realized that the significant travel required of his former position was having a negative impact on Petitioner. He also credibly testified that, while his current job is technically full-time, he is unable to devote forty hours per week to the job because of Petitioner's needs. The Arbitrator declines to award full-time companion care because Petitioner did not sustain a brain injury (as did the claimant

in Rousey, a case in which the Court upheld the Commission's denial of spousal compensation), has some limited ability to use her left hand, is able to walk and climb stairs, does not require quasi-medical services such as wound care or injections and has, to her credit, learned to use various devices to help her dry her hair, don clothing and open containers. The effort she has made to remain as independent as possible is a good thing, in the Arbitrator's view. While four hours may seem random, it is a period within which a reasonably competent aide could pre-prepare food, help Petitioner bathe and get dressed and drive Petitioner to a store to perform an errand. Assistance for that duration would also allow Petitioner's husband to extend his workday and maintain his employment and salary. He has been the sole breadwinner, in terms of earned income, since the accident. The Arbitrator also notes Dr. Konowitz's concessions, during cross-examination, that there are certain activities requiring manual dexterity that Petitioner is unable to perform on her own due to her undisputed right upper extremity CRPS. Dr. Konowitz correctly referred to Petitioner as "one armed." He also conceded that the contractures and functional disuse resulting from the CRPS will not improve.

The Arbitrator has separately awarded prospective care in the form of supervised opioid weaning. See below. Dr. Konowitz indicated this weaning could be performed on either an outpatient or inpatient basis. RX 6. The Arbitrator believes that Petitioner's companion care needs would likely increase to full-time, or 40 hours per week, during the period of weaning, if the weaning was performed on an outpatient basis. Petitioner would have to travel to and from a facility and might have to deal with withdrawal symptoms. See further below.

As for the claimed transportation-related expenses, the Arbitrator awards only those expenses relating to Petitioner's trips to various Respondent Employee Health facilities to undergo return-to-work evaluations. The Arbitrator views these evaluations, performed by Dr. Sefer and others, as akin to examinations afforded by Section 12 of the Act.

Is Petitioner entitled to specific medical/dental devices in the form of an adjustable king mattress, air flosser, walk-in shower and compounding cream? Is Petitioner entitled to Movantik? Is Petitioner entitled to periodic blocks to allow for nail trimming and transient pain relief?

The Arbitrator relies on Dr. Candido and Petitioner's credible testimony concerning her pain-related sleep issues in awarding the adjustable king mattress prescribed on May 9, 2017. Candido Dep Exh 4. Petitioner testified her undisputed right upper extremity condition has adversely affected her posture in the sense that her right arm curves forward and feels heavy. Her medical records confirm that her right shoulder tends to rotate forward. She has difficulty lying in a conventional bed and often feels more comfortable reclining, since that allows gravity to take over.

The Arbitrator relies on Dr. Candido in awarding Movantik, the medication Petitioner has taken to deal with opioid-related constipation. The Arbitrator finds unpersuasive Dr. Middleton's testimony that this medication is not warranted. Dr. Candido credibly testified Petitioner tried more conventional remedies, including over the counter medication, without success, before he determined she needed Movantik. The Arbitrator recognizes that Petitioner's need for constipation-related medication may change once she undergoes opioid weaning.

The Arbitrator relies on the prescription of Dr. Leischner, Petitioner's dentist, in awarding the Philips air flosser recommended in April 2018. As Dr. Candido recognized, at his first deposition, one does not have to be a dentist to say, with authority, that it takes two hands to floss one's teeth. If an air flosser can help Petitioner avoid expensive dental care, it makes sense for her to have one.

The Arbitrator declines to award a walk-in shower because Petitioner already has two and testified she prefers baths over showers.

The Arbitrator also declines to award compounding creams or gels, as recommended by Dr. Candido. The Arbitrator has no dispute with the reasoning underlying the recommendation (see PX 5, p. 22) but Petitioner testified the creams are "tacky" and thus not compatible with her CRPS-related allodynia issues.

The Arbitrator finds it appropriate for Dr. Candido to continue administering blocks at intervals to allow for trimming of the nails of Petitioner's right hand and a brief period of total pain relief. Dr. Konowitz agreed with the need for nail hygiene, to prevent infections. He also agreed that Dr. Candido is performing the blocks correctly. He identified potential risks associated with repeatedly injecting the same area of the body but there is every indication Dr. Candido is aware of these risks and has explained them to Petitioner.

What is the nature and extent of the injury? Is Petitioner entitled to prospective medical and companion care?

The parties placed permanency at issue, with Petitioner seeking an award of permanent total disability and Respondent arguing in favor of an award under Section 8(d)2. The Arbitrator, however, concludes that Petitioner is not at maximum medical improvement and thus it would be premature to make a permanency finding at this time. It would take at least four months to slowly reduce her opioid intake, based on Dr. Konowitz's projection, and presumably additional time thereafter to re-check her pain ratings and determine her new medication needs.

The Arbitrator declines to address permanency and awards prospective care in the form of an evaluation by a pain physician who sub-specializes in opioid weaning, along with the program this physician recommends. In view of Dr. Candido's resistance, and the litigation-related role Dr. Konowitz has played to date, the Arbitrator recommends that the parties confer and reach an agreement as to a third, equally qualified pain physician, or "addictionologist" (RX 6), to perform the evaluation and oversee the weaning. If this physician recommends that the weaning be conducted in an inpatient setting, the Arbitrator awards all related expenses, including reasonable transportation expenses. If the weaning is performed on an outpatient basis, the Arbitrator awards full-time, i.e., 40 hours/week, companion care for its duration. The Arbitrator agrees with Dr. Konowitz that a new life care plan should be prepared "after medication management is addressed." RX 6, p. 29.

The Arbitrator recognizes that opioid weaning and/or transitioning to a different form of narcotic will not eliminate the chronic regional pain syndrome and contractures. It also may not affect the consequences of that syndrome, including the inability to drive safely. However, it might well improve Petitioner's psychological state along with the family dynamic.

The Arbitrator also awards prospective care in the form of psychological counseling. It appears, based on Dr. Behnke's records, that Claire LaFrance has moved or otherwise left her practice. The Arbitrator believes it is important for Petitioner to get back on track with sessions with another provider, preferably one who could work in conjunction with a psychiatrist who could address medication needs.

Is Respondent liable for penalties and fees?

The Arbitrator, having reviewed the entire record and considered the controlling case law, including McMahan v. Industrial Commission, 702 N.E.2d 545 (Ill. 1998) and Oliver v. IWCC, 2015 IL App (1st) 143836WC, finds that Respondent is liable for penalties under Sections 19(k) and 19(l), along with Section 16 attorney fees, based on its refusal to pay temporary total disability benefits from August 28, 2015 through the hearing of April 18, 2019. Respondent lacked an objectively reasonable basis for this refusal. Respondent's adjusters, Tekuila McGee and Jason Henschel, can readily be accused of "tunnel vision" since they simply "went with" Dr. Konowitz rather than examining "all of the existing circumstances," in handling this claim. Those circumstances included the work capacity opinions of Dr. Candido, a physician selected by Respondent's nurse case manager, and the opinions of Drs. Sefer and Ahmed. Additionally, it appears Henschel failed to thoroughly analyze Dr. Konowitz's opinions. In his letter of July 23, 2015 (RX 17), Henschel cited those opinions as the basis for discontinuing temporary total disability benefits but, in his report of April 23, 2015, Dr. Konowitz answered "**no right arm work graded**," with no further explanation, in response to a question asking whether Petitioner could return to work. Konowitz Dep Exh 2, p. 20. That he meant Petitioner was capable of a gradual return, with increasing right arm usage, is possible but that was not compatible with his finding of a completely dysfunctional right upper extremity. Dr. Konowitz also deferred addressing the propriety of a particular job since Respondent neglected to provide him with any formal job description. Konowitz Dep Exh 2, p. 20. [At his deposition, Dr. Konowitz confirmed he never received any such description.] Eventually, Dr. Konowitz concluded that Petitioner could only perform sedentary duty with no use of the right upper extremity. Respondent maintains it made such duty available to Petitioner in 2015 and 2016 but it is clear to the Arbitrator that Petitioner's ability to attempt such duty was conditioned on her being found fit for work by Dr. Sefer, Dr. Ahmed or another Employee Health Services physician. None of Respondent's witnesses refuted Petitioner's testimony that Employee Health "is where you have to go" to be released to work. T. 11/19/18, p. 318. The records in PX 60, to which Respondent did not object, make it clear Drs. Sefer and Ahmed did not find Petitioner fit for work. On June 10, 2016, Dr. Sefer stated: "I am not aware of any nursing job at Cermak that any nurse can perform with one hand." PX 60, p. 213. Based on those records, the Arbitrator cannot find that Petitioner refused to attempt to return to work. Petitioner took the initial step of presenting to Employee Health Services on several occasions, as required. The fact that non-physician human resource employees and adjusters conceived the "bed control" task as doable does not mean it was appropriate from a medical perspective.

At the last hearing, Respondent specifically stipulated that Follenweider's testimony concerning the availability of the "bed control" task at Cermak did not constitute a job offer. Even if Respondent had not so stipulated, the Arbitrator has previously found, based on Dr. Konowitz, that Petitioner, in her current state, is not fit for this task.

The Arbitrator recognizes that Respondent paid substantial permanency benefits, per her recommendation, after discontinuing the payment of temporary total disability in August 2015. Respondent contends it had no obligation to advance permanency but that contention runs counter to its stipulation, per Dr. Konowitz, that Petitioner is essentially "one armed." Amputation-related permanency benefits are payable as soon as the extent of the loss is ascertainable, assuming that accident is agreed, as it is in this case. See, e.g., Greene Welding and Hardware v. IWCC, 2009 Ill.App. LEXIS 1377 (4th Dist. 2009).

The period running from August 23, 2013 through April 18, 2019 comprises 295 weeks. 295 multiplied by $1,110.78 (the TTD rate, based on the stipulated average weekly wage) equals $327,680.10. Respondent has credit of $114,825.95 in TTD and $70,722.74 in permanency payments for

a total credit of $185,548.69. The net unpaid weekly benefits as of April 18, 2019 is $142,131.41. The Arbitrator awards $71,065.71 in Section 19(k) penalties, representing 50% of $142,131.41. The Arbitrator also awards Section 19(l) penalties in the maximum statutory amount of $10,000.00. Finally, the Arbitrator awards Section 16 attorney fees in the amount of $28,426.28, representing 20% of $142,131.41.

The Arbitrator declines to find Respondent liable for penalties and fees on unpaid medical expenses and claimed medical/companion care. Some of the denials were predicated on utilization reviews performed by physicians lacking the credentials and expertise of Drs. Candido and Konowitz but the Arbitrator is not able to conclude that Respondent acted in an objectively unreasonable manner in deferring to those reviews.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Harvey,

Petitioner,

vs.

21IWCC0063

NO. 12WC 16123

Northern Illinois University Foundation,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 2, 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.

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: FEB 11 2021

Stephen J. Mathis

L. Elizabeth Coppoletti

Thomas Tyrrell

SJM/sj
o-2/3/2021
44

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HARVEY, RONALD
Employee/Petitioner

Case# 12WC016123

NORTHERN ILLINOIS UNIVERSITY FOUNDATION
Employer/Respondent

21IWCC0063

n 12/2/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation ommission in Chicago, a copy of which is enclosed.

the Commission reviews this award, interest of 1.58% shall accrue from the date listed above to the day efore the date of payment; however, if an employee's appeal results in either no change or a decrease in this vard, interest shall not accrue.

copy of this decision is mailed to the following parties:

)97 SCHWEICKERT & GANASSIN
RED GLASSMAN
01 MARQUETTE RD
ERU, IL 61354

53 ASSISTANT ATTORNEY GENERAL
0 W RANDOLPH ST 13TH FL
HICAGO, IL 60601

99 CMS RISK MANAGEMENT
1 S SEVENTH ST 8M
) BOX 19208
RINGFIELD, IL 62794-9208

04 STATE UNIVERSITY RETIREMT SYS
) BOX 2710 STATION A
IAMPAIGN, IL 61825

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

DEC 2 - 2019

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

STATE OF ILLINOIS)SS.

COUNTY OF Kane)

21IWCC0063

- [ ] 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

Ronald Harvey
Employee/Petitioner

v.

Northern Illinois University Foundation
Employer/Respondent

Case # 12 WC 16123

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 **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. [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 _____

21IWCC0063

FINDINGS

On **1/12/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**39,155.48**; the average weekly wage was $**752.99**.

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

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

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

Respondent shall be given a credit of $**3,657.46** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**3,657.46**.

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

ORDER

Respondent shall pay Petitioner reasonable and necessary medical services of $30,506.08, as provided in Section 8(a) and 8.2 of the Act and subject to the fee schedule. Respondent shall hold petitioner harmless from any request for repayment by the group medical provider, as set forth in the Conclusions of Law attached hereto.

Respondent shall pay Petitioner temporary total disability benefits of $501.99/week for 17 3/7 weeks, commencing 4/9/12 through 8/8/12, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $3,657.46 for Temporary Total Disability benefits that have been paid, as set forth in the Conclusions of Law attached hereto.

The Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 12.5% loss of use of the right hand and 7.5 % loss of use of the left hand pursuant to §8(e) of the Act, as set forth in the Conclusions of Law attached hereto.

Respondent shall pay Petitioner compensation that has accrued from January 12, 2012 through August 20, 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

11/26/2019
Date

DEC 2 - 2019

Procedural History

This case was tried on August 20, 2019. The disputed issues were whether Petitioner's sustained an accident that arouse out of and in the course of his employment, whether Petitioner's current condition if ill-being is causally related to the injury, whether Respondent is liable for medical services, whether Petitioner is entitled to TTD benefits and the nature and extend of Petitioner's injury.

Findings of Fact

Ronald Harvey (hereinafter referred to as "Petitioner") testified that he started working for Northern Illinois University (hereinafter referred to as "Respondent") on May 1, 1998. Petitioner testified that he is an offset press operated and he works 7 ½ hour shifts. Petitioner testified that three to four hours of his day was spent loading reems of paper into the printing press. Once he would feed a load into the press, then that load would run on a printing press. Petitioner testified that typically the loads would consist of five thousand to eight thousand sheets of paper. Petitioner testified that he would grab twenty pounds of paper at a time, which was around one hundred sheets of paper. Petitioner would fan the papers to get some air separating them as he feed them into the machine. Petitioner testified that he would grab hands full of paper and bend them, lift them and separate the sheets of paper, so air could get between the sheets of paper and the machine would grab a single piece of paper at time. Petitioner testified that during the feeding process, he would use his hands in this force flex position between three to four hours a day. Petitioner would also have to turn over the paper and load it back into the press to print on the other side of the paper. Petitioner testified when he was not feeding the machine, he would have to use his hands in other jobs such as using the cutter to cut down the sheets to the proper size to feed into the machine.

Petitioner testified that he started to notice problems with his hands and it was becoming difficult to perform his job, so he scheduled an appointment with his family doctor.

Petitioner first sought medical treatment with his family physician, Dr. Shah, on January 12, 2012. Dr. Shan referred Petitioner to Dr. Korcek at Rockford Orthopedics. Petitioner first saw Dr. Korcek on April 9, 2012. Dr. Korcek took Petitioner's history in which Petitioner stated that he was "jogging paper, feed through the press, by the thousands". Petitioner complained of bilateral issues with respect to his wrists and hands. Dr. Korcek diagnosed Petitioner with bilateral carpal tunnel syndrome, osteoarthritis of the right and left CMC joints of the thumbs.

Dr. Korcek stated that Petitioner's bilateral carpal tunnel syndrome and bilateral thumb CMC joint arthritis were aggravated by repetitive impinge/grip activities at his work. Dr. Korcek recommended a bilateral upper extremity EMG. Petitioner was provided with work restrictions that day. Petitioner testified that his employer did not have work within those restrictions and he was paid TTD benefits. (Px. 2)

Petitioner returned to Dr. Korcek on April 11, 2012. Dr. Korcek reviewed the EMG study and interpreted it as showing a moderate to severe right and moderate left median nerve conduction delay at the wrist. He also found evidence for mild right ulnar nerve conduction delay across the elbow which would be cubital tunnel syndrome. He reiterated Petitioner's diagnoses as bilateral carpal tunnel syndrome which was confirmed by EMG, mild cubital tunnel syndrome on the right, and osteoarthritis of right and left thumbs at the CMC joint. Dr. Korcek stated that both the bilateral carpal tunnel syndrome and the bilateral thumb CMC arthritis were both work related. Surgery was recommended. (Px. 2)

Petitioner sought a second opinion with Dr. Blair Rhode at Orland Park Orthopedics on May 10, 2012. He was referred to Dr. Rhode by his family physician, Dr. Shah. Dr. Rhode took a history from Petitioner and examined both wrists. Dr. Rhode diagnosed Petitioner with work related bilateral carpal tunnel syndrome secondary to his highly repetitive position as a press operator. Dr. Rhode concurred with Dr. Korcek that Petitioner needed surgery. (Px. 3)

On June 6, 2012, Petitioner was seen by Dr. Michael Vender pursuant to Section 12 of the Act. Dr. Vender reviewed medical records, examined Petitioner, diagnosed him with bilateral carpal tunnel syndrome, and degenerative arthritis of is CMC joints at the thumb. He reviewed the job report for job title press technician, which was introduced into evidence as Respondent's Exhibit #1. Dr. Vender opined that based on the job report, he did not find a causal relationship between Petitioner's thumb or wrist issues and his work. Dr. Vender did not believe the work was repetitive enough, even if heavy, to be contributory to the carpal tunnel syndrome. Dr. Vender agreed that surgery for both wrists was necessary. (Rx. 2)

Petitioner underwent left carpal tunnel surgery with Dr. Rhode at South Chicago Surgical Solutions on June 12, 2012. (Px. 4). Petitioner's TTD benefits terminated on June 20, 2012 based upon Dr. Vender's report.

Petitioner testified that returned to Dr. Korcek because he was within his group medical HMO and Dr. Rhode was not. Petitioner returned to Dr. Korcek on July 25, 2012 and underwent

injection into his right thumb. Dr. Koreck also recommended right carpal tunnel release which Petitioner underwent on July 26, 2012. (Px. 2 & Px. 6)

Petitioner was eventually released to return to work by Dr. Korcek, full duty, on August 8, 2012. Petitioner saw Dr. Korcek one more time on September 29, 2014 for another injection into his right thumb. Petitioner has sought no further treatment regarding this case.

Petitioner has testified that he still has ongoing issues with his hands which include tingling and numbness. Petitioner testified that he retired because he couldn't continually lift the sheets of paper anymore. Petitioner testified that after he retired his symptoms improved but they did not go away. Petitioner testified that after retiring, he started working as an over-the-road truck driver which does not require any lifting.

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*, 225 Ill App. 3d 706 (1992).

In support of the Arbitrator's decision relating to issues "C & F", the Arbitrator concludes 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). There is also no legal requirement that a certain percentage of claimant's workday be spent on repetitive tasks to establish the repetitive nature of a claimant's job duties. *Edward Hines Precision Components v. Indust. Com'n*, 356 Ill.App.3d 186, 193-194 (2005). As these

principles apply to our case: 1) accidents include bodily breakdown from usual work tasks; and 2) causation is established when the tasks contribute to an injury.

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 he sustained an accident that arose out of and in the course of his employment by Respondent and that Petitioner's current condition of ill-being is causally related to his injury.

The Arbitrator notes that Petitioner had to repetitively feed the printing press with papers for up to four hours on every eight-hour shift. The undisputed testimony of Petitioner was that he had to use his wrists in a forced flexion position in order to feed the 20 pound plus reems of paper into the machine. The Arbitrator finds the opinions of Drs. Korcek and Rhode more persuasive than the opinions of Dr. Vender. Dr. Korcek stated that Petitioner's bilateral carpal tunnel syndrome and bilateral thumb CMC joint arthritis were aggravated by repetitive impinge/grip activities at his work. Dr. Rhode diagnosed Petitioner with work related bilateral carpal tunnel syndrome secondary to his highly repetitive position as a press operator.

Dr. Vender opined that even in the presence of heavy lifting, if only performed on an intermittent basis, would not be contributory to carpal tunnel syndrome. The Arbitrator notes that Dr. Vender's opinions appear to be based primarily upon the Demands of Job Report for a press technician and not upon information provided by Petitioner. Dr. Vender's report does not contain a history, elicited from Petitioner, regarding the repetitive activities Petitioner performed. Dr. Vender does not reference any activities Petitioner performed that was elicited from Petitioner. Dr. Vender's report does not indicate that he showed Petitioner a copy of the Demands of the Job report to determine whether Petitioner agrees with the report. 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).

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).

As the Arbitrator has found that Petitioner's condition ill-being was related to his employment, and the only dispute with respect to the medical bills was liability, the Arbitrator awards Petitioner $30,506.08 in outstanding medical bills and out-of-pocket payments as indicated in Petitioner's Exhibit #1. In addition, Respondent shall hold Petitioner harmless from any requests for repayment from the group medical provider in this case for treatment related to Petitioner's injuries.

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 MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at 28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, *but also that he was unable to work*. *Gallentine*, 201 Ill. App. 3d at 887 (emphasis added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

Petitioner claims to be due TTD benefits from April 9, 2012 though August 8, 2012. Petitioner seeks a credit for TTD benefits paid in the amount of $3,657.46 in TTD benefits are awarded. (Arb. Ex. #1). Petitioner disputed responsibility for TTD benefits based upon liability. Dr. Korcek issued work restrictions on April 9, 2012. (Px. 2). Petitioner started receiving TTD benefits at that time. Petitioner's TTD benefits were terminated as of June 20, 2012. Petitioner was not released to return to work until August 8, 2012 or 17 3/7s weeks later. As such, the Arbitrator awards Petitioner 17 3/7s weeks of TTD benefits less a credit for the $3,657.46 for TTD paid.

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 that Petitioner was employed as a printer and was able to return to work but retired because he was experiencing difficulties performing his duties. As such, the Arbitrator assigns significant 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 51 years old at the time of the accident. Petitioner was nearing the end of his work life and the

ability to recover from injuries is compromised with age. 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 are supported by the treating medical records. As such, the Arbitrator assigns significant weight to this factor in determining the extent of permanent partial disability.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 12.5% loss of use of the right hand and 7.5% loss of use of the left hand pursuant to §8(e) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM McWILLIAMS,

Petitioner,

vs. NO: 12 WC 22502

ROCKFORD MASS TRANSIT DISTRICT,

Respondent.

21IWCC0064

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator and awards benefits accordingly.

I. FINDINGS OF FACT

Petitioner filed two claims that proceeded to a consolidated hearing before the Arbitrator. In the above-captioned claim, Petitioner alleges that he sustained a repetitive trauma injury (carpal tunnel syndrome) to his bilateral hands and wrists on January 23, 2012. In the consolidated claim, Case No. 15 WC 35557, Petitioner claims that he sustained a repetitive trauma injury on August 15, 2013 affecting right thumb and elbow. A separate decision will concurrently issue in Petitioner's consolidated claim.

A. Background

William McWilliams (Petitioner) testified that he was working for Rockford Mass Transit (Respondent) in Rockford, Illinois. He was employed by Respondent as a Bus Operator/Bus Driver for over 20 years from approximately 1996 or 1997 until his retirement in February or March of 2017.

In this position, Petitioner testified that he worked at least five days a week and eight hours a day; though he could work up to 18 hours a day if needed. His job duties required him to use extensively his hands and fingers. Petitioner was asked about the particular activities that were required relating to his hands and fingers. He responded "[t]he steering wheel for driving with the road conditions, the vibration, opening and closing doors. In the past, we use to manually punch transfers, paper transfers, anybody getting those throughout the day. Change route signs up above. We used to change them with Rolodexes." Petitioner testified that the levers, handles, and gauges on the buses that he drove were all in the same place, and required slightly different pressures, but most of them were basically the same. In a typical eight-hour day, Petitioner testified that he would be "steady driving" the bus for about six to six and a half hours.

Petitioner testified that he had to adjust the steering column with a lever on the right. He explained that, depending on the shape and size of the driver, the steering column could be adjusted. To adjust the steering column, Petitioner testified that he would pull up a lever to make the steering wheel come up or down and another lever would make the steering wheel go forward and backward. He would bend his right wrist to raise up the lever. Petitioner also used his right hand to operate the button to raise and lower the driver's seat as well as a knob below. Additionally, there was a lever located between the legs below the seat to tip the seat. Petitioner explained that he had to squeeze it upwards with his fingers and sometimes he had to apply force because it would not release. Petitioner would make these adjustments once for each bus he drove, about three or four times a day.

Petitioner also used both hands on the steering wheel at about shoulder width, which was 15 to 18 inches wide. To drive and steer the bus, Petitioner had his hands around the steering wheel at the "10:00 and 2:00" positions. However, sometimes when turning a corner he would "go flat" resting his hands on the wheel and rotate it rather than keep jerking the wheel. Petitioner would do this when his hands were hurting so bad to relieve the pressure when they would start tingling really bad.

With regard to vibration, Petitioner testified that his hands and arms would shake because there was a lot of road vibration, potholes, and things of that sort. Some of the buses would be "shaking pretty good" if the wheels were not balanced correctly. If conditions were bad, Petitioner had to grip the steering wheel tighter for obvious safety reasons.

With regard to changing route signs, he testified that he used a "Rolodex" that controlled the sign on the front of the bus that changed streets and routes to identify where the bus was going for patrons. In order to change the sign in years past before the buses had buttons or computers for this purpose, Petitioner would have his right arm elevated above his head and rotate his wrist from left to right to utilize a nob on the Rolodex. He estimated that he had to change the route information 16 times a day.

Petitioner also testified that he had to use his left hand, fingers, and wrist in applying the hand-operated parking brake located on his left side. He explained that it is a "pull up" parking brake "that gets pretty tough sometimes and the nob [sic] is pretty small so you would have to grip and jerk it up." Petitioner testified that he had to stick his fingers on both sides and his thumb behind it and pull up the brake. To do so, he would apply pressure. When he wanted to release the brake, he had to push the brake down to move. In some buses, Petitioner explained, it was pretty easy to release the brake whereas in others "[w]hen the nobs [sic] got sticky, it got pretty tough." Petitioner testified that he had to engage and disengage the brake approximately 75 to 100 times a day.

With regard to opening and closing doors, Petitioner explained that there is a handle on the left side that he would turn forward, rotating his wrist to the left to open the door. To close the door, Petitioner would turn the handle back toward him rotating his wrist to the right. In years past, the handle was much bigger, but it is now about three to four inches. Petitioner was asked to describe the pressure used to grip and utilize the handle. He responded that it was much more difficult in years past, and harder to turn, but then the handles became smaller and there was an air assist or something that required less pressure to turn the handle. Petitioner estimated that he would do this about 500 times a day. Petitioner acknowledged that he did not have to stop at designated stops if no passengers were waiting.

Petitioner further testified that transfer tickets were used for passengers getting off one bus to get onto another bus. The transfer tickets were placed on a steel grip up above. He would tear a transfer off, put the bus to which [the passenger] was going, punch the route, and punch the time. Petitioner testified that tearing the transfer ticket off required bending his right wrist. Punching the transfer required forceful gripping and grasping of the hole punch with his right hand. Later, Respondent began using printed tickets. However, from the beginning of his employment until he went to the doctor in 2012, Petitioner issued manual punch transfer tickets. He estimated that he would have to punch 500 transfers a day.

Petitioner also testified that he occasionally helped handicapped passengers, which included helping them on and off the bus, putting ramps in and out, raising and lowering seats, and strapping down the wheelchairs. The ramps were automated, but did not always work. Petitioner described the steps involved in helping a disabled passenger off the bus or onto the bus. In the former case, Petitioner would have to get off to reach down and grab a very small clip [releasing] the ramp that he would then manually pull out, place on the curb, and then go back and unhook the disabled passenger. Once the passenger was off the bus, Petitioner testified that he would have to go out on the curb, pick up the ramp, and put it back. Petitioner testified that he could get up to 12 such passengers a day. He explained that these activities required the use of his hands including rotation, flexion, and force. He had no way to estimate how many times a day he engaged in these activities on a bus with a malfunctioning ramp, but he explained that there were additional conditions that required him to use something to pry the ramp free or dislodge something stuck underneath the ramp. Petitioner explained that, with the grime of people's feet, road dust, and all that, the ramps would sometimes "stick pretty good."

Petitioner was asked about the timing of the automation of the buses. He testified that the buses went by year and explained that the 1995 buses were kept around for approximately 12 years. There would be an overrun of older buses in that period. Petitioner acknowledged that the route designation, seat, and steering wheel adjustments later became automated. He estimated this was with the 1995 buses. Petitioner confirmed that from the time he began working for Respondent until he went to the doctor on January 23, 2012, he operated a mix of buses from the eighties and nineties.

B. Videos and Job Description

Petitioner offered a video into evidence that was taken by his grandson of him driving a bus in October of 2016, showing the driving conditions and vibration of the steering wheel that he encountered during his career with Respondent. The vibrations are significant when Petitioner was traveling on what appeared to by a typical city street and are visible throughout the video, but lessen when Petitioner drove on what appears to be a smoothly paved street. PX5.

Petitioner acknowledged that the video did not show him dispensing any transfers. However, he explained that the transfer function became automated approximately five years from the time that he retired in 2017, around 2012. Petitioner also acknowledged that the video did not show any passengers getting on or off the bus. Petitioner also acknowledged that this bus had an automated seat.

Respondent also offered a video into evidence taken in a parking lot at a bus depot on July 8, 2016. Petitioner testified that the conditions then and there were ideal whereas they are much worse and not ideal on the street. Petitioner testified that the bus he was driving on that day was under very different conditions from those he encountered on a day-to-day basis. RX5.

In Respondent's video, Petitioner demonstrated how he manually pulled out the ramp. The parking brake did not need to be deployed every time he picked up a passenger. Petitioner was asked whether the type of bus in this video was a Gilling 2009, and he believed that it was. When asked if that was a bus that he would have regularly operated on his shift Petitioner replied that Respondent did not have just one bus vintage, or one type of bus. He explained, "I think it's like a three different 12 year period [that] they rotate buses, but in the mornings when you come in and sign in, they have a bus number next to it and that bus number comes because they got 50 buses in one garage so whatever lands in your spot, that's the one you take. So it could be any number of buses."

A Job Analysis Report prepared by Respondent in 2006 indicates various physical demands at the light-to-medium physical demand level including frequently reaching, opening and closing doors (1/3 to 2/3 of day), and constant handling (greater than 2/3 of day). PX4. Pushing/pulling was "medium" and "occasional (up to 1/3 of the day)." Drivers are responsible for assisting handicapped passengers on and off a bus. The driver is required to properly restrain

a wheelchair with floor and seat belts. The description also sites pushing/pulling up to 25 pounds of force pushing/pulling seats to accommodate wheelchairs.

Petitioner agreed that he had a pending claim[1] related to an occupational exposure case for which he was hospitalized for three days and after which he returned to regular duty work.

Regarding his prior medical treatment, Petitioner acknowledged that he had treated with Dr. Dietz previously to whom Petitioner relayed his medical history. Petitioner acknowledged that he underwent treatment in 1999 for a right and left rotator cuff tears[2] that were surgically repaired by Dr. Nyquist. Petitioner acknowledged that he weighed considerably more in 2001, 385 pounds, compared to after a gastric bypass surgery performed that year. Petitioner also acknowledged undergoing bilateral total knee replacements in 2007 followed by bilateral knee surgeries in 2008 or 2009 after which he was off work for a year or so. Finally, Petitioner acknowledged that he underwent an EMG five years prior to seeing Dr. Dietz in 2012, and some conservative treatment, but had no surgery thereafter.

While he could choose routes because of his seniority, he could not choose buses. He did not have CTS surgery prior to 2012. His condition continued to deteriorate until he sought treatment in 2012. Petitioner acknowledged that he treated with Dr. Dietz for wrist complaints prior[3] to 2012. Prior to 2012, Dr. Dietz prescribed an injection, exercise, and wrist supports.

C. Accident

Petitioner testified that in January of 2012, he noticed that his hands and arms "were constantly getting worse" and he could not sleep anymore. He explained that he would be driving and have to put his hands down the side and shake them to get the pain out. Petitioner experienced pain in his hands as well as numbness and tingling. The condition progressively got worse, day by day. He noticed these symptoms after being at work for a short period of time and throughout the rest of the day. Then the symptoms would ease up and when he laid down at night the symptoms would come back full force.

D. Medical Treatment

On January 23, 2012, Petitioner saw Dr. Dietz for the problem with his hands. Petitioner testified that he did not know what was happening with them and they finally got so bad that he sought treatment. Petitioner agreed that Dr. Dietz is a rheumatologist and acknowledged that when he saw Dr. Dietz he had a known history of carpal tunnel syndrome for many years and

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[1] Petitioner lodged an objection to this line of questioning, which was overruled. The Arbitrator determined that the pendency of another claim was relevant.
[2] Petitioner lodged an objection to this line of questioning, which was overruled. The Arbitrator determined that it was relevant as [the prior treatment] involved an extremity.
[3] While Petitioner testified that he had pre-accident treatment when asked about it on cross-examination, no pre-accident medical records were submitted into evidence.

had an EMG five years earlier. He acknowledged that he told Dr. Dietz that he had symptoms both at home as well as at work.

Dr. Dietz's records reflect Petitioner's return after a five-year absence with a report of problems in his hands worsening over the last two or three years and becoming increasingly painful especially his thumbs with frequent numbness and tingling after prolonged bus driving. Petitioner reported that he often had pain in his thumbs. Dr. Dietz noted a history of carpal tunnel syndrome over many years, and an EMG performed five years ago. He had bilateral knee replacements and he did poorly. He needed "a patellar button done in Madison on the left knee, considering one on the right knee." He had occasional neck pain and had an epidural/facet injection in 2010.

On physical examination, Dr. Dietz noted bilateral basal joint irritability with loss of full abduction and bilateral flexor tendon trigger fingers in both thumbs. X-rays showed marked arthritis in Petitioner's hands bilaterally. Dr. Dietz diagnosed probable bilateral progressive carpal tunnel syndrome, osteoarthritis of the thumb, cervical spondylosis, bilateral knee replacements, and history of gastric bypass surgery. He administered two injections into both of Petitioner's thumbs at the basal joint and trigger flexor tendon, and ordered bilateral EMGs.

On February 13, 2012, Petitioner presented to Dr. Vo on referral from Dr. Dietz. He reported that he had numbness in the index, middle and ring fingers bilaterally over the past few years and pain in his thumbs. He had much relief after the MCP joint injection. The EMG was abnormal and Dr. Vo found that it showed evidence of "severe bilateral median demyelinating entrapment neuropathy at the wrist (carpal tunnel syndrome) bilaterally."

Petitioner testified that after receiving these test results he told Mike Hammonds, the head supervisor and person over safety, that he had carpal tunnel that his doctor called chronic carpal tunnel. He did not think that he specifically attributed his condition to his job or anything, but Petitioner told Mr. Hammonds that he could not do this anymore, and that it was bothering him more every day that he drove. Respondent sent him to a doctor for evaluation after which he received a denial of his Workers' Compensation claim.

Two days later on February 15, 2012, Petitioner returned to Dr. Dietz who noted that Petitioner had severe bilateral CTS. "Further discussion with Dr. Vo strongly suggested the possibility that his [CTS] is probably caused by his work as a bus driver." Petitioner was thinking about filing a WC claim. He was still working as a bus driver. Injections in his hands were somewhat beneficial except for flexion at the right thumb. Dr. Dietz diagnosed Petitioner with carpal tunnel syndrome noting that Petitioner was very symptomatic. He also diagnosed trigger finger, right thumb. Dr. Dietz injected Petitioner at the right thumb flexor tendon and referred him to neurosurgery.

On May 31, 2012, Petitioner presented to Dr. Brian Bear at Rockford Orthopedic Associates. Petitioner reported bilateral wrist pain on the radial side at the base of the thumb

with radiation of pain into the hand with numbness, tingling and burning in the thumb, index, long and ring fingers. The left wrist was worse than the right. The pain has been present "ever since over 2 years getting worse in the last 3-4 months." Petitioner also reported that the symptoms are worse with gripping, grasping, driving, opening a banana or holding the phone. Dr. Bear diagnosed EMG confirmed, severe bilateral carpal tunnel syndrome. He also diagnosed thumb osteoarthritis CMC. Dr. Bear found that surgery was indicated for the carpal tunnel syndrome, which would be performed on the left hand first.

Petitioner testified about this visit with Dr. Bear. He explained that Dr. Bear asked him about the purpose of his visit and he responded that "from driving it's killing me. I've got to have something done, some relief." Dr. Bear asked Petitioner what he did for a living and Petitioner described his job to the doctor. Petitioner testified that Dr. Bear reviewed his EMG and then told him that he had severe bilateral carpal tunnel syndrome.

Petitioner testified that he worked with pain until June 11, 2012. Then, on June 11, 2012, Dr. Bear performed a left hand mini open carpal tunnel release of the transverse carpal ligament. Petitioner testified that Dr. Bear then placed him off work for six weeks.

On August 1, 2012, Dr. Bear performed a right mini open carpal tunnel release of the transverse carpal ligament. Petitioner then remained off work for six weeks post-operatively.

On September 10, 2012, Petitioner returned to Dr. Bear reporting improvement in his symptoms. He reported 0-3/10 pain and that he was no longer wearing a splint. Petitioner's symptoms were much improved postop. Dr. Bear released Petitioner to work without restrictions and released him from treatment to return as needed. Petitioner testified that he then returned to work in September of 2012.

On August 15, 2013, Petitioner returned for recheck of his right hand. Petitioner testified that he was having problems with his right thumb and right first finger, and he was experiencing pain in his right elbow. The medical records reflect that his main complaint was pain at the base of the thumb and ring fingers radiating up to his wrist and forearm. Petitioner's pain was 3/10 at rest and 6/10 with activity. Dr. Bear diagnosed trigger finger of the right hand, osteoarthritis of the thumb CMC, tenosynovitis, and medial epicondylitis. He administered an injection in the tendon sheath of the right long finger. Dr. Bear also ordered physical therapy and provided a thumb splint.

On December 17, 2013, Petitioner returned for a recheck of his right hand. Petitioner had thumb pain and triggering. He reported his pain as 4/10 at rest and 9/10 with activity. Dr. Bear diagnosed Petitioner with trigger finger of the right thumb and osteoarthritis of the thumb. He recommended that the right trigger thumb condition be treated with a trigger release procedure, but believed that Petitioner's decision to simply observe the thumb osteoarthritis was reasonable. Three days later, on December 20, 2013 Dr. Bear performed surgery consisting of a proximal

annular pulley release and limited tensoynovectomy for right trigger thumb with limited flexor tenosynovitis.

On January 6, 2014, Petitioner followed up post-operatively for the trigger finger of the right thumb. Dr. Bear noted that Petitioner had been working and his condition was much improved. He recommended that Petitioner continue with his home exercises and return as needed.

E. Narrative Report – Dr. Bear

On March 17, 2016, Dr. Bear prepared a narrative report at the request of Petitioner's attorney. Dr. Bear summarized his treatment. After reviewing Petitioner's job analysis he opined that his bilateral CTS and right trigger thumb were aggravated by his job as a bus driver. He noted that the thumb arthritis was degenerative and not caused by his job. The treatment he provided Petitioner was both necessary and reasonable.

F. Respondent's Section 12 Examiner – Dr. Neal

On April 19, 2012, Dr. Neal performed a Section 12 examination of Petitioner at Respondent's request. He reviewed medical records and a job description. Dr. Neal noted that Petitioner was 5'5" and 220 pounds and was obese despite gastric bypass surgery. He was currently working without restrictions. Dr. Neal understood Petitioner's work to be that of a bus driver. He noted that Petitioner drove a bus, loaded/unloaded wheelchairs, opened/closed the door by turning a handle with his left hand which operated an air valve which allows an air-driven mechanism to open/close the door, dealt with a fare box/radio, and operated various buttons. The buses have power steering and automatic transmission. Petitioner reported diagnosis of bilateral CTS and was unaware of any other condition of his upper extremity. Petitioner acknowledged there was no specific injury but he attributed his condition to driving. He also acknowledged that it developed gradually over time. His condition went from tolerable to intolerable. He believed the condition developed in both hands at the same time.

On examination, Dr. Neal noted tenderness in the CMC joints, positive provocative tests, and markedly reduced sensation in his hands. Dr. Neal diagnosed bilateral carpal tunnel syndrome, bilateral CMC joint arthritis, and right long trigger finger.

Dr. Neal opined that neither Petitioner's bilateral CMC joint arthritis nor the bilateral carpal tunnel syndromes were caused by Petitioner's work activities as a bus driver. He stated that it was well accepted that the most common cause of carpal tunnel syndrome is idiopathic and while Petitioner was still obese, he was morbidly obese prior to the gastric bypass surgery; obesity is a well-known risk factor in developing carpal tunnel syndrome. In addition, Dr. Neal concluded that the activities of a bus driver are not generally considered the type of work that could contribute to developing carpal tunnel syndrome or CMC arthritis. Finally, Dr. Neal opined that he found no evidence or indication of any relationship between Petitioner's work

activities and his trigger finger condition. Dr. Neal concluded that Petitioner was not at maximum medical improvement and needed treatment, but not because of any work injury. He believed that Petitioner could work full duty.

On February 20, 2015, Dr. Neal issued an addendum report after attending a demonstration of performing duties of a bus driver, with tape measure and Dictaphone in hand. Dr. Neal did the procedures needed to secure a wheelchair. He lifted the three seats which only took a couple of pounds of force to pull the metal handle to move the seats. The belts securing the wheelchair automatically retract and "you simply pull a small metal latch that allows you to pull the belts where you want to secure on a wheelchair. To tighten them you can turn a little triangular key to tighten them up requiring very little force." The door is air-powered and not manually operated. The handle is four and a half inches long and three and a half inches "up of the side console." "You can easily pull the switch with one finger taking less than 1 pound of force."

Dr. Neal noted that after visually inspecting the outside of the bus, the driver puts his number in the fare box, manipulates toggle switches to test operation of the wheelchair ramp, adjusts the chair by operating a button and adjusting one's weight, and adjusts the steering column which is easy but requires a few pounds of force. Dr. Neal noted that the farebox is button-driven, operated by pushing buttons, and tickets pop out automatically. The parking brake is spring-operated and the valve pulls up easily. To release the brake the driver pushes a button which takes about five to seven pounds of force with an open palm. The parking brakes apply automatically when a bus stops and the door opens. The steering wheel is 20" in diameter and driving does not required gripping of the wheel and the bus can be driven with only a hand resting on it. The transmission is operated by push button. Dr. Neal drove the bus forward but not in reverse.

In reviewing his prior report and reflecting on his experience in the demonstration, Dr. Neal reiterated his previous conclusion that Petitioner's bilateral CTS, CMC joint arthritis, and tenosynovitis were not causally related to his occupation as a bus driver. He cited publications of the Academy of Orthopedic Surgeons indicating that most cases of CTS have no identifiable etiology and that there are many medical risk factors for developing CTS including obesity and rheumatoid arthritis. The articles Dr. Neal cited also indicate that CTS may be caused in whole or in part by adverse working conditions and that it is accepted that preexisting carpal tunnel syndrome may be aggravated, accelerated or exacerbated by work place exposure.

On January 16, 2017, Dr. Neal prepared another addendum report after reviewing the video created during the July 8, 2016 inspection submitted by Respondent. He observed Petitioner operating the doors, performing functions for access and securing wheelchairs, occasionally using the phone, demonstrating securing a bike, and manipulating mirrors. His causation opinions remained the same.

On July 3, 2019, Dr. Neal issued another addendum report upon Respondent's request after reviewing the video created by Petitioner on October 18, 2016. Dr. Neal states that the video generally shows the bus operating on what looks like "see meant" (cement) surface which is rough. One can hear and see the vibrations in the bus by looking at the equipment bus in the front. However at 51 seconds into the video the bus is operating on regular/smooth pavement there does not appear to be any excessive noise or vibration. "one can appreciate that what appears to be a newspaper is draped over the dashboard of the bus and at times the newspaper does not appear to be vibrating to any great extent although the sound of the bus and the other equipment appears to be vibrating."

Dr. Neal again cited various articles and now included factors regarding CMC arthritis and trigger finger. He noted that there was no relationship found between vibration and CMC arthritis, there was "some evidence" that vibration, repetitive force, and posture can aggravate trigger finger. He reiterated his previous opinions and again concluded that Petitioner's conditions of ill-being were not causally related to his work activities. Dr. Neal also noted that trigger finger is often associated with CTS.

G. Additional Information

Petitioner testified that he was 70 years old at the time of the arbitration hearing. Regarding his current condition of ill-being, he testified that he still gets occasional numbness and tingling after he does anything with his hands, usually once or twice a week. He notices the condition more with activities such as using lawn mowers, weed eaters, or anything like that when he is using and holding something with vibration. Petitioner described these symptoms as minor compared to his condition prior to the surgeries. He testified that the triggering in his fingers ended after the surgery. Petitioner testified that he was not taking any prescription medication, but would use braces if he had pain and take Ibuprofen.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found that Petitioner did not sustain his burden of proving repetitive trauma caused his bilateral carpal tunnel syndrome, trigger finger, epicondylitis, or CMC arthritis. The Arbitrator found that "Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of his employment with Respondent on January 23, 2012 and further failed to prove by a preponderance of the evidence that his condition of ill-being is causally connected to his employment[...]" and denied compensation. In so doing, the Arbitrator also found the causation opinion testimony of Dr. Neal persuasive concluding that he had a better understanding of Petitioner's precise work activities than did Dr. Bear. The Commission disagrees.

To obtain compensation under the Illinois Workers' Compensation Act ("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.*

In this case, Petitioner confirmed at the hearing that he alleged repetitive trauma. It is well-settled that there is no legal requirement that a certain percentage of the workday be spent on repetitive tasks in order to establish the repetitive nature of a claimant's job duties. *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2005). However, the Commission is allowed to consider evidence, or the lack thereof, of the repetitive "manner and method" of a claimant's job duties. *Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 211 (1993) (citing *Perkins Product Co. v. Industrial Comm'n*, 379 Ill. 115, 120, 39 N.E.2d 372 (1942)). The question of whether a claimant's work activities are sufficiently repetitive in nature as to establish a compensable accident under a repetitive trauma theory will be decided based upon the particular facts in each case, and it is the province of the Commission to resolve this factual issue. *Williams*, 244 Ill. App. 3d at 210-11.

The salient question is whether Petitioner's driving of any number of buses throughout his employment with Respondent in day-to-day conditions on the streets contributed to his bilateral hand condition. The Commission finds that Petitioner has established that his duties as a bus driver, performed for decades, contributed to and aggravated his bilateral carpal tunnel syndrome as opined by Dr. Bear. Petitioner's claim centers on the video recordings, the physicians' opinions and records, Petitioner's testimony, and a job analysis. The Commission considers the evidence in turn.

Regarding the video evidence, we initially note that a video was offered into evidence by Respondent of Petitioner engaged in a pre-route inspection process of a bus on July 8, 2016. RX5. The Arbitrator was present at the site at the time of the recording. Respondent argues, though not specifically, that the Arbitrator's "first-hand knowledge" with an "'up front and in person' observation of petitioner's duties during the July 8, 2016 inspection[]" should be given deference. Respondent also attributes a profound understanding of Petitioner's job duties to Dr. Neal because he watched this video as well as that submitted by Petitioner. Respondent also asserts that Dr. Neal's opinions should be considered more persuasive because he "even inspected and drove a bus thereby conducting a literal 'hands on' assessment of petitioner's duties as a fixed bus driver." Respondent further notes that the Arbitrator made findings of a "lack of repetitiveness [that] corroborate the same reasonable inference drawn by Dr. Neal, the only medical expert to review this video job analysis." The Commission disagrees.

"[O]ur supreme court has consistently held that when the Commission reviews an arbitrator's decision, it exercises original, not appellate, jurisdiction and that the Commission is not bound by the arbitrator's findings." *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009). The Commission assigns less weight to the July 6, 2018 video than the Arbitrator. Other than the generalized placement of operating systems (*i.e.*, seat, levers, etc.) and the operation of a newer bus during a pre-trip inspection over a perfectly paved bus depot, the video does little to further the understanding Petitioner's actual activities at work. The video submitted by Petitioner does show a difference in the amount of visible vibration on what appeared to by a typical city street compared to the bus operated in Respondent's video. The Commission finds that Petitioner's video revealed vibration not evident in Respondent's video, which can be explained at a minimum by the condition of the road on which it was filmed, and assigns more weight to the former.

The Commission next turns to the physicians' opinions. Dr. Bear, Petitioner's physician, prepared a short and direct narrative report in which he summarized his treatment of Petitioner. Dr. Bear also reviewed a job analysis prepared by Respondent in 2006 indicating various physical responsibilities including frequently reaching, opening and closing doors (1/3 to 2/3 of day), constant handling (greater than 2/3 of day), and pushing/pulling was "medium" and "occasional (up to 1/3 of the day)." He ultimately opined that Petitioner's bilateral carpal tunnel syndrome and right trigger thumb were aggravated by his job as a bus driver. As it relates to his thumb arthritis, Dr. Bear found no causal connection to Petitioner's work.

The medical records underlying Dr. Bear's narrative report establish that when Petitioner returned to Dr. Bear on May 31, 2012, he reported bilateral wrist pain (left worse than right) at the base of the thumb with radiating pain into the hands and several fingers. These symptoms were present "ever since over 2 years getting worse in the last 3-4 months[]" and worsened with gripping, grasping, driving, and daily activities such as peeling a banana or holding a phone. These documented complaints are consistent with Petitioner's testimony that he described worsening symptoms that were "killing" him and from which he needed relief. Petitioner also testified that Dr. Bear asked him about his work, which he described to the doctor. Dr. Bear diagnosed severe bilateral carpal tunnel syndrome that was confirmed by an EMG. Petitioner had not received treatment for his hands in five years at this time. Dr. Bear ultimately opined that Petitioner's bilateral carpal tunnel syndrome condition was causally related to his work as a bus driver.

In addition, Dr. Bear's opinions are supported by the opinions of other physicians. Dr. Dietz noted that "[f]urther discussion with Dr. Vo strongly suggested the possibility that [Petitioner's CTS] is probably caused by his work as a bus driver." The Commission finds the opinions of Dr. Bear to be supported by the record as a whole and persuasive in this case.

In contrast, Respondent offered the opinions of Dr. Neal. He provided no less than three lengthy reports in which he opined that Petitioner's bilateral carpal tunnel syndrome condition was not, and could not, be related to his duties as a bus driver. In part, he relied on his own

inspection of one bus and his review of the videos. However, Dr. Neal's unwavering belief that Petitioner's bilateral carpal tunnel syndrome could not have been caused by his work activities is undermined by the findings of Dr. Dietz, Dr. Vo, and Dr. Bear, as well as his admissions on cross-examination regarding work-related causes of carpal tunnel syndrome.

The Commission notes a very recent, persuasive decision addressing a similar bilateral repetitive trauma claim involving a bus driver. *Greater Peoria Mass Transit District v. Illinois Workers' Compensation Comm'n*, 2021 IL App (3d) 200170WC-U. The claimant began experiencing symptoms in 2008. *Greater Peoria Mass Transit District*, 2021 IL App (3d) 200170WC-U, ¶ 6. An EMG revealed moderately severe bilateral carpal tunnel syndrome. *Id.* Surgery was recommended, which the claimant declined at the time. *Id.* Approximately four years later, her symptoms worsened prompting her to return to treatment. *Id.* ¶¶ 6-7. While seeing her primary care physician for other issues she reported aggravated symptoms with gripping a steering wheel. *Id.* ¶ 7. The claimant's treating physician and a section 12 examiner for the employer opined on the relatedness, if any, of the claimant's condition to her bus driving. *Id.* ¶¶ 13-15. In its causation analysis, the court addressed the opinions of the physicians finding that the Commission's reliance on the opinions of the treating physician which "were consistent with claimant's testimony about the details of her workday and her subjective complaints of increasing symptomology" was not against the manifest weight of the evidence. *Id.* ¶ 40. The court also observed that "[a]lthough [the employer's section 12 examiner] disagreed with the treating physician's assessment, he admitted on cross-examination that it was possible to aggravate or accelerate an already symptomatic condition, beyond what would be considered normal degeneration." *Id.*

There has been disagreement in the medical community regarding the factors that can cause or aggravate carpal tunnel syndrome, but as reflected in *Greater Peoria Mass Transit District* and as admitted by Dr. Neal, it is an accepted proposition that carpal tunnel syndrome may be caused, or pre-existing carpal tunnel syndrome may be aggravated, by certain occupational activities. Dr. Neal acknowledged that some of his cited articles confirm that carpal tunnel syndrome may be caused in whole, or in part, by adverse working conditions. Given these admissions, the Commission does not find the opinions of Dr. Neal to be persuasive in this case.

Finally, with regard to Petitioner's credibility, the Commission notes that Petitioner was not evasive on cross-examination. Indeed, where he did not recall a specific date, he nonetheless agreed with questions asked to the extent that the medical records should reflect a particular point. It is notable that Petitioner was the only witness called at the hearing. Respondent offered no witnesses to rebut any of Petitioner's testimony. The Commission finds Petitioner to be credible.

Given that Petitioner had no medical treatment to his hands or wrists for any bilateral carpal tunnel syndrome or trigger finger symptoms for years before seeking treatment in 2012, and the gripping, grasping, and vibration involved in Petitioner's work as a bus driver, the

Commission finds that Petitioner has established by a preponderance of credible evidence that he sustained a repetitive trauma injury to his bilateral hands and that his bilateral carpal tunnel syndrome condition was aggravated by his duties at work.

B. Causal Connection

The Arbitrator concluded that Petitioner did not establish a causal connection between his then-current condition of ill-being and any compensable repetitive trauma accident. To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. *Id.* at 205. A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181 (1983); *Azzarelli Construction Company v. Industrial Comm'n*, 84 Ill. 2d 262, 266 (1981).

In addition, an employee who alleges injury based on repetitive trauma must "show[] that the injury is work related and not the result of a normal degenerative aging process." *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 530 (1987); *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2005). In repetitive trauma cases, the claimant "generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Nunn v. Illinois Industrial Comm'n*, 157 Ill. App. 3d 470, 477 (1987).

In this case, the Commission concludes that the evidence supports a finding that Petitioner has met his burden of proving causal connection between his current condition of ill-being and repetitive trauma injuries by a preponderance of evidence. As noted above, the opinions of Petitioner's treating physician, Dr. Bear, are more persuasive than those of Dr. Neal.

Thus, the Commission finds that Petitioner has established that his repetitious activities involving forceful gripping and exposure to vibration while a bus driver throughout his employment with Respondent until he sought treatment on January 23, 2012 contributed to his bilateral carpal tunnel syndrome condition.

C. Temporary Total Disability

The Arbitrator concluded that all other issues were moot after finding that Petitioner did not establish that he sustained a compensable repetitive trauma accident, or any causal connection between his condition of ill-being and any such accident. The dispositive test for

awarding temporary total disability ("TTD") benefits is "whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement." *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759 (2003). Petitioner had his first carpal tunnel syndrome surgery on June 11, 2012 and was released to work by Dr. Bear effective September 10, 2012. Petitioner only claims temporary total disability (TTD) for 12 weeks for the periods[4] of June 11, 2012 to July 22, 2012 and August 1, 2012 to September 10, 2012. Therefore, the Commission finds that Petitioner is entitled to TTD benefits for these periods.

D. Medical Bills

Under the provisions of §8(a) of the Act, an employer is required to pay for all necessary medical, surgical, and hospital services that are reasonably required to cure or relieve the effects of an accidental injury sustained by an employee and arising out of and in the course of her employment. 820 ILCS 305/8(a) (West 2010). An employer's liability under this section of the Act is continuous so long as the medical services are required to relieve the injured employee from the effects of the injury. *Second Judicial District Elmhurst Memorial Hospital v. Industrial Comm'n*, 323 Ill. App. 3d 758, 764 (2001) (citing *Efengee Electrical Supply Co. v. Industrial Comm'n*, 36 Ill. 2d 450, 453 (1967)).

The Commission has found that Petitioner has established causal connection between his bilateral carpal tunnel syndrome condition and accident at work as noted above. The record reflects that Petitioner's claimed medical expenses outlined his exhibits were reasonable and necessary to alleviate him from the effects of his accident at work. Thus, the Commission finds no basis to deny the claimed outstanding medical expenses.

Accordingly, the Commission concludes that the weight of the evidence supports finding these charges were reasonable and necessary, and awards Petitioner's claimed medical expenses, pursuant to §8(a) and 8.2 of the Act. Respondent shall receive a credit as agreed by the parties for any such medical bills already paid.

E. Permanent Partial Disability

Although the Arbitrator found the issue of permanent partial disability ("PPD") moot, the Commission's conclusions regarding accident and causal connection require a determination of the issue. Section 8.1b 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 (West 2012). Specifically, §8.1b states:

> "For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria.

[4] The Commission notes that all TTD claimed was accumulated at the benefit rate representing the average weekly wage in effect at the time of the first accident.

(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 Commission addresses the factors delineated in the Act for determining permanent partial disability as indicated below:

With regard to subsection (i) of §8.1b(b), the Commission notes that no AMA impairment report was submitted into evidence. No weight is given to this factor.

With regard to subsection (ii) of §8.1b(b), Petitioner was employed as a bus driver at the time of his accident. Some weight is given to this factor.

With regard to subsection (iii) of §8.1b(b), Petitioner was 63 years old at the time of accident. He is retired and the injuries at his age will have a lesser impact on his ability to perform physical activities than if he were younger and remained employed. Greater weight is given to this factor.

With regard to subsection (iv) of §8.1b(b), there was no evidence that the injury had any effect on Petitioner's future earning capacity. No weight is given to this factor.

With regard to subsection (v) of §8.1b(b), the medical records reflect that Petitioner underwent two surgeries for his carpal tunnel syndrome conditions. A mini open carpal tunnel release of the transverse carpal ligament on the left, and the same? surgery on the right. Petitioner testified that he still gets occasional numbness and tingling after he does anything with his hands, usually once or twice a week. He notices the condition more with activities such as using lawn mowers, weed eaters, or anything like that when he is using and holding something with vibration. He does not take prescription medication for his symptoms, but does use braces if he experiences pain and takes over-the-counter medication. Greater weight is given to this factor.

Based on the above analysis, the Commission finds that the injuries sustained caused Petitioner permanent partial disability to the extent of 10% of the right hand and 7.5% of the left hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $576.39 per week for a period of 12 weeks from June 11, 2012 to July 22, 2012 and August 1, 2012 to September 10, 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 medical expenses incurred for the treatment of Petitioner's bilateral carpal tunnel syndrome pursuant to §8(a) of the Act, subject to the applicable medical fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISION that Respondent pay to the Petitioner the sum of $518.75 a week for a period of 19 weeks because the injury sustained caused the loss of the use of 10% of the right hand and the sum of $518.75 a week for a period of 14.25 weeks because the injury sustained caused the loss of the 7.5% of the left hand, as provided in §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.

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: FEB 17 2021

Barbara N. Flores

Marc Parker

DLS/dw
O-12/17/20
46

12 WC 22502
21IWCC 0064

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM McWILLIAMS,

Petitioner,

vs.

NO: 12 WC 22502
21 IWCC 0064

ROCKFORD MASS TRANSIT DISTRICT,

Respondent.

Dissent

I respectfully dissent from the Decision of the majority. The Majority reversed the Decision of the Arbitrator and found that Petitioner proved repetitive traumatic accidents which caused various conditions of ill-being. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator who found that Petitioner did not sustain his burden of proving that his alleged current conditions of bilateral CTS, trigger finger/thumb, epicondylitis, and CMC joint arthritis were caused by his work activities and denied compensation.

Petitioner worked for Respondent for about 20 years as a bus driver, retiring around 2018. When he began treating in 2012 with his rheumatologist for the various alleged repetitive traumatic injuries that are the subject of the instant claim, it was noted that Petitioner had a long history of bilateral CTS for which he had an EMG in 2007. He came under the treatment of Dr. Bear who performed bilateral CTS open release and trigger-thumb release surgeries. In a narrative report prepared by Dr. Bear at the request of Petitioner's lawyer, he opined that after reviewing Petitioner's job analysis, Petitioner's bilateral CTS and right trigger thumb were aggravated by his job as a bus driver.

The job description upon which Dr. Bear relied indicated that drivers are responsible for assisting handicapped passengers on and off a bus. Drivers are required to properly restrain a wheelchair with floor and seat belts. The description also sites pushing/pulling up to 25 pounds of force pushing/pulling seats to accommodate wheelchairs. The driver is also required to reach frequently (1/3 to 2/3 of the day) to open and close doors. The job has a physical demand level of light-to-medium. Pushing/pulling was "occasional (up to 1/3 of the day)."

Both parties submitted videos showing various activities of a bus driver for Respondent. Respondent presented a video taken on July 8, 2016. Petitioner is filmed doing an initial inspection of the outside of the bus looking for damage *etc.* He then shows how he sets the route by pushing buttons, makes sure the equipment is working, and showed how he answers the phone.

Petitioner then shows the belts used to secure a wheelchair. He notes that the belt must be in good repair because if it does not retract, it is very hard to get out. He then shows the process for wheelchaired passengers. He gets the bus as close to the curb as possible, presses a button to automatically deploy the ramp, shows how he uses the belts to strap in a chair, and presses a button to automatically raise the ramp.

Petitioner also showed what he does if the automated ramp mechanism does not deploy. He would manually lift the ramp, push it out to the street, and step on it to ensure it was stable. He then lifted it up and placed back in the well of the bus. Petitioner drove the bus briefly and showed how he dispensed transfers. Petitioner also showed how he occasionally manually adjusted the mirrors.

Petitioner submitted a video taken by his grandson on October 18, 2016. The video shows Petitioner driving a bus. There does appear to be some vibration in the steering wheel and vibration is seen notably in the wobbling of the fare box. Petitioner's hands do not appear to be gripping the wheel with force. However, there does appear to be intermittent vibration in his hands. At times, Petitioner appears to be driving partially on the shoulder.

Dr. Neal examined Petitioner on April 19, 2012 and issued reports pursuant to §12 of the Act. Dr. Neal opined that neither Petitioner's bilateral CMC joint arthritis nor the bilateral CTS were caused by Petitioner's work activities as a bus driver. He noted that it was well accepted that the most common cause of CTS is idiopathic and while Petitioner was still obese, he was morbidly obese prior to his gastric bypass surgery; obesity is a well-known risk factor in developing CTS.

In addition, Dr. Neal noted that the activities of a bus driver are not generally considered the type of work that could contribute to developing CTS or CMC arthritis. In addition, Dr. Neal noted that there was no evidence or indication of any work relationship between Petitioner's work activities and his trigger thumb condition.

On February 20, 2015, Dr. Neal issued an addendum report after himself performing duties of a bus driver, with tape measure and Dictaphone in hand. Dr. Neal did the procedures needed to secure a wheelchair. He lifted the three seats which only took a couple of pounds of force to pull the metal handle to move the seats. He noted that the belts securing the wheelchair automatically retract and "you simply pull a small metal latch that allows you to pull the belts where you want to secure on a wheelchair. To tighten them you can turn a little triangular key to tighten them up requiring very little force." The door is air-powered and not manually operated. The handle is 4&1/2 inches long and 3&1/2 inches "up of the side console." "You can easily pull the switch with one finger taking less than one pound of force."

Dr. Neal indicated that after visually inspecting the outside of the bus, a driver puts his number in the fare box, manipulates toggle switches to test operation of the wheelchair ramp, adjusts the chair by operating a button and adjusting one's weight, and adjusts the steering column which is easy but requires a few pounds of force. Dr. Neal noted that the farebox is button-driven, operated by pushing buttons, and tickets pop out automatically.

Dr. Neal noted that the parking brake is spring-operated and the valve pulls up easily. To release the brake the driver pushes a button which takes about five to seven pounds of force with an open palm. The parking brakes apply automatically when a bus stops and the door opens. The steering wheel is 20" in diameter and driving does not required gripping of the wheel and the bus can be driven with only a hand resting on it. The transmission is operated by push button. Dr. Neal drove the bus forward but not in reverse.

In reviewing his prior report and reflecting on his experience in the demonstration, Dr. Neal reiterated his previous conclusion that Petitioner's bilateral CTS, CMC joint arthritis, and tenosynovitis were not causally related to his occupation as a bus driver. He cited publications of the Academy of Orthopedic Surgeons indicating that most cases of CTS have no identifiable etiology and that there are many medical risk factors for developing CTS including obesity and rheumatoid arthritis. He also noted that another article found that CTS "occurs at least twice as often bilaterally as in the dominant hand alone. It was stated this factor suggests non-occupational factor could be etiologically more important than work."

After reviewing Respondent's video of Petitioner driving a bus. He observed Petitioner operating the doors, performing functions for access and securing wheelchairs, occasionally using the phone, demonstrating securing a bike, and manipulating mirrors. His causation opinions remained the same.

Dr. Neal issued another addendum report after reviewing the video submitted by Petitioner. He noted that this video generally shows the bus operating on what looks like cement surface which is rough. One can hear and see the vibrations in the bus by looking at the equipment bus in the front. However, at time one can appreciate that what appears to be a newspaper is draped over the dashboard of the bus and at times the newspaper

does not appear to be vibrating to any great extent although the sound of the bus and the other equipment appears to be vibrating." Dr. Neal again cited various articles and now included factors regarding CMC arthritis and trigger finger. He noted that there was no relationship found between vibration and CMC arthritis, there was "some evidence" that vibration, repetitive force, and posture can aggravate trigger finger. He reiterated his previous opinions and again concluded that Petitioner's conditions of ill-being were not causally related to his work activities.

The Arbitrator found that Petitioner did not prove that he sustained a compensable repetitive traumatic accident or causation to current conditions of ill-being of bilateral CTS, trigger finger, epicondylitis, and CMC joint arthritis and denied compensation. He noted that Petitioner had extensive pre-existing medical problems and as a result, Petitioner had the burden of proving that his work activities aggravated those conditions.

The Arbitrator also found the causation opinions of Dr. Neal considerably more persuasive than those of Dr. Bear, noting that Dr Bear only reviewed the job analysis and did not review the videos. On the other hand, the Arbitrator noted that Dr. Neal viewed both videos and actually operated the bus and its controls. Therefore, the Arbitrator found that Dr. Neal had a much better understanding about Petitioner's job activities than did Dr. Bear.

I agree with the Arbitrator that the opinions of Dr. Neal are more persuasive than those of Dr. Bear. Dr. Bear relied only the job description and perhaps Petitioner's report about his job activities, though that recitation does not appear to be in his records. In my opinion, the job description was not very helpful at all in delineating Petitioner's everyday work activities, and would not itself establish a reasonable basis to determine causation.

In addition, Dr. Bear did not explain the basis of his opinion or explain what specific activities he deemed offensive. Also, in looking at the videos, there is no obvious activity which would appear to aggravate peripheral neuropathies. Respondent's video shows extensive use of the hands, however, there does not appear to be any forceful gripping of any kind or awkward positioning of his wrists.

The only objective basis upon which the Majority reversed the Decision of the Arbitrator seems to be the video that shows vibration in the steering wheel. However, as noted above, the video does not show Petitioner gripping the steering wheel forcibly, and Petitioner could have consciously affected the perception of vibration by having it filmed while driving on rough surfaces or while driving on the shoulder.

It also appears that Petitioner's right-hand activities were different from his left-hand activities, which would tend to militate again development of similar work-related pathology on both sides. Finally, it is clear that Petitioner had some co-morbidity factors such as age (63 at the time of the "accident"), obesity, "marked" arthritis in his hands, and likely rheumatoid arthritis.

Based on the entire record before us, I would have affirmed and adopted the well-reasoned Decision of the Arbitrator who found that Petitioner did not sustain his burden of proving an accident or a causal connection between his work activities and his conditions of ill-being and denied compensation. For these reasons, I respectfully dissent.

Deborah L. Simpson

Deborah L. Simpson

DLS/dw
O-12/17/20
46

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM McWILLIAMS,

Petitioner,

vs. NO: 15 WC 35557

ROCKFORD MASS TRANSIT DISTRICT,

Respondent.

21IWCC0065

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, and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator and awards benefits accordingly.

I. FINDINGS OF FACT

Petitioner filed two claims that proceeded to a consolidated hearing before the Arbitrator. In the above-captioned claim, Petitioner alleges that he sustained a repetitive trauma injury on August 15, 2013 affecting his right thumb and elbow. A separate decision will concurrently issue in Petitioner's consolidated claim, Case No. 12 WC 22502, in which he claimed a repetitive injury trauma (carpal tunnel syndrome) to his bilateral hands and wrists on January 23, 2012.

A. Background

William McWilliams (Petitioner) testified that he was working for Rockford Mass Transit (Respondent) in Rockford, Illinois. He was employed by Respondent as a Bus Operator/Bus Driver for over 20 years from approximately 1996 or 1997 until his retirement in February or March of 2017.

In this position, Petitioner testified that he worked at least five days a week and eight hours a day; though he could work up to 18 hours a day if needed. His job duties required him to use extensively his hands and fingers. Petitioner was asked about the particular activities that were required relating to his hands and fingers. He responded "[t]he steering wheel for driving with the road conditions, the vibration, opening and closing doors. In the past, we use to manually punch transfers, paper transfers, anybody getting those throughout the day. Change route signs up above. We used to change them with Rolodexes." Petitioner testified that the levers, handles, and gauges on the buses that he drove were all in the same place, and required slightly different pressures, but most of them were basically the same. In a typical eight-hour day, Petitioner testified that he would be "steady driving" the bus for about six to six and a half hours.

Petitioner testified that he had to adjust the steering column with a lever on the right. He explained that, depending on the shape and size of the driver, the steering column could be adjusted. To adjust the steering column, Petitioner testified that he would pull up a lever to make the steering wheel come up or down and another lever would make the steering wheel go forward and backward. He would bend his right wrist to raise up the lever. Petitioner also used his right hand to operate the button to raise and lower the driver's seat as well as a knob below. Additionally, there was a lever located between the legs below the seat to tip the seat. Petitioner explained that he had to squeeze it upwards with his fingers and sometimes he had to apply force because it would not release. Petitioner would make these adjustments once for each bus he drove, about three or four times a day.

Petitioner also used both hands on the steering wheel at about shoulder width, which was 15 to 18 inches wide. To drive and steer the bus, Petitioner had his hands around the steering wheel at the "10:00 and 2:00" positions. However, sometimes when turning a corner he would "go flat" resting his hands on the wheel and rotate it rather than keep jerking the wheel. Petitioner would do this when his hands were hurting so bad to relieve the pressure when they would start tingling really bad.

With regard to vibration, Petitioner testified that his hands and arms would shake because there was a lot of road vibration, potholes, and things of that sort. Some of the buses would be "shaking pretty good" if the wheels were not balanced correctly. If conditions were bad, Petitioner had to grip the steering wheel tighter for obvious safety reasons.

With regard to changing route signs, he testified that he used a "Rolodex" that controlled the sign on the front of the bus that changed streets and routes to identify where the bus was going for patrons. In order to change the sign in years past before the buses had buttons or computers for this purpose, Petitioner would have his right arm elevated above his head and rotate his wrist from left to right to utilize a nob on the Rolodex. He estimated that he had to change the route information 16 times a day.

Petitioner also testified that he had to use his left hand, fingers, and wrist in applying the hand-operated parking brake located on his left side. He explained that it is a "pull up" parking brake "that gets pretty tough sometimes and the nob [sic] is pretty small so you would have to grip and jerk it up." Petitioner testified that he had to stick his fingers on both sides and his thumb behind it and pull up the brake. To do so, he would apply pressure. When he wanted to release the brake, he had to push the brake down to move. In some buses, Petitioner explained, it was pretty easy to release the brake whereas in others "[w]hen the nobs [sic] got sticky, it got pretty tough." Petitioner testified that he had to engage and disengage the brake approximately 75 to 100 times a day.

With regard to opening and closing doors, Petitioner explained that there is a handle on the left side that he would turn forward, rotating his wrist to the left to open the door. To close the door, Petitioner would turn the handle back toward him rotating his wrist to the right. In years past, the handle was much bigger, but it is now about three to four inches. Petitioner was asked to describe the pressure used to grip and utilize the handle. He responded that it was much more difficult in years past, and harder to turn, but then the handles became smaller and there was an air assist or something that required less pressure to turn the handle. Petitioner estimated that he would do this about 500 times a day. Petitioner acknowledged that he did not have to stop at designated stops if no passengers were waiting.

Petitioner further testified that transfer tickets were used for passengers getting off one bus to get onto another bus. The transfer tickets were placed on a steel grip up above. He would tear a transfer off, put the bus to which [the passenger] was going, punch the route, and punch the time. Petitioner testified that tearing the transfer ticket off required bending his right wrist. Punching the transfer required forceful gripping and grasping of the hole punch with his right hand. Later, Respondent began using printed tickets. However, from the beginning of his employment until he went to the doctor in 2012, Petitioner issued manual punch transfer tickets. He estimated that he would have to punch 500 transfers a day.

Petitioner also testified that he occasionally helped handicapped passengers, which included helping them on and off the bus, putting ramps in and out, raising and lowering seats, and strapping down the wheelchairs. The ramps were automated, but did not always work. Petitioner described the steps involved in helping a disabled passenger off the bus or onto the bus. In the former case, Petitioner would have to get off to reach down and grab a very small clip [releasing] the ramp that he would then manually pull out, place on the curb, and then go back and unhook the disabled passenger. Once the passenger was off the bus, Petitioner testified that he would have to go out on the curb, pick up the ramp, and put it back. Petitioner testified that he could get up to 12 such passengers a day. He explained that these activities required the use of his hands including rotation, flexion, and force. He had no way to estimate how many times a day he engaged in these activities on a bus with a malfunctioning ramp, but he explained that there were additional conditions that required him to use something to pry the ramp free or dislodge something stuck underneath the ramp. Petitioner explained that, with the grime of people's feet, road dust, and all that, the ramps would sometimes "stick pretty good."

Petitioner was asked about the timing of the automation of the buses. He testified that the buses went by year and explained that the 1995 buses were kept around for approximately 12 years. There would be an overrun of older buses in that period. Petitioner acknowledged that the route designation, seat, and steering wheel adjustments later became automated. He estimated this was with the 1995 buses. Petitioner confirmed that from the time he began working for Respondent until he went to the doctor on January 23, 2012, he operated a mix of buses from the eighties and nineties.

B. Videos and Job Description

Petitioner offered a video into evidence that was taken by his grandson of him driving a bus in October of 2016, showing the driving conditions and vibration of the steering wheel that he encountered during his career with Respondent. The vibrations are significant when Petitioner was traveling on what appeared to by a typical city street and are visible throughout the video, but lessen when Petitioner drove on what appears to be a smoothly paved street. PX5.

Petitioner acknowledged that the video did not show him dispensing any transfers. However, he explained that the transfer function became automated approximately five years from the time that he retired in 2017, around 2012. Petitioner also acknowledged that the video did not show any passengers getting on or off the bus. Petitioner also acknowledged that this bus had an automated seat.

Respondent also offered a video into evidence taken in a parking lot at a bus depot on July 8, 2016. Petitioner testified that the conditions then and there were ideal whereas they are much worse and not ideal on the street. Petitioner testified that the bus he was driving on that day was under very different conditions from those he encountered on a day-to-day basis. RX5.

In Respondent's video, Petitioner demonstrated how he manually pulled out the ramp. The parking brake did not need to be deployed every time he picked up a passenger. Petitioner was asked whether the type of bus in this video was a Gilling 2009, and he believed that it was. When asked if that was a bus that he would have regularly operated on his shift Petitioner replied that Respondent did not have just one bus vintage, or one type of bus. He explained, "I think it's like a three different 12 year period [that] they rotate buses, but in the mornings when you come in and sign in, they have a bus number next to it and that bus number comes because they got 50 buses in one garage so whatever lands in your spot, that's the one you take. So it could be any number of buses."

A Job Analysis Report prepared by Respondent in 2006 indicates various physical demands at the light-to-medium physical demand level including frequently reaching, opening and closing doors (1/3 to 2/3 of day), and constant handling (greater than 2/3 of day). PX4. Pushing/pulling was "medium" and "occasional (up to 1/3 of the day)." Drivers are responsible for assisting handicapped passengers on and off a bus. The driver is required to properly restrain

a wheelchair with floor and seat belts. The description also sites pushing/pulling up to 25 pounds of force pushing/pulling seats to accommodate wheelchairs.

Petitioner agreed that he had a pending claim[1] related to an occupational exposure case for which he was hospitalized for three days and after which he returned to regular duty work.

Regarding his prior medical treatment, Petitioner acknowledged that he had treated with Dr. Dietz previously to whom Petitioner relayed his medical history. Petitioner acknowledged that he underwent treatment in 1999 for a right and left rotator cuff tears[2] that were surgically repaired by Dr. Nyquist. Petitioner acknowledged that he weighed considerably more in 2001, 385 pounds, compared to after a gastric bypass surgery performed that year. Petitioner also acknowledged undergoing bilateral total knee replacements in 2007 followed by bilateral knee surgeries in 2008 or 2009 after which he was off work for a year or so. Finally, Petitioner acknowledged that he underwent an EMG five years prior to seeing Dr. Dietz in 2012, and some conservative treatment, but had no surgery thereafter.

While he could choose routes because of his seniority, he could not choose buses. He did not have CTS surgery prior to 2012. His condition continued to deteriorate until he sought treatment in 2012. Petitioner acknowledged that he treated with Dr. Dietz for wrist complaints prior[3] to 2012. Prior to 2012, Dr. Dietz prescribed an injection, exercise, and wrist supports.

C. Accidents

Petitioner testified that in January of 2012, he noticed that his hands and arms "were constantly getting worse" and he could not sleep anymore. He explained that he would be driving and have to put his hands down the side and shake them to get the pain out. Petitioner experienced pain in his hands as well as numbness and tingling. The condition progressively got worse, day by day. He noticed these symptoms after being at work for a short period of time and throughout the rest of the day. Then the symptoms would ease up and when he laid down at night the symptoms would come back full force. Petitioner had left carpal tunnel release on June 11, 2012 and right carpal tunnel release on August 1, 2012 both by Dr. Bear. He was released to return to work at full duty in September of 2012.

Petitioner returned to Dr. Bear on August 15, 2013 for recheck of his CTS. He also complained about a condition of his right thumb and first finger which was diagnosed as trigger finger. He also had pain in his elbow. Petitioner claimed that he sustained repetitive traumatic injuries to his right thumb and elbow manifesting on August 15, 2013.

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[1] Petitioner lodged an objection to this line of questioning, which was overruled. The Arbitrator determined that the pendency of another claim was relevant.
[2] Petitioner lodged an objection to this line of questioning, which was overruled. The Arbitrator determined that it was relevant as [the prior treatment] involved an extremity.
[3] While Petitioner testified that he had pre-accident treatment when asked about it on cross-examination, no pre-accident medical records were submitted into evidence.

D. Medical Treatment

On January 23, 2012, Petitioner saw Dr. Dietz for the problem with his hands. Petitioner testified that he did not know what was happening with them and they finally got so bad that he sought treatment. Petitioner agreed that Dr. Dietz is a rheumatologist and acknowledged that when he saw Dr. Dietz he had a known history of carpal tunnel syndrome for many years and had an EMG five years earlier. He acknowledged that he told Dr. Dietz that he had symptoms both at home as well as at work.

Dr. Dietz's records reflect Petitioner's return after a five-year absence with a report of problems in his hands worsening over the last two or three years and becoming increasingly painful especially his thumbs with frequent numbness and tingling after prolonged bus driving. Petitioner reported that he often had pain in his thumbs. Dr. Dietz noted a history of carpal tunnel syndrome over many years, and an EMG performed five years ago. He had bilateral knee replacements and he did poorly. He needed "a patellar button done in Madison on the left knee, considering one on the right knee." He had occasional neck pain and had an epidural/facet injection in 2010.

On physical examination, Dr. Dietz noted bilateral basal joint irritability with loss of full abduction and bilateral flexor tendon trigger fingers in both thumbs. X-rays showed marked arthritis in Petitioner's hands bilaterally. Dr. Dietz diagnosed probable bilateral progressive carpal tunnel syndrome, osteoarthritis of the thumb, cervical spondylosis, bilateral knee replacements, and history of gastric bypass surgery. He administered two injections into both of Petitioner's thumbs at the basal joint and trigger flexor tendon, and ordered bilateral EMGs.

On February 13, 2012, Petitioner presented to Dr. Vo on referral from Dr. Dietz. He reported that he had numbness in the index, middle and ring fingers bilaterally over the past few years and pain in his thumbs. He had much relief after the MCP joint injection. The EMG was abnormal and Dr. Vo found that it showed evidence of "severe bilateral median demyelinating entrapment neuropathy at the wrist (carpal tunnel syndrome) bilaterally."

Petitioner testified that after receiving these test results he told Mike Hammonds, the head supervisor and person over safety, that he had carpal tunnel that his doctor called chronic carpal tunnel. He did not think that he specifically attributed his condition to his job or anything, but Petitioner told Mr. Hammonds that he could not do this anymore, and that it was bothering him more every day that he drove. Respondent sent him to a doctor for evaluation after which he received a denial of his Workers' Compensation claim.

Two days later on February 15, 2012, Petitioner returned to Dr. Dietz who noted that Petitioner had severe bilateral CTS. "Further discussion with Dr. Vo strongly suggested the possibility that his [CTS] is probably caused by his work as a bus driver." Petitioner was

thinking about filing a WC claim. He was still working as a bus driver. Injections in his hands were somewhat beneficial except for flexion at the right thumb. Dr. Dietz diagnosed Petitioner with carpal tunnel syndrome noting that Petitioner was very symptomatic. He also diagnosed trigger finger, right thumb. Dr. Dietz injected Petitioner at the right thumb flexor tendon and referred him to neurosurgery.

On May 31, 2012, Petitioner presented to Dr. Brian Bear at Rockford Orthopedic Associates. Petitioner reported bilateral wrist pain on the radial side at the base of the thumb with radiation of pain into the hand with numbness, tingling and burning in the thumb, index, long and ring fingers. The left wrist was worse than the right. The pain has been present "ever since over 2 years getting worse in the last 3-4 months." Petitioner also reported that the symptoms are worse with gripping, grasping, driving, opening a banana or holding the phone. Dr. Bear diagnosed EMG confirmed, severe bilateral carpal tunnel syndrome. He also diagnosed thumb osteoarthritis CMC. Dr. Bear found that surgery was indicated for the carpal tunnel syndrome, which would be performed on the left hand first.

Petitioner testified about this visit with Dr. Bear. He explained that Dr. Bear asked him about the purpose of his visit and he responded that "from driving it's killing me. I've got to have something done, some relief." Dr. Bear asked Petitioner what he did for a living and Petitioner described his job to the doctor. Petitioner testified that Dr. Bear reviewed his EMG and then told him that he had severe bilateral carpal tunnel syndrome.

Petitioner testified that he worked with pain until June 11, 2012. Then, on June 11, 2012, Dr. Bear performed a left hand mini open carpal tunnel release of the transverse carpal ligament. Petitioner testified that Dr. Bear then placed him off work for six weeks.

On August 1, 2012, Dr. Bear performed a right mini open carpal tunnel release of the transverse carpal ligament. Petitioner then remained off work for six weeks post-operatively.

On September 10, 2012, Petitioner returned to Dr. Bear reporting improvement in his symptoms. He reported 0-3/10 pain and that he was no longer wearing a splint. Petitioner's symptoms were much improved postop. Dr. Bear released Petitioner to work without restrictions and released him from treatment to return as needed. Petitioner testified that he then returned to work in September of 2012.

On August 15, 2013, Petitioner returned for recheck of his right hand. Petitioner testified that he was having problems with his right thumb and right first finger, and he was experiencing pain in his right elbow. The medical records reflect that his main complaint was pain at the base of the thumb and ring fingers radiating up to his wrist and forearm. Petitioner's pain was 3/10 at rest and 6/10 with activity. Dr. Bear diagnosed trigger finger of the right hand, osteoarthritis of the thumb CMC, tenosynovitis, and medial epicondylitis. He administered an injection in the tendon sheath of the right long finger. Dr. Bear also ordered physical therapy and provided a cock-up wrist splint.

On December 17, 2013, Petitioner returned for a recheck of his right hand. Petitioner had thumb pain and triggering. He reported his pain as 4/10 at rest and 9/10 with activity. Dr. Bear diagnosed Petitioner with trigger finger of the right thumb and osteoarthritis of the thumb. He recommended that the right trigger thumb condition be treated with a trigger release procedure, but believed that Petitioner's decision to simply observe the thumb osteoarthritis was reasonable. Three days later, on December 20, 2013 Dr. Bear performed surgery consisting of a proximal annular pulley release and limited tenosynovectomy for right trigger thumb with limited flexor tenosynovitis.

On January 6, 2014, Petitioner followed up post-operatively for the trigger finger of the right thumb. Dr. Bear noted that Petitioner had been working and his condition was much improved. He recommended that Petitioner continue with his home exercises and return as needed.

E. Narrative Report – Dr. Bear

On March 17, 2016, Dr. Bear prepared a narrative report at the request of Petitioner's attorney. Dr. Bear summarized his treatment. After reviewing Petitioner's job analysis he opined that his bilateral carpal tunnel syndrome and right trigger thumb were aggravated by his job as a bus driver. Dr. Bear also stated that Petitioner's medial epicondylitis condition, which resolved with conservative treatment, was aggravated by bus driving. He noted that the thumb arthritis was degenerative and not caused by his job. The treatment he provided Petitioner was both necessary and reasonable.

F. Respondent's Section 12 Examiner – Dr. Neal

On April 19, 2012, Dr. Neal performed a Section 12 examination of Petitioner at Respondent's request. He reviewed medical records and a job description. Dr. Neal noted that Petitioner was 5'5" and 220 pounds and was obese despite gastric bypass surgery. He was currently working without restrictions. Dr. Neal understood Petitioner's work to be that of a bus driver. He noted that Petitioner drove a bus, loaded/unloaded wheelchairs, opened/closed the door by turning a handle with his left hand which operated an air valve which allows an air-driven mechanism to open/close the door, dealt with a fare box/radio, and operated various buttons. The buses have power steering and automatic transmission. Petitioner reported diagnosis of bilateral CTS and was unaware of any other condition of his upper extremity. Petitioner acknowledged there was no specific injury but he attributed his condition to driving. He also acknowledged that it developed gradually over time. His condition went from tolerable to intolerable. He believed the condition developed in both hands at the same time.

On examination, Dr. Neal noted tenderness in the CMC joints, positive provocative tests, and markedly reduced sensation in his hands. Dr. Neal diagnosed bilateral carpal tunnel syndrome, bilateral CMC joint arthritis, and right long trigger finger.

Dr. Neal opined that neither Petitioner's bilateral CMC joint arthritis nor the bilateral carpal tunnel syndromes were caused by Petitioner's work activities as a bus driver. He stated that it was well accepted that the most common cause of carpal tunnel syndrome is idiopathic and while Petitioner was still obese, he was morbidly obese prior to the gastric bypass surgery; obesity is a well-known risk factor in developing carpal tunnel syndrome. In addition, Dr. Neal concluded that the activities of a bus driver are not generally considered the type of work that could contribute to developing carpal tunnel syndrome or CMC arthritis. Finally, Dr. Neal opined that he found no evidence or indication of any relationship between Petitioner's work activities and his trigger finger condition. Dr. Neal concluded that Petitioner was not at maximum medical improvement and needed treatment, but not because of any work injury. He believed that Petitioner could work full duty.

On February 20, 2015, Dr. Neal issued an addendum report after attending a demonstration of performing duties of a bus driver, with tape measure and Dictaphone in hand. Dr. Neal did the procedures needed to secure a wheelchair. He lifted the three seats which only took a couple of pounds of force to pull the metal handle to move the seats. The belts securing the wheelchair automatically retract and "you simply pull a small metal latch that allows you to pull the belts where you want to secure on a wheelchair. To tighten them you can turn a little triangular key to tighten them up requiring very little force." The door is air-powered and not manually operated. The handle is four and a half inches long and three and a half inches "up of the side console." "You can easily pull the switch with one finger taking less than 1 pound of force."

Dr. Neal noted that after visually inspecting the outside of the bus, the driver puts his number in the fare box, manipulates toggle switches to test operation of the wheelchair ramp, adjusts the chair by operating a button and adjusting one's weight, and adjusts the steering column which is easy but requires a few pounds of force. Dr. Neal noted that the farebox is button-driven, operated by pushing buttons, and tickets pop out automatically. The parking brake is spring-operated and the valve pulls up easily. To release the brake the driver pushes a button which takes about five to seven pounds of force with an open palm. The parking brakes apply automatically when a bus stops and the door opens. The steering wheel is 20" in diameter and driving does not required gripping of the wheel and the bus can be driven with only a hand resting on it. The transmission is operated by push button. Dr. Neal drove the bus forward but not in reverse.

In reviewing his prior report and reflecting on his experience in the demonstration, Dr. Neal reiterated his previous conclusion that Petitioner's bilateral CTS, CMC joint arthritis, and tenosynovitis were not causally related to his occupation as a bus driver. He cited publications of the Academy of Orthopedic Surgeons indicating that most cases of CTS have no identifiable etiology and that there are many medical risk factors for developing CTS including obesity and rheumatoid arthritis. The articles Dr. Neal cited also indicate that CTS may be caused in whole or in part by adverse working conditions and that it is accepted that preexisting carpal tunnel syndrome may be aggravated, accelerated or exacerbated by work place exposure.

On January 16, 2017, Dr. Neal prepared another addendum report after reviewing the video created during the July 8, 2016 inspection submitted by Respondent. He observed Petitioner operating the doors, performing functions for access and securing wheelchairs, occasionally using the phone, demonstrating securing a bike, and manipulating mirrors. His causation opinions remained the same.

On July 3, 2019, Dr. Neal issued another addendum report upon Respondent's request after reviewing the video created by Petitioner on October 18, 2016. Dr. Neal states that the video generally shows the bus operating on what looks like "see meant" (cement) surface which is rough. One can hear and see the vibrations in the bus by looking at the equipment bus in the front. However at 51 seconds into the video the bus is operating on regular/smooth pavement there does not appear to be any excessive noise or vibration. "One can appreciate that what appears to be a newspaper is draped over the dashboard of the bus and at times the newspaper does not appear to be vibrating to any great extent although the sound of the bus and the other equipment appears to be vibrating."

Dr. Neal again cited various articles and now included factors regarding CMC arthritis and trigger finger. He noted that there was no relationship found between vibration and CMC arthritis, there was "some evidence" that vibration, repetitive force, and posture can aggravate trigger finger. He reiterated his previous opinions and again concluded that Petitioner's conditions of ill-being were not causally related to his work activities. Dr. Neal also noted that trigger finger is often associated with CTS.

G. Additional Information

Petitioner testified that he was 70 years old at the time of the arbitration hearing. Regarding his current condition of ill-being, he testified that he still gets occasional numbness and tingling after he does anything with his hands, usually once or twice a week. He notices the condition more with activities such as using lawn mowers, weed eaters, or anything like that when he is using and holding something with vibration. Petitioner described these symptoms as minor compared to his condition prior to the surgeries. He testified that the triggering in his fingers ended after the surgery. Petitioner testified that he was not taking any prescription medication, but would use braces if he had pain and take Ibuprofen.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found that Petitioner did not sustain his burden of proving repetitive trauma caused his bilateral carpal tunnel syndrome, trigger finger, epicondylitis, or CMC arthritis. The Arbitrator found that "Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of his employment with Respondent on

January 23, 2012 and further failed to prove by a preponderance of the evidence that his condition of ill-being is causally connected to his employment[...]" and denied compensation. In so doing, the Arbitrator also found the causation opinion testimony of Dr. Neal persuasive concluding that he had a better understanding of Petitioner's precise work activities than did Dr. Bear. The Commission disagrees.

To obtain compensation under the Illinois Workers' Compensation Act ("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.*

In this case, Petitioner confirmed at the hearing that he alleged repetitive trauma. It is well-settled that there is no legal requirement that a certain percentage of the workday be spent on repetitive tasks in order to establish the repetitive nature of a claimant's job duties. *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2005). However, the Commission is allowed to consider evidence, or the lack thereof, of the repetitive "manner and method" of a claimant's job duties. *Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 211 (1993) (citing *Perkins Product Co. v. Industrial Comm'n*, 379 Ill. 115, 120, 39 N.E.2d 372 (1942)). The question of whether a claimant's work activities are sufficiently repetitive in nature as to establish a compensable accident under a repetitive trauma theory will be decided based upon the particular facts in each case, and it is the province of the Commission to resolve this factual issue. *Williams*, 244 Ill. App. 3d at 210-11.

The salient question is whether Petitioner's driving of any number of buses throughout his employment with Respondent in day-to-day conditions on the streets contributed to his right trigger thumb and elbow conditions. The Commission finds that Petitioner has established that his duties as a bus driver, performed for decades, contributed to and aggravated his right trigger thumb and elbow conditions as opined by Dr. Bear. Petitioner's claim centers on the video recordings, the physicians' opinions and records, Petitioner's testimony, and a job analysis. The Commission considers the evidence in turn.

Regarding the video evidence, we initially note that a video was offered into evidence by Respondent of Petitioner engaged in a pre-route inspection process of a bus on July 8, 2016. RX5. The Arbitrator was present at the site at the time of the recording. Respondent argues, though not specifically, that the Arbitrator's "first-hand knowledge" with an "'up front and in person' observation of petitioner's duties during the July 8, 2016 inspection[]" should be given deference. Respondent also attributes a profound understanding of Petitioner's job duties to Dr. Neal because he watched this video as well as that submitted by Petitioner. Respondent also

asserts that Dr. Neal's opinions should be considered more persuasive because he "even inspected and drove a bus thereby conducting a literal 'hands on' assessment of petitioner's duties as a fixed bus driver." Respondent further notes that the Arbitrator made findings of a "lack of repetitiveness [that] corroborate the same reasonable inference drawn by Dr. Neal, the only medical expert to review this video job analysis." The Commission disagrees.

"[O]ur supreme court has consistently held that when the Commission reviews an arbitrator's decision, it exercises original, not appellate, jurisdiction and that the Commission is not bound by the arbitrator's findings." *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675 (2009). The Commission assigns less weight to the July 6, 2018 video than the Arbitrator. Other than the generalized placement of operating systems (*i.e.*, seat, levers, etc.) and the operation of a newer bus during a pre-trip inspection over a perfectly paved bus depot, the video does little to further the understanding Petitioner's actual activities at work. The video submitted by Petitioner does show a difference in the amount of visible vibration on what appeared to by a typical city street compared to the bus operated in Respondent's video. The Commission finds that Petitioner's video revealed vibration not evident in Respondent's video, which can be explained at a minimum by the condition of the road on which it was filmed, and assigns more weight to the former.

The Commission next turns to the physicians' opinions. Dr. Bear, Petitioner's physician, prepared a short and direct narrative report in which he summarized his treatment of Petitioner. Dr. Bear also reviewed a job analysis prepared by Respondent in 2006 indicating various physical responsibilities including frequently reaching, opening and closing doors (1/3 to 2/3 of day), constant handling (greater than 2/3 of day), and pushing/pulling was "medium" and "occasional (up to 1/3 of the day)." He ultimately opined that Petitioner's bilateral carpal tunnel syndrome, right trigger thumb, and right elbow conditions were aggravated by his job as a bus driver. As it relates to his thumb arthritis, Dr. Bear found no causal connection to Petitioner's work as the condition was degenerative.

The medical records underlying Dr. Bear's narrative report establish that when Petitioner returned to Dr. Bear on May 31, 2012, he reported bilateral wrist pain (left worse than right) at the base of the thumb with radiating pain into the hands and several fingers. These symptoms were present "ever since over 2 years getting worse in the last 3-4 months[]" and worsened with gripping, grasping, driving, and daily activities such as peeling a banana or holding a phone. These documented complaints are consistent with Petitioner's testimony that he described worsening symptoms that were "killing" him and from which he needed relief. Petitioner also testified that Dr. Bear asked him about his work, which he described to the doctor. Dr. Bear diagnosed severe bilateral carpal tunnel syndrome that was confirmed by an EMG. Petitioner had not received treatment for his hands in five years at this time. Dr. Bear ultimately opined that Petitioner's bilateral carpal tunnel syndrome, right trigger thumb, and right elbow conditions were causally related to his work as a bus driver.

In addition, Dr. Bear's opinions are supported by the opinions of other physicians. Dr. Dietz noted that "[f]urther discussion with Dr. Vo strongly suggested the possibility that [Petitioner's CTS] is probably caused by his work as a bus driver." The Commission finds the opinions of Dr. Bear to be supported by the record as a whole and persuasive in this case.

In contrast, Respondent offered the opinions of Dr. Neal. He provided no less than three lengthy reports in which he opined that Petitioner's bilateral carpal tunnel syndrome condition was not, and could not, be related to his duties as a bus driver. In part, he relied on his own inspection of one bus and his review of the videos. However, Dr. Neal's unwavering belief that Petitioner's bilateral carpal tunnel syndrome could not have been caused by his work activities is undermined by the findings of Dr. Dietz, Dr. Vo, and Dr. Bear, as well as his admissions on cross-examination regarding work-related causes of carpal tunnel syndrome. In addition, while Dr. Neal opined that Petitioner's conditions were not caused by his work activities, he also acknowledged that trigger finger is often associated with CTS and can be aggravated by vibration.

The Commission notes a very recent, persuasive decision addressing a similar bilateral repetitive trauma claim involving a bus driver. *Greater Peoria Mass Transit District v. Illinois Workers' Compensation Comm'n*, 2021 IL App (3d) 200170WC-U. The claimant began experiencing symptoms in 2008. *Greater Peoria Mass Transit District*, 2021 IL App (3d) 200170WC-U, ¶ 6. An EMG revealed moderately severe bilateral carpal tunnel syndrome. *Id.* Surgery was recommended, which the claimant declined at the time. *Id.* Approximately four years later, her symptoms worsened prompting her to return to treatment. *Id.* ¶¶ 6-7. While seeing her primary care physician for other issues she reported aggravated symptoms with gripping a steering wheel. *Id.* ¶ 7. The claimant's treating physician and a section 12 examiner for the employer opined on the relatedness, if any, of the claimant's condition to her bus driving. *Id.* ¶¶ 13-15. In its causation analysis, the court addressed the opinions of the physicians finding that the Commission's reliance on the opinions of the treating physician which "were consistent with claimant's testimony about the details of her workday and her subjective complaints of increasing symptomology" was not against the manifest weight of the evidence. *Id.* ¶ 40. The court also observed that "[a]lthough [the employer's section 12 examiner] disagreed with the treating physician's assessment, he admitted on cross-examination that it was possible to aggravate or accelerate an already symptomatic condition, beyond what would be considered normal degeneration." *Id.*

There has been disagreement in the medical community regarding the factors that can cause or aggravate carpal tunnel syndrome, but as reflected in *Greater Peoria Mass Transit District* and as admitted by Dr. Neal, it is an accepted proposition that carpal tunnel syndrome may be caused, or pre-existing carpal tunnel syndrome may be aggravated, by certain occupational activities. Dr. Neal acknowledged that some of his cited articles confirm that carpal tunnel syndrome may be caused in whole, or in part, by adverse working conditions. Given these admissions, the Commission does not find the opinions of Dr. Neal to be persuasive in this case.

Finally, with regard to Petitioner's credibility, the Commission notes that Petitioner was not evasive on cross-examination. Indeed, where he did not recall a specific date, he nonetheless agreed with questions asked to the extent that the medical records should reflect a particular point. It is notable that Petitioner was the only witness called at the hearing. Respondent offered no witnesses to rebut any of Petitioner's testimony. The Commission finds Petitioner to be credible.

Given that Petitioner had no medical treatment to his hands or wrists for any bilateral carpal tunnel syndrome or trigger finger symptoms for years before seeking treatment in 2012, and the gripping, grasping, and vibration involved in Petitioner's work as a bus driver, the Commission finds that Petitioner has established by a preponderance of credible evidence that he sustained a repetitive trauma injury to his right trigger thumb and right elbow conditions were aggravated by his duties at work.

B. Causal Connection

The Arbitrator concluded that Petitioner did not establish a causal connection between his then-current conditions of ill-being and any compensable repetitive trauma accident. To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. *Id.* at 205. A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181 (1983); *Azzarelli Construction Company v. Industrial Comm'n*, 84 Ill. 2d 262, 266 (1981).

In addition, an employee who alleges injury based on repetitive trauma must "show[] that the injury is work related and not the result of a normal degenerative aging process." *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 530 (1987); *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2005). In repetitive trauma cases, the claimant "generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Nunn v. Illinois Industrial Comm'n*, 157 Ill. App. 3d 470, 477 (1987).

In this case, the Commission concludes that the evidence supports a finding that Petitioner has met his burden of proving causal connection between his current condition of ill-being and repetitive trauma injuries by a preponderance of evidence. As noted above, the opinions of Petitioner's treating physician, Dr. Bear, are more persuasive than those of Dr. Neal.

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Thus, the Commission finds that Petitioner has established that his repetitious activities involving forceful gripping and exposure to vibration while a bus driver throughout his employment with Respondent until he sought treatment on August 15, 2013 contributed to his right trigger thumb and right elbow conditions.

C. Medical Bills

Under the provisions of §8(a) of the Act, an employer is required to pay for all necessary medical, surgical, and hospital services that are reasonably required to cure or relieve the effects of an accidental injury sustained by an employee and arising out of and in the course of her employment. 820 ILCS 305/8(a) (West 2010). An employer's liability under this section of the Act is continuous so long as the medical services are required to relieve the injured employee from the effects of the injury. *Second Judicial District Elmhurst Memorial Hospital v. Industrial Comm'n*, 323 Ill. App. 3d 758, 764 (2001) (citing *Efengee Electrical Supply Co. v. Industrial Comm'n*, 36 Ill. 2d 450, 453 (1967)).

The Commission has found that Petitioner has established causal connection between his right trigger thumb and right elbow conditions and accident at work as noted above. The record reflects that Petitioner's claimed medical expenses outlined his exhibits were reasonable and necessary to alleviate him from the effects of his accident at work. Thus, the Commission finds no basis to deny the claimed outstanding medical expenses.

Accordingly, the Commission concludes that the weight of the evidence supports finding these charges were reasonable and necessary, and awards Petitioner's claimed medical expenses, pursuant to §8(a) and 8.2 of the Act. Respondent shall receive a credit as agreed by the parties for any such medical bills already paid.

D. Permanent Partial Disability

Although the Arbitrator found the issue of permanent partial disability ("PPD") moot, the Commission's conclusions regarding accident and causal connection require a determination of the issue. Section 8.1b 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 (West 2012). Specifically, §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 Commission addresses the factors delineated in the Act for determining permanent partial disability as indicated below:

With regard to subsection (i) of §8.1b(b), the Commission notes that no AMA impairment report was submitted into evidence. No weight is given to this factor.

With regard to subsection (ii) of §8.1b(b), Petitioner was employed as a bus driver at the time of his accident. Some weight is given to this factor.

With regard to subsection (iii) of §8.1b(b), Petitioner was 63 years old at the time of accident. He is retired and the injuries at his age will have a lesser impact on his ability to perform physical activities than if he were younger and remained employed. Greater weight is given to this factor.

With regard to subsection (iv) of §8.1b(b), there was no evidence that the injury had any effect on Petitioner's future earning capacity. No weight is given to this factor.

With regard to subsection (v) of §8.1b(b), the medical records reflect that Petitioner underwent a release surgery for his right trigger thumb condition. Petitioner testified the triggering stopped after surgery but he still gets occasional numbness and tingling after he does anything with his hands, usually once or twice a week. He notices the condition more with activities such as using lawn mowers, weed eaters, or anything like that when he is using and holding something with vibration. He does not take prescription medication for his symptoms,

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but does use braces if he experiences pain and takes over-the-counter medication. With regard to the right elbow, Petitioner underwent very little conservative care for his right medial epicondylitis condition and made no complaints in the medical records, or at the hearing, about continuing symptoms after August 15, 2013. Greater weight is given to this factor.

Based on the above analysis, the Commission finds that the injuries sustained caused Petitioner permanent partial disability to the extent of 5% of the use of the right thumb only.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay the medical expenses incurred for the treatment of Petitioner's right trigger thumb condition pursuant to §8(a) of the Act, subject to the applicable medical fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISION that Respondent pay to the Petitioner the sum of $530.62 a week for a period of 3.8 weeks because the injury sustained caused the loss of the use of 5% of the right thumb, as provided in §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.

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: FEB 17 2021

Barbara N. Flores

Marc Parker

DLS/dw
O-12/17/20
46

15 WC 35557
21 IWCC 0065

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM McWILLIAMS,

Petitioner,

vs.

NO: 15 WC 35557
21 IWCC 0065

ROCKFORD MASS TRANSIT DISTRICT,

Respondent.

Dissent

I respectfully dissent from the Decision of the majority. The Majority reversed the Decision of the Arbitrator and found that Petitioner proved repetitive traumatic accidents which caused various conditions of ill-being. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator who found that Petitioner did not sustain his burden of proving that his alleged current conditions of bilateral CTS, trigger finger/thumb, epicondylitis, and CMC joint arthritis were caused by his work activities and denied compensation.

Petitioner worked for Respondent for about 20 years as a bus driver, retiring around 2018. When he began treating in 2012 with his rheumatologist for the various alleged repetitive traumatic injuries that are the subject of the instant claim, it was noted that Petitioner had a long history of bilateral CTS for which he had an EMG in 2007. He came under the treatment of Dr. Bear who performed bilateral CTS open release and trigger-thumb release surgeries. In a narrative report prepared by Dr. Bear at the request of Petitioner's lawyer, he opined that after reviewing Petitioner's job analysis, Petitioner's bilateral CTS and right trigger thumb were aggravated by his job as a bus driver.

The job description upon which Dr. Bear relied indicated that drivers are responsible for assisting handicapped passengers on and off a bus. Drivers are required to properly restrain a wheelchair with floor and seat belts. The description also sites pushing/pulling up to 25 pounds of force pushing/pulling seats to accommodate wheelchairs. The driver is also required to reach frequently (1/3 to 2/3 of the day) to open and close doors. The job has a physical demand level of light-to-medium. Pushing/pulling was "occasional (up to 1/3 of the day)."

Both parties submitted videos showing various activities of a bus driver for Respondent. Respondent presented a video taken on July 8, 2016. Petitioner is filmed doing an initial inspection of the outside of the bus looking for damage *etc.* He then shows how he sets the route by pushing buttons, makes sure the equipment is working, and showed how he answers the phone.

Petitioner then shows the belts used to secure a wheelchair. He notes that the belt must be in good repair because if it does not retract, it is very hard to get out. He then shows the process for wheelchaired passengers. He gets the bus as close to the curb as possible, presses a button to automatically deploy the ramp, shows how he uses the belts to strap in a chair, and presses a button to automatically raise the ramp.

Petitioner also showed what he does if the automated ramp mechanism does not deploy. He would manually lift the ramp, push it out to the street, and step on it to ensure it was stable. He then lifted it up and placed back in the well of the bus. Petitioner drove the bus briefly and showed how he dispensed transfers. Petitioner also showed how he occasionally manually adjusted the mirrors.

Petitioner submitted a video taken by his grandson on October 18, 2016. The video shows Petitioner driving a bus. There does appear to be some vibration in the steering wheel and vibration is seen notably in the wobbling of the fare box. Petitioner's hands do not appear to be gripping the wheel with force. However, there does appear to be intermittent vibration in his hands. At times, Petitioner appears to be driving partially on the shoulder.

Dr. Neal examined Petitioner on April 19, 2012 and issued reports pursuant to §12 of the Act. Dr. Neal opined that neither Petitioner's bilateral CMC joint arthritis nor the bilateral CTS were caused by Petitioner's work activities as a bus driver. He noted that it was well accepted that the most common cause of CTS is idiopathic and while Petitioner was still obese, he was morbidly obese prior to his gastric bypass surgery; obesity is a well-known risk factor in developing CTS.

In addition, Dr. Neal noted that the activities of a bus driver are not generally considered the type of work that could contribute to developing CTS or CMC arthritis. In addition, Dr. Neal noted that there was no evidence or indication of any work relationship between Petitioner's work activities and his trigger thumb condition.

On February 20, 2015, Dr. Neal issued an addendum report after himself performing duties of a bus driver, with tape measure and Dictaphone in hand. Dr. Neal did the procedures needed to secure a wheelchair. He lifted the three seats which only took a couple of pounds of force to pull the metal handle to move the seats. He noted that the belts securing the wheelchair automatically retract and "you simply pull a small metal latch that allows you to pull the belts where you want to secure on a wheelchair. To tighten them you can turn a little triangular key to tighten them up requiring very little force." The door is air-powered and not manually operated. The handle is 4&1/2 inches long and 3&1/2 inches "up of the side console." "You can easily pull the switch with one finger taking less than one pound of force."

Dr. Neal indicated that after visually inspecting the outside of the bus, a driver puts his number in the fare box, manipulates toggle switches to test operation of the wheelchair ramp, adjusts the chair by operating a button and adjusting one's weight, and adjusts the steering column which is easy but requires a few pounds of force. Dr. Neal noted that the farebox is button-driven, operated by pushing buttons, and tickets pop out automatically.

Dr. Neal noted that the parking brake is spring-operated and the valve pulls up easily. To release the brake the driver pushes a button which takes about five to seven pounds of force with an open palm. The parking brakes apply automatically when a bus stops and the door opens. The steering wheel is 20" in diameter and driving does not required gripping of the wheel and the bus can be driven with only a hand resting on it. The transmission is operated by push button. Dr. Neal drove the bus forward but not in reverse.

In reviewing his prior report and reflecting on his experience in the demonstration, Dr. Neal reiterated his previous conclusion that Petitioner's bilateral CTS, CMC joint arthritis, and tenosynovitis were not causally related to his occupation as a bus driver. He cited publications of the Academy of Orthopedic Surgeons indicating that most cases of CTS have no identifiable etiology and that there are many medical risk factors for developing CTS including obesity and rheumatoid arthritis. He also noted that another article found that CTS "occurs at least twice as often bilaterally as in the dominant hand alone. It was stated this factor suggests non-occupational factor could be etiologically more important than work."

After reviewing Respondent's video of Petitioner driving a bus. He observed Petitioner operating the doors, performing functions for access and securing wheelchairs, occasionally using the phone, demonstrating securing a bike, and manipulating mirrors. His causation opinions remained the same.

Dr. Neal issued another addendum report after reviewing the video submitted by Petitioner. He noted that this video generally shows the bus operating on what looks like cement surface which is rough. One can hear and see the vibrations in the bus by looking at the equipment bus in the front. However, at time one can appreciate that what appears to be a newspaper is draped over the dashboard of the bus and at times the newspaper

does not appear to be vibrating to any great extent although the sound of the bus and the other equipment appears to be vibrating." Dr. Neal again cited various articles and now included factors regarding CMC arthritis and trigger finger. He noted that there was no relationship found between vibration and CMC arthritis, there was "some evidence" that vibration, repetitive force, and posture can aggravate trigger finger. He reiterated his previous opinions and again concluded that Petitioner's conditions of ill-being were not causally related to his work activities.

The Arbitrator found that Petitioner did not prove that he sustained a compensable repetitive traumatic accident or causation to current conditions of ill-being of bilateral CTS, trigger finger, epicondylitis, and CMC joint arthritis and denied compensation. He noted that Petitioner had extensive pre-existing medical problems and as a result, Petitioner had the burden of proving that his work activities aggravated those conditions.

The Arbitrator also found the causation opinions of Dr. Neal considerably more persuasive than those of Dr. Bear, noting that Dr Bear only reviewed the job analysis and did not review the videos. On the other hand, the Arbitrator noted that Dr. Neal viewed both videos and actually operated the bus and its controls. Therefore, the Arbitrator found that Dr. Neal had a much better understanding about Petitioner's job activities than did Dr. Bear.

I agree with the Arbitrator that the opinions of Dr. Neal are more persuasive than those of Dr. Bear. Dr. Bear relied only the job description and perhaps Petitioner's report about his job activities, though that recitation does not appear to be in his records. In my opinion, the job description was not very helpful at all in delineating Petitioner's everyday work activities, and would not itself establish a reasonable basis to determine causation.

In addition, Dr. Bear did not explain the basis of his opinion or explain what specific activities he deemed offensive. Also, in looking at the videos, there is no obvious activity which would appear to aggravate peripheral neuropathies. Respondent's video shows extensive use of the hands, however, there does not appear to be any forceful gripping of any kind or awkward positioning of his wrists.

The only objective basis upon which the Majority reversed the Decision of the Arbitrator seems to be the video that shows vibration in the steering wheel. However, as noted above, the video does not show Petitioner gripping the steering wheel forcibly, and Petitioner could have consciously affected the perception of vibration by having it filmed while driving on rough surfaces or while driving on the shoulder.

It also appears that Petitioner's right-hand activities were different from his left-hand activities, which would tend to militate again development of similar work-related pathology on both sides. Finally, it is clear that Petitioner had some co-morbidity factors such as age (63 at the time of the "accident"), obesity, "marked" arthritis in his hands, and likely rheumatoid arthritis.

Based on the entire record before us, I would have affirmed and adopted the well-reasoned Decision of the Arbitrator who found that Petitioner did not sustain his burden of proving an accident or a causal connection between his work activities and his conditions of ill-being and denied compensation. For these reasons, I respectfully dissent.

Deborah L. Simpson

Deborah L. Simpson

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GREGORY ROCHELLE,

Petitioner,

vs. NO: 08 WC 3403

ULTRA FOODS,

Respondent.

21IWCC0066

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Respondent's timely Petition for Review of the Decision of the Arbitrator. Therein, the Arbitrator found Petitioner's left and right knee conditions of ill-being are causally related to his October 4, 2007 accident, but his left shoulder condition is not causally related; the Arbitrator awarded 387 6/7 weeks of Temporary Total Disability benefits as well as medical expenses, and found Petitioner permanently and totally disabled under §8(f) of the Act. Notice having been given to all parties, the Commission, after considering the issues of causation, temporary disability, medical expenses, and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator with respect to Petitioner's left and right knee conditions of ill-being.

Procedural History

The matter was originally assigned to Arbitrator DeVriendt who presided over a §19(b) hearing on August 26, 2010. At issue was causal connection, temporary disability, and prospective medical treatment. The transcript from the §19(b) hearing was admitted as an exhibit (Respondent's Exhibit 2) at the current hearing. A summary of the pertinent evidence from the §19(b) hearing follows.

Petitioner worked as a meat packer for Respondent, a grocery store. RX2 – 8.26.10 Hearing Transcript, p. 7 The boxes he lifted ranged from 8 to 90 pounds. RX2 – 8.26.10 Hearing Transcript, p. 8. On the date of his accidental injury, Petitioner weighed 280 pounds. RX2 – 8.26.10 Hearing Transcript, p. 7. Petitioner described the undisputed October 4, 2007 accident as follows: "I was in our holding cooler. I reached up on a shelf to bring down a box. I felt a pop in my knee. Popped in and out. It was very painful." RX2 – 8.26.10 Hearing Transcript, p. 9. Petitioner initiated treatment with his primary care physician and ultimately came under the care of Dr. Scott Cordes. The initial consultation with Dr. Cordes occurred on March 7, 2009. The record from that evaluation reflects Petitioner reported "problems with the knee wanting to buckle and give way" which he related to an acute injury in October 2007. Dr. Cordes' examination findings included medial joint line tenderness, positive McMurray's sign, 1+ effusion, and painful yet full range of motion; he reviewed an MRI "demonstrating suspected meniscal pathology." Dr. Cordes diagnosed medial meniscus pathology, recommended arthroscopic intervention, and authorized Petitioner off work pending surgery. RX2 – 8.26.10 Hearing Transcript PX3. At his subsequent evidence deposition, Dr. Cordes explained, "The history that was provided to me from the patient and with acute onset of pain, especially with a sense of popping, that this sounds like classic meniscal pathology." (8.26.10 PX4, p. 9-10)

In his September 13, 2010 decision, Arbitrator DeVriendt concluded Petitioner's left knee condition was causally related to his undisputed accident. In so doing, the Arbitrator noted "[Dr. Cordes] diagnosed the Petitioner with a left knee meniscal tear. The doctor testified that it was his opinion a causal connection exists between the incident of reaching up and grabbing a box at work and the Petitioner's meniscal tear. Dr. Cordes further explained that you can get meniscal tears from impact loading." The Arbitrator awarded left knee arthroscopy with Dr. Cordes and temporary total disability benefits through the date of hearing, finding "Petitioner has sustained an injury to the left knee resulting in meniscal damage from which he is currently temporarily and totally disabled." Respondent filed a Petition for Review, but this was voluntarily dismissed.

On March 20, 2019, the parties appeared before Arbitrator Cronin and hearing commenced on the issues herein.

Findings of Fact

Petitioner testified, following the Arbitrator's decision, he resumed treating with Dr. Cordes, with the first visit occurring on January 6, 2011. T. 7-8. Dr. Cordes memorialized Petitioner had previously been diagnosed with a medial meniscus tear stemming from an acute left knee injury in October 2007, and recently obtained approval for arthroscopic treatment. Dr. Cordes noted his intent to proceed with the recommended surgery that was outlined for Petitioner in 2009. PX1, RX14.

On January 24, 2011, Petitioner presented to Northwestern Memorial Hospital for surgery. Dr. Cordes' intraoperative findings reflect, "Upon entry into the medial compartment, the medial meniscus was probed and appeared to be intact"; he further documented the presence of "a large full-thickness cartilage defect on the lateral femoral condyle with full-thickness articular cartilage loss in an oblong fashion running from anterior to posterior." Dr. Cordes

proceeded with arthroscopic partial lateral meniscectomy, chondroplasty of patellofemoral joint, and microfracture of lateral femoral condyle. The post-operative diagnosis was osteochondral injury lateral femoral condyle with lateral meniscal tear and chondromalacia patella. PX1, PX4, RX14.

At the initial post-operative visit on February 8, 2011, Dr. Cordes reviewed the arthroscopic photos with Petitioner and identified the full thickness articular cartilage defect of the lateral femoral condyle which he treated with an arthroscopic microfracture and drilling. Petitioner was noted to be ambulating with a cane and utilizing Tylenol for pain. Dr. Cordes ordered physical therapy and authorized Petitioner to remain off work. PX1, RX14. Petitioner testified he underwent physical therapy at AthletiCo. T. 9.

On March 23, 2011, Petitioner followed up with Dr. Cordes and reported feeling "100% better than he did preoperatively." Dr. Cordes noted Petitioner still had pain for which he took Tylenol, and "occasionally gets lateral joint line symptoms consistent with his underlying cartilage pathology." Dr. Cordes provided a prescription for a pull-up hinged brace at Petitioner's request, ordered additional physical therapy, and directed Petitioner to return for "final follow-up" in two months, at which time he expected Petitioner to be at maximum medical improvement. In the meantime, Petitioner was to remain off work. PX1, RX14.

When Petitioner next saw Dr. Cordes on April 26, 2011, Petitioner indicated he was doing reasonably well with his knee rehabilitation but was having a significant amount of residual stiffness in his iliotibial band radiating from the hip down the lateral aspect of the left leg. After reviewing the therapy reports, Dr. Cordes ordered additional physical therapy and maintained Petitioner's off work status. PX1, RX14.

On June 7, 2011, Petitioner was re-evaluated by Dr. Cordes. Petitioner again stated he felt better than he did preoperatively regarding his knee but described ongoing pain and tightness. Dr. Cordes recorded Petitioner's "main limitation at this point is what he describes as left hip pain. In actuality it appears to be radicular pain from his back. He has known low back problems"; Dr. Cordes further noted Petitioner's "symptoms are consistent with sciatica emanating from the lumbosacral spine." The record reflects Petitioner advised he was applying for disability, and "[u]pon questioning he states that he is unable to sit or stand greater than an hour because of his chronic pain issues. He does not feel he is an employable candidate at this point." Dr. Cordes recommended focusing on a conservative therapy program for Petitioner's back symptoms. Dr. Cordes also noted, due to the significance of the cartilage pathologies in the knee joint, knee arthroplasty may be required in the distant future. RX14. Petitioner confirmed he has a chronic low back condition unrelated to his 2007 work accident. T. 30. Petitioner agreed he applied for and was awarded Social Security Disability as a result of his low back pain. T. 31.

On July 7, 2011, Petitioner presented to Dr. Cordes for follow-up. Petitioner complained of knee pain with buckling while descending stairs as well as shooting pain down the lateral aspect of his thigh from the iliotibial band, radiating down the sacroiliac joint and back area. Examination of the left knee revealed full range of motion and trace swelling. Dr. Cordes noted Petitioner wished to continue physical therapy, and he agreed. Dr. Cordes recommended an MRI of the lumbar spine. Dr. Cordes indicated Petitioner is not a candidate for work at this time.

Noting the "osteochondral defect in the lateral femoral condyle will unfortunately progress to osteoarthritic deterioration of the left knee joint," Dr. Cordes discussed the potential for knee arthroplasty. RX14.

Petitioner testified he had to stop treating after August 2011 because the physical therapy "ran its course for the amount of visits." T. 9. He further stated authorization for all medical treatment stopped at that time. T. 10.

On November 11, 2011, Dr. James Cohen conducted a Section 12 examination and record review at Respondent's request; Dr. Cohen evaluated Petitioner's left knee, left hip, and right knee. The report reflects Petitioner provided a history of "standing on both feet and reaching up and felt his left knee pop," followed by immediate swelling and diffuse pain. Dr. Cohen memorialized Petitioner localized his pain on the medial aspect of his left knee. Petitioner eventually underwent surgery to repair a meniscus as well as lateral cartilage, and also underwent microfracture; Petitioner reported he did fine while in post-operative physical therapy, but after physical therapy stopped in approximately July, his pain became worse. Petitioner indicated his pain was no better than before surgery and complained of pain both at the anterior and lateral aspect of left knee. Petitioner further complained of pain from the lateral aspect of his left hip down his iliotibial band to his knee, which developed two months post-op, as well as intermittent right knee pain. Dr. Cohen documented Petitioner stated he has been much less active since the incident in question; Petitioner's then-current weight was 306 pounds. On physical examination, Dr. Cohen observed Petitioner was able to stair-step with both legs, but with more difficulty and crepitus on the left than the right, and there was a five degree difference in range of motion of the left knee compared to the right. Radiographs taken that day were interpreted as follows: AP x-rays of both knees did not show any joint space narrowing; standing PA view showed some mild spurring off the intercondylar notch of left knee and of the interspinous processes, but there were no other arthritic changes; and skyline view showed some mid periarticular spurring of the trochlea on both knees along the lateral trochlear margin. First addressing Petitioner's left knee, Dr. Cohen recommended an intraarticular steroid injection for Petitioner's symptoms. As to causation, Dr. Cohen "[could not] imagine an incident where a patient that had apparently a normal left knee and was simply standing and reaching upward for a box would have a knee 'pop' and have it result in advanced chondromalacia of the patellofemoral joint or a large chondral defect of the lateral femoral condyle." Dr. Cohen concluded Dr. Cordes' intraoperative findings are not consistent with the 2007 injury as described by Petitioner. Dr. Cohen explained as follows:

> As I stated above, I do not believe that the osteochondral defect was caused by the incident in question. I base this not that it was not stated on the MRI report, but on the fact that an injury like this would not be caused by simply standing on both knees. There is no reported twisting injury or direct contusion. I believe that this was chondromalacia of the patellofemoral joint, as well as the chondral defect of the lateral compartment and were preexisting.

Dr. Cohen opined Petitioner could work restricted duty, but given Petitioner's diffuse complaints, recommended a Functional Capacity Evaluation. Turning to Petitioner's right knee problems, Dr. Cohen denied a causal relationship to the 2007 incident: "He states that he feels

that he has the right knee problems because he has been favoring his left side, but it also should be noted that overall, his activity has been far less than if he would have had a normal left knee." Finally, regarding Petitioner's left hip complaints, Dr. Cohen again concluded those symptoms are not related to the incident in question. Dr. Cohen further agreed with Dr. Cordes's conclusion those resulted from a radicular component of Petitioner's known back problems. RX3.

On March 9, 2012, Dr. Cohen authored an addendum report. In response to questions posed, Dr. Cohen first asserted Petitioner's left knee condition was not aggravated or caused by the 2011 surgery:

> Clearly, the chondromalacia of the patellofemoral joint, as well as the chondral defect of the lateral compartment was preexisting. The basis for my opinion is that neither of these conditions would have been caused by the incident in question. Specifically, these are degenerative changes or a result of a trauma. There was not any traumatic incident related to the October [4], 2007 incident. The patient stated he was just standing. Both of these were preexisting conditions and I do not see that the arthroscopic surgery performed by Dr. Cordes would have aggravated these conditions.

Dr. Cohen next addressed the MRI findings, which he emphasized were "simply 'mild intrasubstance degeneration of the posterior horn of the medial meniscus without a surface tear.'" Dr. Cohen opined there was no evidence of aggravation: "Therefore, the only findings on the MRI were that of degenerative changes of the meniscus. There were not any traumatic findings seen on the MRI. The reason arthroscopy was performed was based on the patient's symptoms and not his MRI. The MRI findings were simply degenerative meniscal changes. There were no acute traumatic findings." Finally, Dr. Cohen turned to the etiology of the lateral compartment finding:

> First of all, I would not describe it as a chondral "injury." The chondral defect, as well as the chondromalacia described in Dr. Cordes' report, I believe, was preexisting conditions. I do not believe that they were related to the original accident. I also do not believe that they are necessarily incidental findings. I believe that this patient's left knee became symptomatic unrelated to an incident at work, as there was not any traumatic incident. He simply, according to his history, became symptomatic while at work. RX4.

On June 4, 2013, Petitioner resumed treatment with Dr. Cordes. T. 10. Petitioner explained he was able to see the doctor after obtaining different coverage: "I was put on disability. And my disability kicked in on June 1st of 2013." T. 10. He confirmed he became Medicare eligible at that time. T. 10. Petitioner testified that between August 2011 and June 2013, he noticed he was getting worse physically. T. 11. He had pain throughout his hips, and in February 2013, his right leg gave out and he fell on his right knee. T. 12. In his June 4, 2013 office note, Dr. Cordes summarized Petitioner's history, including "arthroscopy in 2011 at which time a severe kind of pathology was identified." He further recorded Petitioner "is now on full disability" and weighed 313 pounds. Bilateral knee x-rays demonstrated mild degenerative changes in the right knee and very mild degenerative changes in the left knee. Dr. Cordes

recommended continuing with conservative treatment in the form of physical therapy and discussed viscosupplementation. Dr. Cordes also noted the "possibility of lifetime total knee replacement due to his weight and known arthritis within the left knee." PX2, RX13. Petitioner commenced physical therapy at AthletiCo the next day. PX6.

On July 18, 2013, Dr. Cordes administered Petitioner's first left knee Euflexxa injection. During that visit, Petitioner also complained of significant problems with his right knee, though x-ray showed only moderate degenerative changes, as well as pain over his buttock and iliac crest. Dr. Cordes concluded Petitioner's hip complaints emanated from his back and recommended low back rehabilitation in therapy, weight loss, and activity modification. Additionally, he ordered a right knee MRI. PX3, RX13.

The right knee MRI was completed on July 22. The history reflects complaints of right knee pain with a fall seven months prior. The radiologist's impression was moderate osteoarthritis with small tricompartmental osteophytes and diffuse chondromalacia. PX3.

On July 25, 2013, Dr. Cordes injected Petitioner's left knee with the second Euflexxa dose and reviewed the right knee MRI. Noting the presence of degenerative tricompartmental arthritis but no meniscal pathology, he recommended and administered a steroid injection. PX3, RX13.

When Petitioner received his third Euflexxa injection on August 1, 2013, he reported the right knee Kenalog injection provided only short-term relief. Dr. Cordes recommended giving the medication more time to provide full benefit before considering Euflexxa. Dr. Cordes' note also reflects the following:

> He is stressed the importance to point out that his left knee is on treatment to date has been due to a work-related injury. This stems from an October 2007 injury. In over the course of time, there has been progressive deterioration from a traumatic injury to the left knee. He is aware that total knee arthroplasty may be warranted on the left knee and that the treatment as through 2013 stems a work-related injury of 2007. PX3, RX13.

Dr. Cordes administered an Euflexxa injection series to Petitioner's right knee on August 29, September 5, and September 12, 2013. PX3, RX13. At the September 12, 2013 visit, Dr. Cordes advised Petitioner to follow up in six months for possible repeat injections. PX3, RX13.

Physical therapy continued into 2014. The therapeutic modalities focused on Petitioner's knees and left hip. PX6.

On January 10, 2014, Petitioner presented to his primary care physician, Dr. Mark Reiter, with complaints of bilateral knee, hips, and lower extremity pain. Petitioner's history reflects long-standing difficulties with his knees, "initially starting in the left knee and now is a compensation [*sic*] the right knee." Petitioner reported significant problems with the right knee giving out and causing falls. He further advised a weight loss of 50 pounds over the prior six months. Dr. Reiter directed Petitioner to follow up with the orthopedist and ordered additional

physical therapy, insurance allowing. Dr. Reiter additionally documented he authored a note "explaining the knee arthritis situation" for Petitioner's attorney. PX5, RX10. The Commission observes there is no corresponding note in the transcript.

On January 16, 2014, Petitioner returned to Dr. Cordes with complaints of bilateral knee pain. The record reflects Petitioner associated the onset of symptoms in his right knee to "prolonged treatment in favoring his knee." X-rays of the left knee demonstrated preservation of joint space with early degenerative changes. Noting Petitioner was requesting physical therapy for his knees as well as his upper extremities, and this had proven beneficial in the past, Dr. Cordes provided the necessary order. PX3, RX13. Over the next several months, Petitioner attended physical therapy at AthletiCo. PX6.

In April 2014, Dr. Cohen performed a record review at Respondent's request. In his April 4, 2014 report, Dr. Cohen memorialized he was provided with the December 12, 2007 MRI report as well as Dr. Cordes' records through January 2014. Dr. Cohen opined Petitioner's "diagnosis of his left knee is that he has arthritis of his knee. I base this on his operative findings. He has a chondral defect of his lateral femoral condyle. He also has similar arthritic changes of his right knee based on his x-ray reports which showed mild degenerative changes in both knees." Dr. Cohen again concluded there was no causal connection to the 2007 incident:

> I do not believe that Mr. Rochelle's condition in either knee is related to the work incident of October 2007, the basis of which I clearly stated in my initial report, and it is unchanged. In addition to what I based my opinion on in my initial report, it should be noted that Mr. Rochelle's symptoms were all on the medial aspect of his left knee and indeed, according to the operative note from Dr. Cordes, the meniscal tear was in the lateral aspect of his knee, along with a chondral defect in the lateral aspect of his knee.
> I do not think there is any special significance that in the x-rays of both knees from June 2013 there was more degeneration in the right knee than the left. The significance is that this man has arthritic changes in both knees, and over time they have become more symptomatic which is simply the natural history of arthritis, and not related to either a work incident regarding the left knee or overuse regarding the right knee. Specifically, regarding the right knee, his complaints are in no way related to the incident of October 2007. He had symptoms before the incident in question. Although he may think that overusing the right knee to favor the left knee caused his problems, overall his general activity was markedly less since October 2007, and therefore there is not even an indirect relationship between the alleged injury to his left knee and the development of right knee pain. RX5.

In Summer of 2014, Petitioner underwent a second Euflexxa series for both knees. Dr. Cordes administered the injections on July 31, August 7, and August 21, 2014. PX3, RX13. At the August 21, 2014 appointment, Dr. Cordes noted the injections had been beneficial and could be repeated on a six-month basis. PX3, RX13.

Petitioner continued to attend physical therapy through the end of 2014 and into 2015.

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Therapy eventually discontinued in March of 2015. PX6.

On April 2, 2015, Petitioner presented to Dr. Cordes for evaluation of left shoulder pain. As indicated above, Petitioner's left shoulder condition was determined to be unrelated to his work injury, and Petitioner has not raised the issue on review. As such, Petitioner's left shoulder treatment will not be detailed herein beyond noting Petitioner's treatment focused on his left shoulder through late 2015.

On January 21, 2016, Petitioner returned to Dr. Cordes requesting repeat Euflexxa injections as well as physical therapy for upper and lower extremity conditioning. Dr. Cordes provided the therapy referral and administered the first Euflexxa doses to Petitioner's knees. PX3, RX13. The Euflexxa injections were repeated on January 28 and February 4, 2016. PX3, RX13. From February through June 6, 2016, Petitioner underwent a further course of physical therapy directed to his upper and lower extremities. PX6.

On August 11, 2016, Petitioner was re-evaluated by Dr. Cordes for "multiple orthopedic issues." Dr. Cordes concluded, "In regard to his knees, he is medically recovered as well as he is going to." Noting Petitioner's condition could progress to where surgery was necessary, Dr. Cordes documented Petitioner was maintaining with semi-yearly viscosupplementation and recommended repeating the Euflexxa series. The initial injections were administered that day. PX3, RX13. Dr. Cordes provided a note reflecting Petitioner "has reached bilateral knee maximal medical improvement with Viscosupplementation." RX13, RX15. The remaining Euflexxa injections were completed on August 25 and September 1, 2016. PX3, RX13.

In February 2017, Petitioner commenced a further course of physical therapy for upper and lower extremity conditioning. PX7. This was at Dr. Cordes' direction following an aggravation of Petitioner's left shoulder. PX3, RX13.

On March 30, 2017, Petitioner returned to Dr. Cordes for repeat Euflexxa injections. The second and third injections were administered on April 6 and April 13, 2017, respectively. PX3.

On February 1, 2018, Petitioner saw Dr. Cordes for the last time. Dr. Cordes memorialized Petitioner was on disability and "considers himself disabled." Petitioner had "multiple complaints," including "left neck and shoulder pain, pain radiating posteriorly toward the shoulder blades, gout in his hands with diffuse swelling and pain…chronic low back symptoms and bilateral knee problems." Dr. Cordes noted Petitioner benefitted from viscosupplementation in the past but was not able to proceed with that at that point and, further, felt he may not be able to return for follow-up. Dr. Cordes discharged Petitioner to return prn and indicated, "A note stating that he is presently disabled due to his multiple orthopedic issues." PX3.

On February 5, 2018, Dr. Troy Karlsson performed a Section 12 record review at Respondent's request. The report reflects the doctor was provided with a five-and-a-half-inch stack of printed records dating back to 2001. Dr. Karlsson observed the initial post-accident record was from Midwest Healthworks on October 16, 2007, and memorialized Petitioner "was reaching overhead to bring down a box standing on his tiptoes when he felt a pull and

subsequently pain behind the left knee. There was no direct trauma." After examination revealed swelling in the popliteal fossa consistent with a Baker's cyst and tenderness posteriorly and over the medial aspect of the knee and medial joint line, Petitioner was diagnosed with a left knee sprain and referred for further evaluation. Dr. Karlsson then summarized the remaining records detailing Petitioner's treatment through April 13, 2017. Beginning with Petitioner's left knee, Dr. Karlsson diagnosed "osteoarthritis...listed in recent x-ray report as being of mild degree," which he concluded was not causally related "in any way" to the October 2007 work incident, explaining as follows:

> The mechanism of injury at work was described as stretching to lift and being on his tip toes. There was no twist injury or fall. Following that injury, he complained of medial-sided pain and there was a suspicion of a medial meniscal tear. He eventually went on to have surgery in 2011, which did not find any medial pathology at all. Instead, he had significant arthritic changes including grade 3-4 changes in the patellofemoral joint and grade 4 changes with a defect in the articular cartilage on the lateral condyle. There was also mention of a lateral meniscal tear and lateral meniscectomy. However, the body did not describe the lateral meniscal tear and the interoperative pictures at most show some blunting of the meniscus with no large displaced fragments. All of the changes found at surgery would be degenerative in nature, including a degenerative meniscal tear with some blunting and irregularity of the free surface, but no evidence of a traumatic portion. There was never any evidence on MRI or x-ray of a traumatic piece knocked off the articular surface and all cartilage loss found at surgery would be on a degenerative basis. Also, the mechanism of injury of simply standing up on one's toes and stretching could cause some irritation and stretch of the muscles surrounding the knee joint, but would not cause the interoperative findings which are degenerative and full-thickness cartilage loss, as well as meniscal tear. His mechanism that occurred in October 2007 would not be causative of these abnormalities. I do not believe there was a temporary or permanent aggravation of preexisting conditions, but his ongoing problems are degenerative in nature.
>
> In other words, while it may have been reasonable to proceed with surgery for a suspected medial meniscal tear, there was no medial meniscal tear found and simply degenerative changes and blunting of the lateral meniscus, none of which were acute. There were no loose bodies or traumatic injuries found. Following that surgery, his care for approximately [two] months to recover range of motion and regain strength would be related to the surgery. Any further care after that [two] month postoperative point would be completely unrelated to his surgery and would be simply related to care of his underlying degenerative conditions in the knee. RX6.

Turning to Petitioner's right knee, Dr. Karlsson diagnosed degenerative osteoarthritis, mild in nature per x-ray, unrelated to the work accident. Dr. Karlsson provided the basis for his opinion stating as follows:

> He had treatment for his right knee predating this injury. There was no direct

> injury at work on October 4, 2007. There was conjecture that he may have injured or aggravated the right knee by favoring the left knee. However, it was noted in Dr. Cohen's Independent Medical Evaluation of November 11, 2011 on page two and actually mentioned that it was stated by the patient that he had been much less active since the incident in question. If anything, his decreased activity may have led to somewhat slower pace of advancement of his preexisting osteoarthritis in the right knee. I do not believe there is any temporary or permanent aggravation of his preexisting condition of osteoarthritis. RX6.

Noting Petitioner's x-ray findings were of mild osteoarthritis, Dr. Karlsson further opined Petitioner's knees do not limit his ability to work as a stocker. PX6.

On August 21, 2018, Dr. Karlsson examined Petitioner pursuant to §12 at Respondent's request. Dr. Karlsson memorialized Petitioner's description of his mechanism of injury:

> He said he was reaching up to an upper shelf, did not fall, did not twist, but as he was reaching up, he felt pain in his knee and says he dislocated his kneecap and tore his meniscus. He did not fall on the ground. He did not strike any objects. He was not lifting an object at the time, but he was reaching up to get something. RX7.

Petitioner reported he ultimately underwent surgery, which helped his left knee. Petitioner further reported, "that because of the problems he was having with his left knee, he had to shift a lot of weight onto his right." Dr. Karlsson noted he asked Petitioner when the right knee problems began and Petitioner "says it was in 2013, when the right knee gave out on him and he fell onto his kneecap. He says he had an MRI scan done at that time and was told he needed a knee replacement." Dr. Karlsson detailed his physical examination findings then responded to a series of questions. Beginning with Petitioner's left knee, Dr. Karlsson reiterated Petitioner's diagnosis is osteoarthritis which is unrelated to the October 4, 2007 injury. Dr. Karlsson provided the basis for his conclusion:

> I have reviewed the operative report. The patient did undergo a partial lateral meniscectomy, which could be due to a single injury in recent years before that. He also had grade 3 and 4 changes on the femoral trochlea, grade 3 changes on the patella, and had an area on the lateral femoral condyle, which is described as a large area with full-thickness loss. There was no large corresponding loose body to indicate that there was a single loss of cartilage from a trauma, but rather this would be lifelong loss of cartilage from attritional wear over an entire lifetime. This is not in any way due to his injury of October 4, 2007. RX7.

Dr. Karlsson further noted, assuming surgery was reasonable based on Petitioner's pre-surgery complaints, postoperative treatment related to that injury would be follow-up with his surgeon and physical therapy for a period of two to three months. Dr. Karlsson denied there was an aggravation of a preexisting condition. "He had a preexisting condition of osteoarthritis, but that was not aggravated either temporarily or permanently. His surgery was primarily for a meniscal tear. He then had some treatment for his arthritis as well with microfracture." As to Petitioner's right knee, Dr. Karlsson diagnosed tricompartmental degenerative osteoarthritis, mild by

radiographic standards. Dr. Karlsson repeated his conclusion there is no relationship between the right knee osteoarthritis and Petitioner's workplace accident: "He has tricompartmental arthritic changes, which radiographically appear similar to the contralateral left knee." Finally, Dr. Karlsson observed Petitioner would have reached maximum medical improvement from his workplace accident by three months post arthroscopy, and given Petitioner's bilateral knee osteoarthritis is radiographically mild, there is no reason Petitioner cannot be working full-duty as a stocker. RX7.

Petitioner described his current symptoms. As to his left knee, his "pain has subsided to a point, but the pain is still there…The pain is constant every day." T. 16-17. Petitioner also has pain in his right knee, both hips, and left shoulder. T. 17. Petitioner has a brace which he uses occasionally "if the knees flare up, I put them on if I have to go out to go grocery shopping or to walk around. I also had a cane. Unfortunately it did break, and I have not replaced that yet." T. 18. Petitioner does not take pain medication. T. 18.

Prior to issuing a decision, Arbitrator Cronin retired, and the matter was reassigned to Arbitrator Seal. The parties agreed Arbitrator Seal would decide the matter based on the transcript, and Arbitrator Seal issued his decision on March 20, 2020.

Conclusions of Law

I. Causal Connection

A. Left knee

Our analysis commences with the initial §19(b) hearing and decision. Petitioner described his mechanism of injury as follows: "I reached up on a shelf to bring down a box. I felt a pop in my knee. Popped in and out. It was very painful." RX2 – 8.26.10 Hearing Transcript, p. 9. The Commission observes this is an atypical mechanism of injury, with no twisting, torqueing, or impact; instead, Petitioner, a 278-pound individual, simply came down from his tiptoes. Despite the benign nature of the incident, Dr. Cordes opined this was a competent cause for a meniscal injury: "The history that was provided to me from the patient and with acute onset of pain, especially with a sense of popping, that this sounds like classic meniscal pathology." RX2 - 8.26.10 PX4, p. 9-10. In the §19(b) Decision, the Arbitrator relied on Dr. Cordes in finding Petitioner's condition was causally related to the accident; notably, the Decision reflects the condition of ill-being was a meniscal pathology: "[Dr. Cordes] diagnosed the Petitioner with a left knee meniscal tear. The doctor testified that it was his opinion a causal connection exists between the incident of reaching up and grabbing a box at work and the Petitioner's meniscal tear. Dr. Cordes further explained that you can get meniscal tears from impact loading." §19(b) Decision. As such, the starting point following the §19(b) Decision- Petitioner has a causally related medial meniscal tear, and Dr. Cordes will perform arthroscopy.

What the January 24, 2011 operative report establishes, however, is Dr. Cordes found Petitioner's medial meniscus to be intact; instead, Dr. Cordes noted a lateral meniscus tear as well as a large full-thickness cartilage defect on the lateral femoral condyle and chondromalacia patella. PX1, PX4, RX14. Thereafter, Petitioner underwent a standard course of post-operative

physical therapy.

At the March 23, 2011 follow-up, Petitioner advised Dr. Cordes he "feels he is 100% better than" preoperatively. Dr. Cordes ordered ongoing physical therapy and directed Petitioner to return for "final follow-up" at which time Petitioner was expected to be at maximum medical improvement. PX1, RX14.

When Petitioner was re-evaluated by Dr. Cordes on June 7, 2011, Petitioner again indicated he "feels better than he did preoperatively in regards to his knee" but still had pain and tightness; notably, Dr. Cordes memorialized the focus of Petitioner's complaints had shifted: "His main limitation at this point is what he describes as left hip pain. In actuality it appears to be radicular pain from his back. He has known low back problems." RX14 (Emphasis added). Dr. Cordes further documented Petitioner was pursuing disability:

> Between his low back radicular pain, his left knee and his previous history of right shoulder surgery, he apparently is applying for disability[1]. On September 1st he has a hearing. Films [*sic*] were completed for him. Upon questioning he states that he is unable to sit or stand greater than an hour because of his chronic pain issues. He does not feel he is an employable candidate at this point. RX14.

Dr. Cordes' treatment plan was continued conservative care. RX14.

Petitioner's last post-operative visit with Dr. Cordes took place on July 7, 2011. Petitioner indicated he had ongoing knee pain and instability descending stairs as well as radiating low back pain; examination revealed full left knee range of motion and trace swelling. Dr. Cordes ordered a lumbar spine MRI, kept Petitioner off work, and at Petitioner's request, provided a physical therapy prescription. Dr. Cordes included the following: "osteochondral defect in the lateral femoral condyle will unfortunately progress to osteoarthritic deterioration of the left knee joint." RX14. Petitioner did not return to Dr. Cordes until June 4, 2013, a treatment gap of 23 months.

In finding ongoing causal connection, the Arbitrator did not acknowledge the two-year treatment gap, instead focusing on a single office note: "In an August 1, 2013 office note, Dr. Cordes commented: 'In over the course of time there has been a progressive deterioration from a traumatic injury to the left knee. He is aware that total knee arthroscopy may be warranted on the left knee and that the treatment as through 2013 stems from a work-related accident.'" The Commission finds reliance on this note is improper. First, the entire text of the note reads, "He [Petitioner] is stressed the importance to point out that his left knee is on treatment to date has been due to a work-related injury. This stems from an October 2007 injury. In over the course of time, there has been progressive deterioration from a traumatic injury to the left knee." PX3, RX13. As such, rather than expressing his own causation opinion, Dr. Cordes appears to be simply parroting Petitioner's belief. However, even assuming, *arguendo*, this is Dr. Cordes' opinion, he failed to provide the basis for his opinion. This is significant as Petitioner did not suffer what could truly be considered a "traumatic" injury. See, *e.g.*, *Sunny Hill of Will County v.*

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1 The record reflects Petitioner applied for Social Security Disability in approximately April 2010. PX1.

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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 be clear, there is no causal connection opinion specifically addressing the large chondral defect and chondromalacia patella nor explaining how such "severe pathology" could have been caused by the October 4, 2007 un-tiptoeing incident. There are, however, multiple opinions from Respondent's experts explaining how the significant chondral defect and chondromalacia could not have been caused by Petitioner's innocuous incident:

Dr. Cohen, November 11, 2011 – "I base this not that it was not stated on the MRI report, but on the fact that an injury like this would not be caused by simply standing on both knees. There is no reported twisting injury or direct contusion. I believe that this was chondromalacia of the patellofemoral joint, as well as the chondral defect of the lateral compartment and were preexisting." (RX3);

Dr. Cohen, March 9, 2012 – "Clearly, the chondromalacia of the patellofemoral joint, as well as the chondral defect of the lateral compartment was preexisting. The basis for my opinion is that neither of these conditions would have been caused by the incident in question. Specifically, these are degenerative changes or a result of a trauma. There was not any traumatic incident related to the October [4], 2007 incident. The patient stated he was just standing." (RX4);

Dr. Cohen, April 4, 2014 – "In addition to what I based my opinion on in my initial report, it should be noted that Mr. Rochelle's symptoms were all on the medial aspect of his left knee and indeed, according to the operative note from Dr. Cordes, the meniscal tear was in the lateral aspect of his knee, along with a chondral defect in the lateral aspect of his knee." (RX5);

Dr. Karlsson, February 5, 2018 – "The mechanism of injury at work was described as stretching to lift and being on his tip toes. There was no twist injury or fall…the mechanism of injury of simply standing up on one's toes and stretching could cause some irritation and stretch of the muscles surrounding the knee joint, but would not cause the interoperative findings which are degenerative and full-thickness cartilage loss, as well as meniscal tear. His mechanism that occurred in October 2007 would not be causative of these abnormalities." (RX6); and

Dr. Karlsson, August 21, 2018 - I have reviewed the operative report. The patient did undergo a partial lateral meniscectomy, which could be due to a single injury in recent years before that. He also had grade 3 and 4 changes on the femoral trochlea, grade 3 changes on the patella, and had an area on the lateral femoral condyle, which is described as a large area with full-thickness loss. There was no large corresponding loose body to indicate that there was a single loss of cartilage from a trauma, but rather this would be lifelong loss of cartilage from attritional wear over an entire lifetime. This is not in any way due to his injury of October 4, 2007." RX7.

Inexplicably, the Arbitrator's Decision fails to mention any of the five reports prepared by the two examining experts nor does it acknowledge Dr. Cohen's and Dr. Karlsson's repeated conclusions that the minimal event Petitioner described could not cause the chondral defect nor

the chondromalacia found intraoperatively.

In summary, the only definitive positive causal connection opinion from Dr. Cordes was his testimony in the prior §19(b) hearing, and this was limited to meniscal pathology. In contrast, both Dr. Cohen and Dr. Karlsson specifically addressed the chondral defect and chondromalacia and repeatedly concluded and explained Petitioner's incident was not a factor.

The Commission finds Dr. Cohen's and Dr. Karlsson's conclusions are supported by the medical and testimonial evidence and are highly persuasive. As such, we rely on same. The Commission finds Petitioner's current left knee condition of ill-being is not causally related to the October 4, 2007 accident. The Commission further finds that following the January 24, 2011 surgery, Petitioner's left knee condition reached maximum medical improvement on July 7, 2011.

B. Right knee

In finding Petitioner's right knee condition related to the work accident, the Arbitrator relied on Dr. Cordes' January 16, 2014 office note. The Arbitrator found such note indicated Petitioner's right knee osteoarthritis developed as *sequelae* of the left knee injury. The Commission views the evidence differently.

Initially, the Commission notes what the Arbitrator references in support of causation is Petitioner's theory of injury: "On January 16, 2014, the Petitioner reported to Dr. Cordes, during the course of time due to prolonged treatment favoring the right [*sic*] knee, he has developed onset of symptoms in his left [*sic*] knee." (Emphasis added). Moreover, troublingly, the Arbitrator again failed to acknowledge the contrary causation opinions. Both Dr. Cohen and Dr. Karlsson concluded Petitioner's right knee condition was not causally related to the 2007 injury; in doing so, both doctors noted Petitioner had pre-existing problems in his right knee, and more importantly, the overcompensation theory fails as it is inconsistent with Petitioner's description of his activity level:

Dr. Cohen, November 11, 2011 – He is having some right knee pain that is intermittent. Overall, "he states he has been much less active since the incident in question." He currently weighs 306 pounds and is 5'11". "I would not relate his right knee problems to the incident in question. He states that he feels that he has the right knee problems because he has been favoring his left side, but it also should be noted that overall, his activity has been far less than if he would have had a normal left knee." (RX3);

Dr. Cohen, April 4, 2014 – His right knee complaints are in no way related to the incident of October 2007. "He had symptoms before the incident in question. Although he may think that overusing the right knee to favor the left knee caused his problems, overall his general activity was markedly less since October 2007, and therefore there is not even an indirect relationship between the alleged injury to his left knee and the development of right knee pain." (RX5);

Dr. Karlsson, February 5, 2018 – There is no causal relationship between his current diagnosis of right knee osteoarthritis and his workplace accident. He had treatment for the right

knee predating this injury. There was no direct injury at work on October 4, 2007. "There was conjecture that he may have injured or aggravated the right knee by favoring the left knee. However, it was noted in Dr. Cohen's Independent Medical Evaluation of 2011 and actually mentioned that it was stated by the patient that he had been much less active since the incident in question. If anything, his decreased activity may have led to somewhat slower pace of advancement of his preexisting osteoarthritis in the right knee." (RX6); and

Dr. Karlsson, August 21, 2018 – He says that because of the problems he was having with his left knee, he had to shift a lot of weight onto his right. I asked him when he first started having problems with the right knee and he says it was in 2013, when the right knee gave out on him and he fell onto his kneecap. He says he had an MRI scan done at that time and was told he needed a knee replacement. He has tricompartmental degenerative osteoarthritis of right knee, mild by radiographic standards. "I do not believe there is any relationship between the current diagnosis of right knee osteoarthritis and his workplace accident. He has tricompartmental arthritic changes, which radiographically appear similar to the contralateral left knee." RX7.

The Commission finds the opinions of Dr. Cohen and Dr. Karlsson to be supported by the evidence and highly persuasive. The Commission finds Petitioner failed to prove a causal connection between his work accident and his right knee condition of ill-being.

II. Temporary Disability

"An employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co. v. Industrial Commission*, 138 Ill. 2d 107, 118, 561 N.E.2d 623 (1990). 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. When a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.*, whether the claimant has reached maximum medical improvement. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 236 Ill.2d 132, 142, 923 N.E.2d 266 (2010).

Petitioner alleges he was temporarily and totally disabled from August 27, 2010, the day after the §19(b) hearing, through February 1, 2018. ArbX1. The Commission notes Petitioner was authorized off work pending surgery at the time of the §19(b) hearing. Following issuance of the §19(b) Decision, surgery was ultimately performed on January 24, 2011, and Dr. Cordes directed Petitioner to remain off work. The medical records reflect Dr. Cordes maintained Petitioner's off work status at the post-operative re-evaluations in February, March, and April of 2011. PX1, RX14.

Given our causal connection determinations, the Commission finds Petitioner entitled to temporary total disability benefits from August 27, 2010 through July 7, 2011, the date Petitioner's left knee condition of ill-being reached maximum medical improvement. Petitioner's request for temporary total disability benefits from July 8, 2011 through February 1, 2018 is denied.

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The parties stipulated Petitioner's average weekly wage is $189.75. ArbX1. This yields a TTD benefit rate of $126.50, which falls below the statutory minimum. Pursuant to §8(b)1, Petitioner's TTD benefit rate is his average weekly wage of $189.75. *820 ILCS 305/8(b)1.* Therefore, the Commission finds Petitioner entitled to TTD benefits of $189.75 per week for a period of 45 weeks.

III. Medical Expenses

Consistent with our resolution of the causal connection issue, the Commission finds the left knee treatment rendered through July 7, 2011 was reasonable, necessary, and causally related to the work accident. Petitioner's request for medical expenses incurred for treatment rendered after July 7, 2011 is denied.

IV. Permanent Disability

The Arbitrator found Petitioner medically permanently and totally disabled as of February 1, 2018. The Commission disagrees. We find there is simply no evidence to support the Arbitrator's finding.

Initially, the Commission emphasizes there are no post-2011 work status reports in the record. While Dr. Cordes apparently completed Social Security Disability forms on Petitioner's behalf, these forms are not in the record. Moreover, it is clear Petitioner is on Social Security Disability due to his multitude of orthopedic issues, including a chronic low back injury dating back to 1998, right shoulder surgeries, and left shoulder surgery, as well as claimed knee pain. While the Arbitrator concluded Petitioner's left knee injury is one of the "prime orthopedic issues" which preclude Petitioner from being able to work, there is no medical opinion to support that conclusion. Rather, the only work capability opinions related to Petitioner's knees are from Dr. Karlsson: "His x-rays findings were of mild osteoarthritis. In terms of his knees, he would have no limitation whatsoever for working as a stocker" (RX6), and "Radiographically, he has mild osteoarthritis to both knees…there is no reason he cannot be working full-duty as a stocker with his current diagnosis of bilateral knee osteoarthritis." RX7. The evidence simply does not support a finding of medical permanent total disability.

On January 24, 2011, Dr. Cordes performed surgery to address Petitioner's medial knee complaints. However, rather than the suspected medial meniscal pathology, Dr. Cordes found Petitioner's medial meniscus to be intact. Upon further arthroscopic evaluation, Dr. Cordes observed a lateral meniscus tear as well as a large full-thickness cartilage defect on the lateral femoral condyle and chondromalacia patella. PX1, PX4, RX14. As detailed above, the cartilage defect and chondromalacia patella are not related to Petitioner's work incident.

Post-operatively, Petitioner underwent routine follow-up care as well as physical therapy. The records reflect Petitioner repeatedly advised Dr. Cordes his symptoms improved after surgery. The Commission finds Petitioner's surgery resulted in a positive outcome. Based on the above, the Commission finds Petitioner sustained a 20% loss of use of the left leg pursuant to Section 8(e) of the Act.

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IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 25, 2020 is hereby reversed as set forth above.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's current left knee condition of ill-being is not causally related to the October 4, 2007 accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's right knee condition of ill-being is not causally related to the October 4, 2007 accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $189.75 per week for a period of 45 weeks, representing August 27, 2010 through July 7, 2011, that being the period of temporary total incapacity for work under §8(b) of the Act. The award of TTD benefits from July 8, 2011 through February 1, 2018 is vacated. Respondent shall have a credit of $13,418.04 for TTD benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's liability for medical expenses under §8(a) is limited to left knee treatment rendered through July 7, 2011, subject to §8.2 of the Act. The award of medical expenses for treatment rendered on or after July 8, 2011 is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $189.75 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 20% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of permanent total disability benefits is vacated.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent 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 $3,400.00. 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: FEB 18 2021

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

LEC/mck

O: 12/22/2020

Stephen Mathis

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SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on December 22, 2020, before a three-member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and D. Douglas McCarthy, at which time Oral Arguments were heard. Subsequent to Oral Arguments and prior to the departure of Commissioner McCarthy on December 31, 2020, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

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

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROCHELLE, GREGORY
Employee/Petitioner

Case# **08WC003403**

ULTRA FOODS
Employer/Respondent

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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:

0347 MARSZALEK AND MARSZALEK
STEVEN A GLOBIS
120 W MADISON ST SUITE 801
CHICAGO, IL 60602

3998 ROSARIO CIBELLA LTD
JACOB SCHNEIDER
2561 DIVISION ST SUITE 103
JOLIET, IL 60435

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

GREGORY ROCHELLE
Employee/Petitioner

v.

ULTRA FOODS
Employer/Respondent

Case # **08** WC **3403**

Consolidated cases: _____

21IWCC0066

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on 3/20/19, 4/17/19, and 5/15/2019. 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 **10/04/2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned $9,867.00; the average weekly wage was $**189.75**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**13,418.04** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**13,418.04**.

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $36,658.67, as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $189.75/week for 387 6/7 weeks, commencing 08/27/2010 through 02/01/2018, as provided in Section 8(b) of the Act.

Permanent Total Disability

Respondent shall pay Petitioner permanent and total disability benefits of $**436.64**/week for life, commencing **02/02/2018**, as provided in Section 8(f) of the Act.

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

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

March 18, 2020

Signature of Arbitrator — Date

MAR 25 2020

FACTS

This matter was previously tried before Arbitrator Charles DeVriendt on August 26, 2010. On September 13, 2010, the Arbitrator issued a Decision finding that the condition of ill-being of the Petitioner's left knee was causally related to the accident of October 4, 2007. He awarded 125 and 5/7ths weeks of temporary total disability benefits from January 8, 2008 through January 21, 2008, and from April 5, 2008 through August 26, 2010. He also found that the Respondent shall pay all reasonable and necessary medical expenses calculated pursuant to the fee schedule, for all medical services related to arthroscopic surgery to the left knee, as provided in Sections 8(a) and 8.2 of the Act.

Arbitrator Brian Cronin heard this case March 20, 2019; April 17, 2019; and May 15, 2019. The parties stipulated that another Arbitrator would issue Decision from Transcripts of Proceedings and exhibits.

On August 20, 2018, the Petitioner testified again. He stated that he has not worked anywhere since his last testimony on August 26, 2010. He resumed his care with Dr. Cordes on January 6, 2011, after he gained approval for left knee arthroscopic surgery. The left knee surgery was performed by Dr. Cordes on January 24, 2011, at Northwestern Memorial Hospital. Post surgically he received physical therapy at Athletico. Between April 26, 2011, and June 4, 2013, he did not return to Dr. Cordes because a lack of insurance authorization. He resumed treatment in June of 2013 once he obtained Medicare coverage. He testified that by June of 2013 he was noting right knee pain and his right knee gave out on him. Dr. Cordes prescribed a course of physical therapy for both knees. On August 1, 2013, Dr. Cordes began a course of Euflexxa injections first on the left knee and later on both knees.

In March of 2015 he injured his left shoulder in physical therapy at Athletico. Dr. Cordes ordered an MRI scan and then surgery for the left shoulder that was performed on May 20, 2015 at Northwestern Memorial Hospital. He also received treatment for his right shoulder from Dr. Cordes and Athletico, but he is not claiming the right shoulder condition is work related.

He currently notes constant pain in his left knee, with pain also in the right knee, both hips and the left shoulder.

The Petitioner' primary treating physician was Dr. Scott Cordes, an orthopedic surgeon. His records were placed into evidence by both parties. After the initial Arbitration Hearing, Petitioner returned to Dr. Cordes on January 6, 2011. It was noted that he had gained approval to proceed with the arthroscopic treatment that had been originally scheduled in 2009. The doctor planned to proceed with the recommended surgery that was outlined for him back in 2009. (Petitioner's Exhibit #1)

On January 24, 2011, Dr. Cordes performed an arthroscopic partial lateral meniscectomy, chondroplasty of the patellofemoral and micro fracture of the lateral femoral condyle. During the surgery he observed Grade III chondromalacia changes of the patella. Unstable articular cartilage was debrided. In the lateral compartment, several loose bodies were identified and removed. A large full thickness cartilage defect was found on the lateral condyle with articular cartilage loss running from anterior to posterior. The post-operative diagnosis was an osteochondral injury of the lateral femoral condyle with lateral meniscus tear and chondromalacia patella. (Petitioner's Exhibit # 1 and Petitioner's Exhibit #4)

Post surgically, the Petitioner was prescribed physical therapy and on March 23, 2011 was noted to have generalized discomfort around the lateral femoral condyle with swelling. On April 26, 2011, he continued to have 1+ swelling and diffuse joint line tenderness with stiffness in the iliotibial band during rehabilitation. The doctor recommended six more months of physical therapy. (Petitioner's Exhibit #1).

The Petitioner did not resume treatment with Dr. Cordes until June 4, 2013, when he obtained Medicare Coverage. At that time the Petitioner was 313 pounds. The doctor recommended conservative care, but he felt that he would be a candidate for future total knee replacement. Another prescription for physical therapy was provided. (Petitioner's Exhibit #1).

On July 25, 2013, Dr. Cordes recorded the Petitioner had a problematic right knee with degenerative tricompartmental arthritis. Dr. Cordes then commenced a series of Euflexxa and Kenalog injections in both knees. (Petitioner's Exhibit #3).

On September 5, 2013, the Petitioner discussed with Dr. Cordes possible treatment for his right and left shoulders. The Petitioner reported that he, "Had injuries to both shoulders." (Petitioner's Exhibit #3).

On January 16, 2014, the Petitioner reported to Dr. Cordes that he attributed his right knee pain to, "Prolonged treatment in favoring his knee. He has developed onset of symptoms in his right knee." The Petitioner requested physical therapy for his knees and upper extremities. The doctor felt physical therapy would be beneficial because it would help the Petitioner to lose weight. (Petitioner's Exhibit #3).

The Petitioner saw Dr. Cordes complaining of left shoulder pain on April 2, 2015. He reported, "It started last month. He has been required to do excessive housework and

now he is complaining of left shoulder pain." Dr. Cordes requested an MRI scan which was performed on April 4, 2015. The MRI history states: "Left shoulder pain status post MVA 2009." The scan demonstrated moderate supraspinatus tendinopathy with low grade interstitial partial tearing and a linear full thickness perforation suspected of the anterior distal tendon, with non-displaced labral tearing, tendinopathy and mild acromioclavicular osteoarthritis. On May 20, 2015, Dr. Cordes performed a left shoulder arthroscopic subacromial decompression and rotator cuff debridement. The postoperative diagnosis was a left rotator cuff with impingement syndrome. On June 4, 2015, physical therapy was initiated for the left shoulder. (Petitioner's Exhibit #3 and #4).

Dr. Cordes noted on July 23, 2015 that the Petitioner's left knee, "Will progress to the point of needing a total knee replacement." He stated that in the interim he will recommend rehabilitation for the left shoulder. On January 21, 2016, Dr. Cordes ordered physical therapy for upper and lower extremity conditioning. (Petitioner's Exhibit #3).

On April 13, 2017, Dr. Cordes noted that an MRI of the right shoulder showed tendinosis, thickening and scarring, but no evidence of a new tear. Both knees were injected, and the doctor felt that the Petitioner should defer having knee replacement surgery at the time because of his age (52).

The Petitioner's last visit with Dr. Cordes took place on February 1, 2018. The doctor noted the Petitioner considered himself disabled with multiple complaints including the neck, shoulder pain, gout in the hands with diffuse swelling. The doctor noted chronic low back symptoms and bilateral knee problems. The Petitioner told the doctor he may not be able to return for follow up. The doctor indicated Petitioner was

given a note stating he is presently disabled due to his multiple orthopedic issues and should follow up PRN. (Petitioner's Exhibit #3).

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (F) THE ARBITRATOR FINDS THE FOLLOWING FACTS:

This matter was previously tried on August 26, 2010, before Arbitrator Charles DeVriendt. The Arbitrator found that a causal connection exists between the condition of ill-being of the Petitioner's left knee condition and the accident of October 4, 2007. Dr. Cordes diagnosed a medial meniscus tear and recommended arthroscopic surgery, for which the Respondent was ordered to authorize and to pay.

On January 24, 2011, the Petitioner underwent arthroscopic surgery on the left knee. The post-operative diagnosis was an osteochondral injury to the left femoral condyle, lateral meniscus tear and chondromalacia. Post surgically he underwent a series of injections and physical therapy. He continues to complain of pain in the left knee.

In an August 1, 2013 office note, Dr. Cordes commented: "In over the course of time there has been a progressive deterioration from a traumatic injury to the left knee. He is aware that total knee arthroscopy may be warranted on the left knee and that the treatment as through 2013 stems from a work-related accident."

There is no evidence of any intervening event causing injury to the left knee which would break the chain of causation between the present condition of ill-being that occurred on October 4, 2007, and the Petitioner's present condition.

The Arbitrator finds that Dr. Cordes' opinion regarding the left knee persuasive. He is best acquainted with the development of the Petitioner's condition because he has examined and treated the petitioner a number of times since 2009.

Additionally, it is the law of the case that the Petitioner's condition of ill-being of the left knee is causally related to the accident of October 4, 2007. The findings of the previous arbitration decision are final and cannot be disturbed in a subsequent hearing.

The Petitioner also has been diagnosed with osteoarthritis of the right knee. On January 16, 2014, the Petitioner reported to Dr. Cordes, during the course of time due to prolonged treatment favoring the right knee, he has developed onset of symptoms in his left knee."

Based upon the above entry the Arbitrator finds that the Petitioner suffers from right knee osteoarthritis as a *sequale* of his left knee injury.

Petitioner also claims an injury to his left shoulder which occurred in physical therapy. The records of Athletico do not document an injury there. There is no medical opinion that supports the finding that the Petitioner injured his left shoulder in physical therapy and claims for any compensation or medical treatment for the left shoulder are denied.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (K) THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The Arbitrator finds that the Petitioner was temporarily and totally disabled from August 26, 2010, through February 1, 2018.

In the initial Decision of Arbitrator, filed on September 13, 2010, Arbitrator Charles DeVriendt found that the Petitioner was temporarily and totally disabled through

the date of the hearing on August 26, 2010, as a result of the condition of ill-being of his left knee. The Petitioner had been prescribed operative intervention by Dr. Cordes, which was not performed due to lack of insurance authorization. In the September 13, 2010, decision, Arbitrator DeVriendt ordered the Respondent to pay for any and all treatment related to the arthroscopic surgery for the left knee prescribed by Dr. Cordes.

On January 24, 2011, Dr. Cordes performed an arthroscopic lateral meniscectomy, chondroplasty and a micro fracture of the lateral femoral condyle of the left knee.

The Petitioner remained under the care of Dr. Cordes for the left knee, as well as the right knee and both shoulders through February 1, 2018. During that time period Dr. Cordes never released the Petitioner to return to work. On February 1, 2018, the doctor stated he considered Mr. Rochelle permanently disabled due to all of his orthopedic problems. Petitioner was released from the doctor's care PRN on that date.

After the left knee surgery, Dr. Cordes prescribed a course of physical therapy for the left knee that Petitioner attended at Athletico from February 8, 2011 through August 3, 2012, and from June 5, 2013 to June 16, 2016 where he received physical therapy for the right knee and the shoulders as well.

Between August 1, 2013 and April 13, 2017, Petitioner underwent a series of Euflexxa and Kenalog injections in both knees.

The above stated evidence demonstrates that from August 26, 2010 to February 1, 2018 the Petitioner was unable to return to work. This was solely as a consequence of the left knee injury through July 25, 2013. After July 25, 2013, Petitioner's right knee contributed to his disability and after February 25, 2015, he began to seek treatment for

the left shoulder and on March 30, 2017, the right shoulder. Despite the contribution of the right knee and shoulder problems, the left knee remained the contributing factor to his disability. Furthermore, the Petitioner received medical treatment for the left knee in the form of surgery, physical therapy, and injections until February 1, 2018.

On July 23, 2015, Dr. Cordes commented the Petitioner's left knee will progress to the point of needing a total knee replacement. Consequently, the Petitioner's condition had not stabilized until February 1, 2018.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (J) THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner's Exhibit #8 is a bill from North Shore Orthopedic Institute, which is Dr. Cordes' office, from June 4, 2013 through April 13, 2017. The charges total $65,048.00.

In Section F of this Decision, the Arbitrator has found that the condition of ill-being of the Petitioner's left and right knee are causally related to the accident of October 4, 2007 but the condition of ill-being of the shoulder is not. Consequently, the Arbitrator excludes the following charges as solely related to treatment of the shoulders:

April 2, 2015
April 14, 2015
April 16, 2015
May 20, 2015
April 9, 2017
April 10, 2017

These excluded charges total $19,469.00, there were payments by Medicare of $1,822.74, adjustments of $17,110.42 and a balance that is denied of $535.84. The Arbitrator awards the charges of $45,579.11. Of that, $11,765.29 was paid by Medicare,

their adjustments of $30,400.06 leaving a balance of $3,413.65. Therefore, the Respondent shall pay to the Petitioner $15,178.94 relative to Petitioner's Exhibit #8.

Petitioner's Exhibit #9 is a bill from North Shore University Health System for a February 1, 2018 office visit with Dr. Cordes. The charges total $227.00. This bill reflects Medicare payments totaling $47.06 and adjustments of $149.94 and a $30.00 balance.

The Respondent shall pay $77.06 for Petitioner's Exhibit #9.

Petitioner's Exhibit #10 is a bill from Athletico with charges totaling $91,231.00 for services from July 5, 2012 through June 6, 2017. The bill includes services for both knees and both shoulders.

The charges for July 5, 2012 through August 30, 2012 are solely for the left knee and were paid by the Respondent.

The charges for June 5, 2013 through December 5, 2013 were ordered by Dr. Cordes solely for the left knee. They totaled $15,062.00, Medicare paid $3,675.82 leaving a balance of $988.15, and the remaining $10,398.03 was adjustments. The Respondent shall pay $4,663.97 for this time period.

The charges for January 17, 2014 through March 30, 2015 are primarily for knee treatment. Consequently, the Arbitrator awards the charges for this period, which total $37,196.00. Medicare paid $9,959.33, leaving a balance of $2,759.59. The remaining $24,477.08 was adjustments. The Respondent shall pay to the Petitioner $12,718.92 for this period.

The charges for June 5, 2015 through October 31, 2015 were for the left arm. Based upon the Arbitrator's findings in Section F of this Decision, any charges for this period are denied.

Physical therapy for January 22, 2016 through June 16, 2016 ordered by Dr. Cordes for both knees and the left shoulder. Based upon the Athletico records this treatment was provided primarily to the lower extremities. The charges for this period total $11,562.00, Medicare paid $3,202.66, and $7,542.16 was deducted for adjustments leaving a balance of $817.18. Respondent shall pay $4,019.84 for this period.

The charges for February 13, 2017 through June 6, 2017 were ordered by Dr. Cordes for a chronic left shoulder problem. Based upon the Arbitrator's findings in Section F of this Decision, any charges for this period are denied.

The total to be paid by the Respondent for Petitioner's Exhibit #10 is $21,402.73.

Petitioner's Exhibit #11 and #12 are charges from Northwestern Medicine for Petitioner's left shoulder surgery performed on February 20, 2015. Based upon the Arbitrator's findings in Section F of this Decision, these charges are denied.

Regarding the contention raised by Respondent's IME physicians that the Petitioner had reached maximum medical improvement prior to the disputed treatment, the Arbitrator notes that Section 8.7(3) of the Act which states:

> "An employer may only deny payment or refuse to authorize payment of medical services rendered or proposed to be rendered on the grounds that the extent and scope of medical treatment is excessive and unnecessary in compliance with an accredited utilization review program under this section."

The Arbitrator notes that Respondent did not offer a utilization review into evidence.

The total amount awarded by the Arbitrator and to be paid by the Respondent to the Petitioner for medical expenses under Section 8(a) of the Act is $36,658.67.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (L) THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The Arbitrator finds that the entirety of the evidence proves that Petitioner is permanently and totally disabled from February 1, 2018.

The Petitioner's left knee injury required arthroscopic surgery which was performed by Dr. Cordes on January 24, 2011. The Petitioner was found to have an osteochondral injury of the lateral femoral condyle with a lateral meniscus tear and chondromalacia of the patella. He subsequently developed osteoarthrosis resulting in chronic left knee pain that was largely unresponsive in the long term to physical therapy and injections.

On August 1, 2013, Dr. Cordes commented that there has been a progressive deterioration of the left knee and that a "total knee arthroscopy" may be warranted in the future.

When the Petitioner last saw Dr. Cordes on February 1, 2018, Petitioner complained of pain in both shoulders, gout in his hands, chronic low back pain and bilateral knee problems. The Petitioner stated that he may not be able to return for follow up treatment. The doctor then wrote, "A note stating that he is presently disabled due to his multiple orthopedic issues. Follow up appointment PRN."

Based upon the above the Arbitrator concludes that the Petitioner is permanently and totally disabled. In the opinion of Dr. Cordes, the Petitioner can no longer work because of multiple orthopedic issues, all of the evidence demonstrates one of the prime orthopedic issues that the Petitioner suffers from is his left knee injury which began on October 4, 2007.

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 Medical	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTONIO REID,

Petitioner,

vs. NO: 14 WC 34954

CITY OF CHICAGO,

Respondent.

21IWCC0067

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, §11 intoxication presumption, and medical expenses, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission writes separately to address Respondent's intoxication argument. Pursuant to §11 of the Act, a rebuttable presumption exists which finds an employee was intoxicated and such intoxication was the proximate cause of his injury,

> if there is any evidence of impairment due to the unlawful use or unauthorized use of ...(1) cannabis as defined in the Cannabis Control Act...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. *820 ILCS 305/11* (West 2013).

To be clear, for the rebuttable presumption to apply, evidence of impairment must be presented. The Commission finds there is no such evidence herein.

The only documentary evidence in the record regarding Petitioner's marijuana exposure is Respondent's Exhibit 2, the NON-DOT Urine Drug Test Results. The Commission emphasizes this single-page document does not include any specific chemical results or metabolite levels; rather, the report simply reads "Verified Positive for: Marijuana." RX2. A positive test result does not presuppose impairment; this is particularly true here, given the paucity of information in the report.

Petitioner testified he was not under the influence of marijuana nor was he impaired at the time of the accident. Immediately following the motor vehicle accident, the police responded and investigated, and Petitioner testified the police only issued citations to the driver of the semi. T. 15-16. This testimony is unrebutted. The Commission finds there is no evidence of impairment to trigger the §11 intoxication presumption.

The Commission observes the Arbitrator found Petitioner's medical treatment was reasonable and necessary but failed to include the associated expenses in the award. The Commission corrects the decision to award the medical expenses as detailed in Petitioner's Exhibit 4.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2019, as modified above, is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 0.76 weeks, as provided in §8(e)1 of the Act, for the reason that the injuries sustained caused 1% loss of use of the right thumb.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 10 weeks, as provided in §8(d)2 of the Act, for the reason that the right shoulder injury resulted in 2% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 12.5 weeks, as provided in §8(d)2 of the Act, for the reason that the lumbar spine injury resulted in 2.5% 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.

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: FEB 18 2021

L. Elizabeth Coppoletti

LEC/mck

O: 2/3/21

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L. Elizabeth Coppoletti

Stephen Mathis

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REID, ANTONIO
Employee/Petitioner

Case# **14WC034954**

CITY OF CHICAGO
Employer/Respondent

21IWCC0067

On 4/2/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1315 DWORKIN & MACIARIELLO
MARTHA NILES
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

0113 CITY OF CHICAGO DEPT OF LAW
STEPHANIE LIPMAN
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

STATE OF ILLINOIS)

)SS.

COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ANTONIO REID
Employee/Petitioner
v.

Case # **14 WC 34954**

Consolidated cases: _____

CITY OF CHICAGO
Employer/Respondent

21IWCC0067

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 **July 27, 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: FEE PETITION FROM PRIOR COUNSEL

FINDINGS

On **10/7/2014**, 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 **$77,484.27**; the average weekly wage was **$1,490.08**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

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

Respondent ***has 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 $- 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 sustained a permanent partial disability to the extent of **1% loss of use of the right thumb for the sprain/strain** pursuant to §8(d)2 of the Act (.76 weeks); **2% loss of a person-as-a-whole for the sprain/strain to the right shoulder** pursuant to §8(d)2 of the Act (10 weeks); and **2.5% loss of person-as-a-whole for the lumbar sprain/strain and radiculopathy** pursuant to §8(d)2 of the Act (12.5 weeks).

Therefore, Respondent shall pay Petitioner permanent partial disability benefits of **$735.37/week for 23.26 weeks.**

The Arbitrator makes no finding on the merits of any pending Fee Petition inasmuch as no evidence was presented in support of the Petition.

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 27, 2019
Date

APR 2 - 2019

Antonio Reid v City of Chicago
14 WC 34954

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***F:*** Is Petitioner's current condition of ill-being causally related to the 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?; ***L:*** What is the nature and extent of the injury?

STATEMENT OF FACTS

On October 7, 2014 Petitioner Antonio Reid was employed as a Construction Laborer with Respondent City of Chicago Water Management Department. He had been employed by Respondent since December 2014. Petitioner's job involved traveling from site to site to either turn on or turn off water supply. He also had to install water meters and mains. Petitioner drove a car issued by Respondent.

On October 7, 2014 Petitioner was driving a motor vehicle issued by Respondent westbound on 95th Street at Ashland while on the job. An 18-wheeler truck came westbound out of a parking lot, crossed the center line and struck Petitioner's vehicle. A police report was made. The truck driver was given a ticket, but Petitioner was not cited.

Petitioner testified that he immediately had pain in his low back, right shoulder, and right thumb. His back pain went into his right leg. He reported to MercyWorks the following day for complaints of 8/10 pain in the right shoulder and lower back. He also complained of 3/10 neck pain and 5/10 right thumb pain (PX #1). He gave a history of an accident with a "semi" and the Ford pickup truck he was driving.

On exam the cervical spine had full active range of motion but there was tenderness over C4 to C7. The rotator cuff was tender over the acromioclavicular joint and bicipital tendon, although strength was 5/5 and there was a negative impingement test. The right thumb had normal range of motion but was tender over the first carpometacarpal Joint. There was bilateral tenderness, right greater than left, in the back from L2 through S1. Petitioner was able to bend and touch his toes. Straight-leg

raise was negative. X-rays of the right shoulder revealed degenerative changes in the acromioclavicular joint as well as the lumbosacral spine.

Petitioner was diagnosed with cervical and lumbar strain, as well as strains to his right shoulder and right thumb. He was referred for physical therapy for his back and shoulder 3 times a week for 4 weeks and was taken off work.

Petitioner followed up with Associated Medical Centers Illinois (AMCI) at Jackson Park Hospital on October 13, 2014 (PX #2). He presented with complaints of 8/10 low back pain, 8/10 right shoulder pain, 8/10 right thigh pain, and 8/10 right thumb pain since a work-related motor vehicle accident on October 7, 2014. Clinical examination of the affected parts of the body showed tenderness, decreased range of motion, and weakness due to pain. Straight-leg raise was positive for pain and radiculopathy on the right. Petitioner was diagnosed with shoulder/upper arm sprain, thumb sprain, lumbar sprain, lower extremity radiculopathy, and hip/thigh sprain, all related to the accident given the history. He was treated until February 16, 2015, when he was discharged at his request to work as tolerated.

Petitioner had an MRI of his right shoulder on December 23, 2014 (PX #3). The MRI showed the rotator cuff, glenoid labrum, and biceps tendon were intact. There was mild to moderate arthropathy of the acromioclavicular. No radiological studies were conducted of the low back or right thumb. He was treated at AMCI until February 16, 2015 (PX #2). Physical therapy was mainly focused on the lumbar spine, with less attention to the right shoulder. There was no significant therapy to the right thumb, although a brace was provided on October 20. Petitioner was discharged from treatment without restrictions.

Petitioner also testified that he was tested for drugs and alcohol the day of the accident. He admitted that his drug test was positive for marijuana (cannabis). He testified that he had been "exposed" to marijuana 2 weeks before the accident. The positive drug test report was admitted in evidence as RX #2. Petitioner initially testified that he had not been given an opportunity to retest but then acknowledged that Respondent sent him a letter confirming his right to retest at his own expense. The retest offer letter was admitted in evidence as RX #3.

As a result of the positive drug test Petitioner's Workers' Compensation claim was denied. He verified that he received a letter from Respondent denying his claim (RX #4). Petitioner also testified that he was suspended for a month as a result of the positive drug test. He retired November 21, 2014.

On cross-examination Petitioner acknowledged that it is illegal in the State of Illinois to drive under the influence of marijuana. He also admitted that working under the influence of marijuana is prohibited by Respondent. Petitioner stated that he was not impaired by his exposure to marijuana at the time of the accident.

Petitioner testified that he has occasional back aches at the present time. His shoulder occasionally "pops" too. He has no doctor's appointments scheduled. He takes ibuprophen when needed and takes hot baths to relieve his current complaints.

CONCLUSIONS OF LAW

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

There is no dispute that at the time of the accident Petitioner was operating a motor vehicle issued to him by Respondent, which he was operating in furtherance of his job duties. Respondent disputes that Petitioner's claimed injuries are compensable due to the language of §11 (intoxication) of the Act. §11 of the Act states:

> No compensation shall be payable if
> (i) the employee's intoxication is the proximate cause of the employee's accidental injury or
> (ii) at the time the employee incurred the accidental injury, the employee was so intoxicated that the intoxication constituted a departure from the employment. Admissible evidence of the concentration of
> (1) alcohol,
> (2) cannabis as defined in the Cannabis Control Act,
> (3) a controlled substance listed in the Illinois Controlled Substances Act, or
> (4) an intoxicating compound listed in the Use of Intoxicating Compounds Act in the employee's blood, breath, or urine at the time the employee incurred the accidental injury shall be considered in any hearing under this Act to determine whether the employee was intoxicated at the time the employee incurred the accidental injuries.
> If at the time of the accidental injuries, there is 0.08% or more by weight of alcohol in the employee's blood, breath, or urine or if there is any evidence of impairment due to the unlawful or on authorizing use of
> (1) cannabis is defined by the Cannabis Control Act,
> (2) a controlled substance listed in the Illinois Controlled Substances Act, or
> (3) any intoxicating compound listed in the use of intoxicating compounds act or if the employee refuses to submit to testing of blood, breath, or urine,
> 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.

It was not disputed that Petitioner's urine tested positive for cannabis on October 13, 2014. Petitioner acknowledged that he was "exposed" to marijuana approximately 2 weeks before the accident but denied that he was impaired by marijuana at the time of

his accident. Petitioner testified that the motor vehicle accident at issue was caused by the operator of a semi-tractor trailer truck crossing the center line of the roadway and striking the pickup truck being operated by Petitioner. There was no evidence offered to rebut Petitioner's account of the motor vehicle accident at issue.

The evidence clearly showed that Petitioner's operation of Respondent's pickup truck was not a contributing factor to the accident. Petitioner testified that he was not impaired by his exposure to marijuana at the time of the accident. There was no evidence rebutting Petitioner's allegation of lack of impairment. Therefore, the Arbitrator finds that there was no evidence of impairment due to the unlawful or unauthorized use of marijuana (cannabis) that would give rise to a presumption that Petitioner was intoxicated and that the intoxication was the proximate cause of his injuries.

While §11 of the Act creates a rebuttable presumption that an employee's injury is not compensable if there is 0.08% or more by weight of alcohol in the employee's blood, breath, or urine, no presumption arises by mere evidence of consumption of cannabis, a controlled substance, or an intoxicating compound absent evidence of impairment due to consumption of one or more of those illicit substances.

Accordingly, the Arbitrator finds that Petitioner proved that he was injured in an accident that arose out of and in the course of his employment by respondent

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

Petitioner testified that he had immediate pain in his low back, right shoulder, right leg, and right thumb following the accident. He sought care and mercy works in the morning of the following day, October 8, 2014. His subjective complaints and objective clinical findings supported diagnoses of cervical, lumbar, right shoulder, and right thumb strain secondary to a motor vehicle accident. He was taken off work and referred for physical therapy. Petitioner followed up with medical care and therapy at AMC Jackson Park February 2015. No evidence was offered to rebut Petitioner's credible claim that he sustained his claimed injuries to his low back, right shoulder, and right thumb.

Therefore, the Arbitrator finds that Petitioner proved that his current condition of ill-being is causally related to the work-related accident on October 7, 2014

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

Petitioner sought medical care the day following his October 7, 2014 accident. He was initially referred for physical therapy, which he obtained through AMC Jackson Park Hospital through February 2015. No evidence was offered to rebut the reasonableness or necessity of the medical care and therapy provided to Petitioner. The Arbitrator finds that the medical care and therapy provided to Petitioner following his work-related accident was reasonable and medically necessary to cure or relieve the effects of the accident

L: What is the nature and extent of the injury?

Petitioner's claim for permanent partial disability was evaluated in accord with §8.1b(b) of the Act:

(i) No AMA impairment rating was admitted in evidence. The Arbitrator could not give any weight to this factor.

(ii) Petitioner was employed as a construction laborer at the time of the accident. His job duties including connecting and disconnecting water service. In addition, he installed water meters and water mains. Petitioner's job would from time to time demand strenuous labor. Petitioner was released to return to work "as tolerated." The Arbitrator gives moderate weight to this factor.

(iii) Petitioner was 49 years old at the time of the accident. He had a life expectancy of approximately 28 years. Petitioner had pre-existing degenerative orthopedic conditions. Although he complained of continuing aches and pains, Petitioner's condition is probably related to those pre-existing degenerative conditions rather than his accident injuries. The Arbitrator gives lesser weight to this factor.

(iv) There was no evidence that Petitioner's earning capacity was affected by the injuries he sustained in the accident. Due to his violation of Respondent's drug use policy he was suspended, after which he retired. The Arbitrator gives lesser weight to this factor.

(v) Petitioner sustained sprains/strains to his lumbar spine with some evidence of radiculopathy, sprains/strains to his right shoulder, and sprains/strains to his right thumb. He received conservative care in the nature of physical therapy. He was released to return to work "as tolerated" by his treating physicians. The Arbitrator gives greater weight to this factor.

Based on all the evidence, including the above factors, the Arbitrator finds that Petitioner sustained a permanent partial disability to the extent of 1% loss of use of the right thumb for the sprain/strain (.76 weeks) pursuant to §8(e); 2% loss of a person-as-a-whole for the sprain/strain to the right shoulder (10 weeks) pursuant to §8(d)2; and

2.5% loss of person-as-a-whole the lumbar sprain/strain and radiculopathy (12.5 weeks), pursuant to §8(d)2 of the Act.

Steven J. Fruth, Arbitrator

March 27, 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 Medical	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KIMBERLY HANSEN,

Petitioner,

vs.

NO: 17 WC 33296
17 WC 33298

FLEXCORP, INC. & PLANO MOLDING, INC.
Respondent.

21IWCC0068

DECISION AND OPINION ON REVIEW

Timely Petition for Review pursuant to §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, maintenance, medical expenses, and vocational rehabilitation, 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 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).

Respondents Flexcorp, Inc. and Plano Molding, Inc. stipulated to a loaning/borrowing employment relationship wherein Flexcorp, Inc. agrees, as the loaning employer, to waive its rights to seek reimbursement from Plano Molding, Inc., the borrowing employer. RXA, T. 9-10.

The Commission reduces the Arbitrator's award of medical services totaling $628.82 by $85.00 for a total of $543.82. Petitioner's Exhibit 1 lists an outstanding amount of $85.00 for an April 30, 2018 visit with Dr. Alam, but such visit concerned an unrelated condition, a rash. PX5 at 2-3. The medical records indicate Petitioner presented with a rash, thyroid enlargement and finger pain. Petitioner was diagnosed with a rash, thyromegaly and finger pain. The plan of treatment included recommendations for the rash but not finger pain. There is insufficient evidence

that this date of service was related to the work-related injury. Accordingly, the Commission reduces the medical award by $85.00.

In the body of the Arbitration Decision, p.13, maintenance benefits are appropriately awarded commencing February 22, 2019. However, the Order page mistakenly identifies March 22, 2019 as the commencement date. The Commission corrects the Order page to reflect the commencement date of payment of maintenance benefits to be February 22, 2019.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 10, 2019, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses of $543.82, as provided in §8(a), subject to §8.2 of the Act. Respondent shall also pay to Petitioner $85.00 for reimbursement of out-of-pocket expenses paid by Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 28 3/7 weeks, representing October 13, 2017 through March 21, 2018 and June 2, 2018 through July 10, 2018, 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 $9,101.86 for temporary total disability benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits in the amount of $286.00 per week for a period of 21 1/7 weeks, representing February 22, 2019 through July 17, 2019, as provided in §8(a) of the Act.

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

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

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

21IWCC0068

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,800.00. 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: FEB 18 2021

L. Elizabeth Coppoletti

LEC/ca

O: 12/22/2020

Stephen Mathis

43

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on December 22, 2020, before a three-member panel of the Commission including members L. Elizabeth Coppoletti, Stephen Mathis, and D. Douglas McCarthy, at which time Oral Arguments were heard. Subsequent to Oral Arguments and prior to the departure of Commissioner McCarthy on December 31, 2020, the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued.

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

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HANSEN, KIMBERLY
Employee/Petitioner

Case# **17WC033296**

17WC033298

FLEXICORP INC AND PLANO MOLDING INC
Employer/Respondent

21IWCC0068

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:

0190 PETER F FERRACUTI LAW OFFICES
ALEXIS FERRACUTI
110 E MAIN ST
OTTAWA, IL 61350

5001 GAIDO & FINTZEN
GAIL BEMBNISTER
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
GUY DITURI
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

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

Kimberly Hansen
Employee/Petitioner

v.

FlexiCorp, Inc. and Plano Molding, Inc.
Employer/Respondent

Case # **17WC 33296**
17 WC 33298

21IWCC0068

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 **Ottawa, Illinois**, on **7/19/2019**. 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 - Vocational Rehabilitation

FINDINGS

On **10/12/2017** 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 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 first injury, Petitioner earned **$21,268.00**; the average weekly wage was **$409.00.**

On the first date of accident, Petitioner was **45** 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 **$9,101.86** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$9,101.86.**

Respondent is entitled to a credit of for all reasonably related group medical under Section 8(j). 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.

ORDER

Respondent shall pay reasonable and necessary medical services of $628.82, as provided in Section 8(a) and 8.2 of the Act. Respondent shall further pay to Petitioner $85.00 for reimbursement of out-of-pocket paid by Petitioner.

Respondent shall pay Petitioner temporary total disability benefits of $286.00/week for 28-3/7 weeks, commencing 101/13/17 through 3/21/18 and from 6/2/18 through 7/10/18, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance from 3/22/19 through 7/17/19, as provided in Section 8(a) of the Act.

In no instance shall this ward 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

10/7/19
Date

ICArbDec p

OCT 10 2019

Statement of Facts:

Petitioner testified that she was employed by Respondent as an assembler at Plano Molding, in a temporary position. Petitioner testified that her assembler job for Plano Molding was broad and included several different lines which included making anything from tackle boxes, gun cases or storage boxes. She testified that several parts of her job required force including using a hammer or using her fingers and hands to put hinges on boxes or latches on boxes. Petitioner testified that although on each station, she was rotating by the hour, she was still exposed to significant amounts of repetitive gripping and used significant force on all of the lines.

Petitioner testified that she would lift anywhere between five (5) pounds and twenty (20) pounds depending on the specific line she worked on. She indicated that depending on the object and the line, she could assemble anywhere from a minimum of ten (10) objects to a and maximum of sixty (60) per hour.

Petitioner testified that on the Unipack line, she would use a hand jack at least three (3) to four (4) days a week when placed on that line. When working on the tote line to assemble totes for the molder, she would have to affix the wheels on each tote by hand. She explained that this required gripping and she would have to affix the wheels on fifty (50) to sixty (60) totes per day. In addition, she would have to lift these totes, which weighed eleven (11) pounds each, and place them in a box.

It should be noted that Respondent submitted videos purporting to show Petitioner's job duties at Plano Molding. According to Petitioner, none of the videos showed the assembler's tasks of putting the latches or handles on each tackle box. She stated the video only featured one of the four stations on the line for the tackle boxes. She went on to describe that there was a plastic box on top of the tackle box that the she would have been expected to snap into place and there were also metal U-hooks that snapped onto each tackle box requiring significant use of gripping and force of both hands.

Petitioner testified that on October 12, 2017, she was working on a newer line with a product which was almost identical to the tackle box. She was being showed how to operate the machinery and to complete her job tasks by Doug, another employee of Plano Molding. According to Petitioner, the machinery was not working correctly and Doug instructed her to stabilize the tackle box with her chest. Petitioner stated she could not use her chest to stabilize the box and instead used her hand to hold the box in place while the press operated. When the press came down, it crushed her right hand.

Petitioner testified that she immediately reported the incident to Antonio, the Safety Coordinator, and was told to go to a different line. Petitioner stated that she then went to another person, Kristi Corey, who took her to the FlexiCorp office where her hand was iced. She was also advised to keep icing it over the weekend.

Petitioner testified that the following Monday, she was scheduled to return to work. However, she continued with right hand discomfort. She called FlexiCorp and was sent to Physicians Immediate Care. Records submitted show she presented on October 16, 2017and reported that a "...press came down on [her right] hand squeezing right digits 2, 3, and 4, but the 3 (middle) finger "got it worst." Petitioner reported improved ecchymosis. She had numbness and tingling to her finger tips (ring and index). She rated her right middle finger pain at 7 out of 10. X-rays taken of the middle finger and hand revealed no fractures, avulsions, dislocations, bone tumors, cysts, intramedullary lesions, soft tissue swelling, free airs, foreign bodies, and no calcifications were found. Petitioner was diagnosed with 1.) contusion of the right middle finger with damage to the nail, 2.) contusion of the right hand; 3.) pain in the right fingers; and 4.) pain in the right hand. Work

restrictions were given of avoiding strong gripping with the right hand. She was advised to apply ice and to buddy tape her fingers while at work. (PX 4, pp. 8-11)

On October 23, 2017, Petitioner returned to Physicians Immediate Care for a follow up visit. Petitioner reported that her pain remained unchanged. It was noted that her pain radiated to the wrist with attempted finger flexion. Also noted was that her fingers (digits 2 and 3) were still buddy-taped. Upon examination, there was sharp tenderness to palpation of the distal phalanx of the right hand. There was tenderness to the right middle finger at the DIP, PIP and MCP joints. Also noted was the ecchymosis over the right middle finger. The nail at the base was healing. X-rays taken revealed the same results noted above. Petitioner was released at that time with no restrictions. She was advised to continue icing and instructed on home exercises. (PX 4, pp. 21-24)

On the same day, October 23, 2017, Petitioner presented to her primary care provider, Dr. Alam, with complaints of right finger pain that radiated to the right wrist. Petitioner rated her pain intensity at seven (7). An examination demonstrated decreased range of motion and pain in the right wrist. Dr. Alam differential diagnosis was finger pain. The doctor prescribed medication and indicated "back to work with restriction in doing exertional work from her right hand for 1 week." (PX 5, pp. 9-10)

Petitioner returned to Dr. Alam on October 30, 2017. At that visit the doctor noted Petitioner was off work and had continuing complaints of pain in her index, middle and ring finger of her right hand. Petitioner continued with demonstrated decreased range of motion and pain in the right wrist. Dr. Alam restricted her from work and referred her for physical therapy. (PX 5, pp.7-8)

Petitioner returned to Dr. Alam on November 6, 2017 at which point she was still complaining of 7-8 out of 10 pain in the right middle finger. She also reported that the pain medication was not helping her. Dr. Alam noted she had restriction of movement and swelling to the right middle finger. The doctor also recorded Petitioner was still waiting on approval for physical therapy. Dr. Alam continued Petitioner's medication regiment as well as his physical therapy recommendation. He also continued her off work and referred her to an orthopedist. (PX 5, pp. 5-6) When Petitioner returned to Dr. Alam, on November 13, 2017, she reported worsening pain in the right middle finger. She was positive for paresthesias and had difficulty with movement. Petitioner was continued off work and the doctor again referred her to an orthopedist. (PX 5, p.4)

On November 20, 2017, Petitioner reported to Castle Orthopaedics where she saw Dr. John Pinello. The doctor noted Petitioner presented with a history of smashed index fingertip, middle finger and ring finger in a press on October 12, 2017. An examination revealed exquisite tenderness over the middle finger (distal and middle phalanges) with mild swelling. There was a deformity to the proximal aspect of the nail plate which the doctor indicated appeared to be growing in better. On motor exam, there was deficit in the middle finger, slightly deficient at the PIP and the ring. Range of motion was slightly limited at the PIP. Middle finger was extremely limited. X-rays were taken of the right middle finger. According to the records there was a bony callus on the volar aspect of the middle phalanx. No fracture line was seen, and alignment appeared normal. Also noted was a "...possible healed fracture involving the middle phalanx of the middle finger, No obvious acute fracture noted." Dr. Pinello's impression was "[p]robale fracture with bony callus on the middle phalanx, already greater than 6 weeks out and showing signs of healing." The doctor stated, "I do not see a fracture line, however, the patient is significantly sensitive as well as stiff in that finger." The doctor ordered physical therapy indicating that aggressive therapy would be important. Dr. Pinello also prescribed medication and released Petitioner to one-handed duty only. (PX 6)

On December 11, 2017, Petitioner again followed up with Dr. Pinello for a re-check of her right-hand pain. Dr. Pinello noted that therapy had not yet been scheduled because the insurance had not yet approved his request. The doctor also noted Petitioner was still using buddy tape and was on one-handed duty since her last visit. Her physical examination that day showed slight enlargement of the right middle finger with sensitivity

over the dorsal aspect near the DIP joint. Although the PIP joint was less sensitive, Dr. Pinello stated "...all of it is more sensitive than typical..." The doctor also noted significant stiffness and a limited range of motion. Dr. Pinello diagnosed right middle finger status post fracture with stiffness. Dr. Pinello wrote that "[she] really needs therapy to advance. Buddy taping can only get it so far and home program will probably be very unsuccessful. Progressive therapy pushing range of motion including manipulation would be warranted." The doctor added, "[i]it is disappointing that a month has gone by with no further advancement of this patient's care, as she may have been resolving this condition, but, at this point, rather than still trying to start her basic therapy." Dr. Pinello recommended she come back in one month assuming therapy would begin. (PX 6)

Petitioner returned to Dr. Pinello on January 8, 2018 at which time he noted that she still not been approved for physical therapy. Examination of the finger showed limited range of motion particularly over the dorsal aspect of the middle finger. Petitioner reported same was slightly better when utilizing the buddy tape. Dr. Pinello again expressed his displeasure that Petitioner had not undergone therapy. The doctor wrote, "It is extremely disappointing that therapy has not been approved...Patient is over 3 months out from injury has never gone through therapy. When likely this would've been already resolved by now if they just centered through therapy...Her MMI is pending therapy and now that's been delayed it will take much longer to resolve her condition." (PX 6)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Brian Murphy on February 9, 2018. Dr. Murphy noted that Petitioner's objective findings were stiffness of the finger affecting motion. She had significant pain with attempts at passive motion beyond the limitation of her active motion. She also had some mild tenderness to palpation about the finger. The physician reviewed the x-rays taken on November 20, 2017, indicating he did not see any evidence of a fracture. Dr. Murphy assessed right hand crush injury with subsequent contracture of the middle finger. Petitioner was diagnosed with a crush injury to the right hand with residual contracture of the right middle finger. The doctor opined that the diagnosis and Petitioner's complaints were consistent with the work accident described. He felt that the best course of treatment, four months out from the injury, would be a course of therapy with a hand therapist. Lastly, the doctor indicated Petitioner was not at maximum medical improvement and she would require restricted use of the right and. (RX 7)

Subsequent to the Section 12 examination with Dr. Murphy, Petitioner was approved to begin undergoing physical therapy and occupational therapy. Petitioner underwent physical therapy for six visits from March 19, 2018 through April 12, 2018. (PX 6)

Petitioner returned to Dr. Pinello on April 16, 2018. Dr. Pinello noted Petitioner was improving with therapy. Her middle finger still had stiffness but was vastly improved from before. Her PIP joint was about 50 – 60 degrees and her DID joint moved actively about 30 degrees passively. Also noted was that her MP joint was moving along. Dr. Pinello diagnosed displaced fracture of the medial phalanx of the right middle finger and a crush injury of the right hand. Dr. Pinello prescribed Meloxicam, additional three weeks of therapy and no work involving the right hand. (PX 6)

On May 24, 2018, Petitioner followed up with Dr. Pinello at Castle Orthopedic with reported improvement. Petitioner reported that she was back to work using her hand occasionally. (Petitioner testified that she was at work in transitional duty work off site at Caring Hands sorting clothing and putting price tags on clothing.) On physical exam, her range of motion showed full extension. Flexion was lacking a few degrees through the PIP joint. DIP was equivalent to the other digits. MCP was lacking a couple of degree. There was some swelling of the idle phalanx as well as the PIP joint. Petitioner's diagnoses remained unchanged. At that time, Dr. Pinello changed her work restriction to a one-pound restriction with the right hand and advised that she should follow up in four weeks after continuing with an additional three weeks of physical therapy or ten more visits. Dr. Pinello indicated he would obtain another x-ray in one month to assess her healing. (PX 6)

Records submitted show that initially, Dr. Pinello's additional therapy recommendation and ongoing medical treatment were not authorized.

On June 22, 2018, Petitioner was seen for a second Section 12 evaluation with Dr. Murphy. According to Dr. Murphy, Petitioner reported that she still noticed soreness with use, although improved. She felt that she actually regressed a bit since therapy was stopped in May 2018. Upon examination, Petitioner was able to fully extend the fingers. She was able to fully flex the digits, except for the middle finger. Her active motion was 60 degrees of flexion, at the MCP joint, 50 degrees of flexion at the PIP joint and 35 degrees of flexion at the DIP joint. The doctor noted as she attempted to make a fist, the middle finger was still at least 6 cm from the distal palmar crease. Dr. Murphy indicated Petitioner had limitations in range of motion, grip strength, and right hand function. He noted she was showing slow, but steady progress with therapy. As such, he felt additional physical therapy was warranted. He also felt she could participate in job activities with a right hand 5-pound lifting restriction. (RX 8)

Subsequent to the second Section 12 examination, additional physical therapy sessions were authorized. Petitioner underwent a total of six (6) additional therapy sessions from July 5, 2018 through July 30, 2018. At that time, the physical therapist recommended discharge. According to the therapist, Petitioner had been compliant. She met the following goals: 1.) decreased pain from 7/10 to 2/10 at worse; 2.) increased active range of motion of the right long finger by 15-20 degrees; 3.) increased grip strength to 10-15 psi for increased ease with holding a cup; and 4.) independent with home exercise program and self-management. There is no indication from the therapist whether Petitioner met her goal of returning to work without restrictions. (PX 6)

On August 13, 2018, Petitioner returned to Dr. Pinello. Petitioner reported overall improvement but continued with stiffness and some radiating dorsal based pain. On examination, Dr. Pinello noted her range of motion of the finger was much improved. Passively, she was able to flex and had full extension. The doctor noted she had an enlargement of the middle phalanx which he indicated was typical at that stage. Actively, she was lacking about 20-30 degrees of flexion at the PIP and about 5-10 degrees at the DIP. X-rays taken were interpreted to show healing fracture of the middle phalanx with fine alignment. Dr. Pinello noted in his plan that she seemed to be progressing and that her restrictions should be changed from a one-pound only use of the right hand to a five-pound only use of the right hand. Petitioner was instructed to continue with her home exercise program. Based on her progression, the doctor believed Petitioner would attain maximum medical improvement in one (1) to two (2) months. (PX 6) Petitioner testified that during this period, she was still having difficulty gripping and making a fist with her right hand. She still had problems picking up large and small objects at that point in her recovery.

Petitioner followed up again with Dr. Pinello on September 10, 2018. The doctor noted that Petitioner had been off therapy for a month and had been making great progress until recently. Upon examination, the doctor noted worsening of her range of motion. Her active range of motion was worse than her passive range of motion. There was tenderness along the dorsal aspect of the middle phalanx. Also noted was some swelling. Dr. Pinello noted in his plan that she had worsening symptoms in the middle finger and recommended a return to therapy to regain her function, adding that he thought she needed to be in physical therapy longer to regain her range of motion and stretch out the tissue. Dr. Pinello also noted she may need desensitization. Her right hand five-pound restriction was continued.

At Respondent's request, Petitioner underwent a third Section 12 examination with Dr. Murphy on September 19, 2018. Petitioner reported complaints of stiffness in the right middle finger; some pain along the dorsum of the finger, especially on the dorsum of the middle phalanx; and difficulty with flexion. The doctor performed an examination and reviewed addition medical records which included the July 30, 2018 discharge from therapy and Petitioner's visit to Dr. Pinello on September 10, 2018. Dr. Murphy's diagnosis remained

right hand crush injury with contracture of the right middle finger. He felt Petitioner appeared to have some mild regression noting she had limitations in active and passive motion with grip strength weakness. Dr. Murphy felt that because Petitioner had been discharged from therapy and the fact that she was one year out from the injury, further care would likely not be of significant benefit. The doctor noted Petitioner would likely have some limitations in motion and strength in the right hand due to injury to the right middle finger. Dr. Murphy felt that a functional capacity evaluation was appropriate. He opined she was at maximum medical improvement noting Petitioner would likely have a 5-10 pound lifting restriction on the right hand. (RX 9)

On October 18, 2018, Dr. Pinello noted that Petitioner did not qualify for therapy as she had gone to an IME who recommended she maintain her restrictions and undergo a functional capacity evaluation to determine her permanent restrictions at that time. On physical examination, Dr. Pinello noted mild swelling, tenderness and limited flexion and range of motion. He noted in his plan that Petitioner continued with pain and disability in the right middle finger. The doctor agreed that a functional capacity evaluation was appropriate to understand what her permanent disabilities and restrictions were. Her restrictions remained the same at that time. (PX 6)

Petitioner underwent the functional capacity evaluation on December 18, 2018 at ATI Physical Therapy. The evaluator noted that during the assessment Petitioner primarily reported right third phalanx, hand and wrist pain while avoiding use of the third digit with nearly all gripping tasks. It was noted that Petitioner did not complete chair to floor lifting and full squatting due to reported body mass impedance. She fell on the right hand after losing balance with kneeling and requested to not perform crawling due to pain. Crawl, crouch, kneel and squat were recommended as "not at all." Right frim hand grasp was recommended as "minimally occasionally." Balance, bend/scoop, climb stairs, right and simple grasp and right and fine grasp was recommended as "occasionally." The evaluator deemed the evaluation as "valid" indicating Petitioner demonstrated a light to medium physical demand level. The evaluator stated that Petitioner's capabilities fell below her previous job as an assembly, which was a medium level job.

Petitioner returned to Dr. Pinello on January 10, 2019. At that time, Petitioner continued to report some limitations with lifting as well as pain and stiffness in her finger of the right hand. Petitioner also reported she was restricted to carrying heavy items with her left arm only which was causing back discomfort. Dr. Pinello noted Petitioner's physical exam remained unchanged indicating she was lacking a full range of motion of the middle finger particularly with extension. Slight minor deformity was noted and there was tenderness in the tip of the right middle finger. Dr. Pinello opined that Petitioner had met medical maximum improvement and had permanent restrictions that generally included a weight carrying on the right side of 22 pounds, 26 pounds above her shoulder on the right side and 35 pounds occasionally on the right side. Dr. Pinello opined that these were her final restrictions and she would follow up on an as needed basis.

Petitioner testified she worked light duty from March 22, 2018 through June 1, 2018 and from July 11, 2018 through February 3, 2019.

Petitioner testified that the only other jobs she has held throughout the course of her life include acting as a kitchen manager, waitress and cook in a restaurant or working as an independent contractor for the military on a base in Wisconsin where she drove heavy equipment, tracked equipment and labeled items used for military purposes. Petitioner testified that she still has pain in her right hand. She has ongoing numbness and tingling in the right hand and ongoing pain multiple times throughout the day which ranges anywhere from being mildly annoying to extreme pain. The pain is located in the first joint of her middle finger and continues through the wrist via the outer side of the right hand and then up the arm on the outer side of the arm. Petitioner provided that she is unable to make a full fist. During trial, she demonstrated her continuing inability to make a fist.

Petitioner testified that she has difficulty performing basic tasks in the kitchen. Petitioner stated she is forced to do many tasks with her left hand only which takes longer and is far more difficult. Petitioner provided an example that her daughter has to help fasten her undergarments when she's getting dressed in the morning. Lastly, Petitioner testified that she continues to use ice and heat and anti-inflammatories such as Ibuprofen and Tylenol two to three times per day to reduce her symptoms.

Petitioner testified that based on her economic condition, she was unable pay for automobile insurance for her vehicle. As a result, she lost her privileges to drive and has lost her driver's license. Because of her license situation, a job search has been difficult. Petitioner conveyed that she had applied for work with the U.S. Census. According to Petitioner, she was offered employment subject to finger printing. Petitioner stated she couldn't get to the finger printing local because her drivers license had been suspended. Petitioner also provided another example wherein she applied for work at Amazon. She was offered an interview which she did not attend due to her driving situation. Lastly, Petitioner testified that because she has lost all sources of income, her housing situation is tenuous

Petitioner underwent vocational evaluation testing with Steven Blumenthal on April 4, 2019. In his report dated April 5, 2019, Mr. Blumenthal details the records he reviewed including the treatment records of John Pinello of Rush Castle Orthopedics, the IME report of Dr. Murphy dated September 19, 2018 and the functional capacity evaluation from ATI Physical Therapy dated December 18, 2018. Mr. Blumenthal noted in his report that Petitioner's weight at the date of injury was approximately 275 pounds and that her weight as of the date of their meeting on April 4, 2019 was 350 pounds. He felt she was cooperative throughout the interview and the results of his testing were a valid representation of Petitioner's abilities. The Arbitrator notes that Petitioner's self-reported medical history matches the records submitted as well as Petitioner's testimony regarding the loss of her license due to her inability to obtain insurance is corroborated in Mr. Blumenthal's report.

Petitioner was administered several vocational evaluation tests wherein she demonstrated an above average reading vocabulary and comprehension ability in comparison to entering community college students. Petitioner demonstrated average spelling and math skills and high average non-verbal reasoning ability. Mr. Blumenthal noted on page 8 of his report that Petitioner would be a very good candidate to complete any additional training which would improve her employability or earning capacity within her physical abilities.

Mr. Blumenthal noted on page 11 of his report that a traditional software based transferrable skills and aptitude analysis would be difficult to complete on Petitioner as she had what amounted to sedentary work restrictions suggesting that her abilities could most easily be accommodated in a work setting where the majority of the tasks are performed in a seated position. It was also noted that Petitioner had a very specific limitation on the use of her right middle finger which may require specific training or workplace accommodations which the counselor believed could be completed. However, he indicated not all job titles which would require frequent constant data entry could be accommodated. Mr. Blumenthal believed that Petitioner may be able to work as either a general clerk or appointment clerk. Mr. Blumenthal noted that in Kendall County, entry level minimum hourly rates ranged from $8.99 to $9.47 per hour. He also provided that the minimum wage in the State of Illinois was $8.25 an hour effective July 1, 2010 and $9.25 an hour effective January 1, 2020. (PX 9, p.12)

Mr. Blumenthal prepared a vocational rehabilitation plan for Petitioner which was submitted as Petitioner's Exhibit 10. In that rehabilitation plan, Mr. Blumenthal noted that rehabilitation was necessary for the employee to return to work, that "[Petitioner] has lost access to her occupation as an assembler and is unable to perform any occupation she has performed on her past work history based on the results of her FCE and post-FCE work release by her treating physician, Dr. Pinello." The vocational counselor recommended computer office skills training to learn keyboarding (two or one handed) along with the use of Microsoft Office, Word,

Excel, and Outlook. Mr. Blumenthal also believed additional ergonomic assessment may be required post-completion of computer skills training, the provision of job readiness training and job placement services. (PX 10)

At Respondent's request Petitioner underwent another Section 12 examination. On May 14, 2019, Petitioner saw Dr. John J. Fernandez at Midwest Orthopaedics Hand & Shoulder Center. Dr. Fernandez reported that he reviewed photographs and video submitted by Respondent at trial as Exhibits 5 and 6. Dr. Fernandez additionally stated that he reviewed treatment notes beginning on 10/16/17 and ending on 4/5/19. (The Arbitrator notes that according to the records submitted, Petitioner's medical treatment ended on January 10, 2019. The Arbitrator believes the doctor is referencing Mr. Blumenthal's April 4, 2019 vocational assessment.) According to Dr. Fernandez, an examination demonstrated normal creases along the dorsal finger and hand equal to the contralateral side indicating better range of motion than what was indicated during the examination. During motor exam, there were subjective complaints of weakness to grip and pinch secondary to pain. There was no visible atrophy along the intrinsic or extrinsic muscles of the hand or forearm. Upon palpation, there was significant complaints along the digits including the distal and middle phalanx as well as the proximal phalanx on the distal palm. There were no mechanical symptoms such as crepitus, locking, or triggering. As to the range of motion, there was a 3-cm tip to palm deficient active motion, 2 cm passively with pain, but with full correction passively. The physician opined there was a significant mismatch which could not be explained as there was FDP and FDS function, which was normal and intact, but Petitioner was not able to initiate beyond 3 cm. (RX 10)

Dr. Fernandez reviewed x-rays taken on the date of the examination. The doctor indicated same revealed normal bone quality and alignment without any evidence for any fracture, dislocation, or contributory degenerative process.

Dr. Fernandez opined that Petitioner's previous diagnosis was impact injury with contusion involving the middle primarily, and possibly the index and ring finger secondarily. He opined that her current diagnosis is one of pain of unknown etiology with associated stiffness involving the middle finger. The doctor felt there was no evidence of fracture, nonunion, joint injury, residual nail or skin injury or CRPS. Additionally, he indicated there was no evidence of any tendon injury or loss. The physician further expanded indicating there was virtually no objective findings, despite a lot of subjective complaints. He provided that the x-rays were normal and her extensor and flexor tendons and ligaments were functioning normally. Dr. Fernandez opined that the FCE indicates limitations secondary to pain but not because of any objective losses as there were none. The physician stated that he had no work related explanation as to the source and severity of her current residual complaints and symptoms. The doctor sated that he could not explain Petitioner's residual complaints because the mechanism of injury appeared to be relatively minor and she had an extensive amount of treatment. He believed she had a crush injury as documented but felt same should have resolved within three (3) to six (6) months without any residual impact disability. (RX 10)

Dr. Fernandez opined that Petitioner's initial treatment was reasonable and work related. This would include the initial therapy for up to six months after which therapy for contusion would not have been necessary or indicated. He added that further diagnostic studies such as an MRI or bone scan could be considered as part of her general pain workup, however this would not be considered work related to the crush or contusion mechanism of injury at work. He stated that the work up would be related to her non-work related diagnosis of pain of unknown etiology. (RX 10)

Dr. Fernandez also opined that Petitioner required no restrictions or limitations with regard to the work related injury. He stated that even if the FCE was valid and indicative of the needful restrictions, said restrictions would be based on her pain which had no work related etiology. The doctor added, "assuming hypothetically that her injuries [were] treated as work related and the losses from the FCE are treated as work related…She should be able to return to work as noted in the video in terms of assembling these tackle boxes as

those activities are relatively light and although frequent in nature given her current physical examination, she should be able to engage in the lower extremities without restrictions or limitation..." Lastly, the doctor stated Petitioner reached maximum medical improvement approximately six months after the work injury and that she had no need for restrictions. (RX 10)

With respect to C) DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, the Arbitrator finds as follows:

It is clear from the testimony presented at trial that Petitioner was working within her described job duties as an assembler for Plano Molding through FlexiCorps Inc. when this injury occurred on October 12, 2017. Petitioner credibly testified at trial with regards to her job duties on each specific line at Plano Molding for which she was expected to work. Petitioner gave a credible account of the work accident wherein she, due to the unstable mold on the bottom of the press, which should have held the tackle box in place, used her right hand to secure the tackle box within the mold so that the press machine could be operated on that specific tackle box. Specifically, Petitioner testified that the line and press she was operating was a new line. She was being trained by her supervisor, Doug, who indicated that she should use her chest to stabilize the tackle box while the press machine was operated. Instead of using her chest to stabilize the tackle box, Petitioner used her right hand to complete the process.

All of the medical records submitted by both Petitioner and Respondent contain the same history of the work injury as corroborated by Petitioner by her testimony at hearing.

Petitioner testimony, corroborated by the medical records, demonstrate that the press came down on her right hand and crushed her middle, index and ring fingers. There is no question that Petitioner was in the course of her job duties and that this injury, had it not been for the malfunctioning mold on the tackle box press line arose as a direct result of the employment of Petitioner in this claim.

Based on all the above, the Arbitrator finds that Petitioner sustained an accidental injury that arose out of and in the course of her employment with Respondent on October 12, 2017.

With respect to F), WHETHER THE PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, the Arbitrator finds as follows:

The Arbitrator finds that based upon the greater weight of the evidence, Petitioner's current condition of ill-being is causally related to the work accident which occurred on October 12, 2017. The Arbitrator relies on the opinions and findings of Dr. Pinello who treated Petitioner consistently throughout the course of her medical care, from November of 2017 until her maximum medical improvement release on January 10, 2019. It is clear that Dr. Pinello believed that the delay with authorizing prescribed treatment impeded Petitioner's recovery. Respondent failed to authorize care from as early as October 30, 2017 when her primary care physician, Dr. Alm ordered physical therapy. Petitioner received no therapy despite the continuing recommendations of her orthopedic physician, Dr. Pinello. Petitioner initially saw Dr. Pineelo on November 20, 2017. At that time, the doctor ordered physical therapy indicating that aggressive therapy would be important. At her next visit with Dr. Pinello on December 11, 2017, the doctor noted that therapy had not been authorized. Dr. Pinello stated "[she] really needs therapy to advance. Buddy taping can only get it so far and home program will probably be very unsuccessful. Progressive therapy pushing range of motion including manipulation would be warranted." The doctor added, "[i]it is disappointing that a month has gone by with no further advancement of this patient's care, as she may have been resolving this condition, but, at this point, rather than still trying to start her basic therapy." By January 8, 2018, Dr. Pinello again expressed his displeasure that Petitioner had not undergone therapy. The doctor wrote, "It is extremely disappointing that therapy has not been approved...Patient is over 3

months out from injury has never gone through therapy. When likely this would've been already resolved by now if they just centered through therapy...Her MMI is pending therapy and now that's been delayed it will take much longer to resolve her condition."

It was not until Petitioner saw Respondent's Section 12 examiner, Dr. Brian Murphy, on February 9, 2018 that therapy sessions were authorized. Dr. Murphy assessed right hand crush injury with subsequent contracture of the middle finger. The doctor opined that the diagnosis and Petitioner's complaints were consistent with the work accident described. He felt that the best course of treatment, four months out from the injury, would be a course of therapy with a hand therapist. Dr. Murphy seemed to agree with Dr. Pinello that the failure to provide that care could cause ongoing deficits if it was not addressed.

In addition, Dr. Murphy performed two other Section 12 examinations (June of 2018 and September of 2018) over the ensuing 7 months detailing his opinions regarding the necessity of further treatment. Dr. Murphy's reports are consistent in stating that the injury is causally related to the work accident of October 12, 2017. In September 2018, Dr. Murphy's diagnosis remained right hand crush injury with contracture of the right middle finger. He felt Petitioner appeared to have some mild regression noting she had limitations in active and passive motion with grip strength weakness. Although, Dr. Murphy opined that further care would likely not be of significant benefit, the doctor noted Petitioner would likely have some limitations in motion and strength in the right hand due to injury to the right middle finger. Dr. Murphy makes it abundantly clear in his September report that Petitioner's ongoing deficits are likely permanent in nature and remain causally connected to the work accident of October 12, 2017. Dr. Murphy felt that a functional capacity evaluation was appropriate and that Petitioner would likely have a 5-10 pound lifting restriction on the right hand.

It is also noted by the Arbitrator that there are no other findings of pre-existing conditions and the Petitioner was able to work full duty and had no difficulty with her right hand until October 12, 2017.

The Arbitrator is not persuaded by the opinions offered by Dr. Fernandez. The doctor indicated her current diagnosis was one of pain of unknown etiology with associated stiffness involving the middle finger with virtually no objective findings despite the findings listed on page 4 of his report indicating a limited grip on physical examination. The Arbitrator notes that although the doctor provided that the weakness to grip was based on Petitioner's subjective complaint, on page 5 the doctor indicated a Jamar dynamometer was used to measure grip strength, however, there is no mention of the findings of said testing.

Dr. Fernandez provided that he reviewed the videos depicting work processes regarding assembling a tackle box. Petitioner credibly testified these videos only showed a very specific part of one of the many lines that she worked on as an assembler while employed by Plano Molding.

He indicated that her x-rays were normal and that the FCE which was determined valid by Petitioner's physical therapists and Dr. Pinello indicates limitations secondary to pain but not because of any objective losses as there are none. Dr. Fernandez goes on to explain that despite there being no evidence of any pre-existing status or injury to Petitioner's hand, he has no work-related explanation as to the source and severity of her current residual complaints and symptoms. As noted above, Dr. Pinello as early as December 11, 2017, conveyed that "[she] really needs therapy to advance...as she may have been resolving this condition..." He again conveyed his displeasure on January 8, 2018 when the doctor wrote, "...Patient is over 3 months out from injury has never gone through therapy. When likely this would've been already resolved by now if they just centered through therapy...now that's been delayed it will take much longer to resolve her condition." It was not until March 2018, that Dr. Pinello's therapy prescription was honored. By that time Petitioner had developed contracture of the middle finger as assessed by Dr. Murphy. It appears that Dr. Pinello's prediction was accurate.

Dr. Fernandez also opined in his report that the mechanism of injury was relatively minor and that Petitioner continues to have very significant residual complaints which he could not explain as relating to a crush injury. Dr. Fernandez believed that Petitioner's injury related to the work accident in question was only a contusion and that further care or restrictions were not indicated or necessary based on the work-related accident described to him by the employer. However, Dr. Fernandez also went on to state that hypothetically if her injuries were treated as work related, Petitioner would be able to return to work as noted in the video in terms of assembling tackle boxes as the activities are light but frequent in nature. The Arbitrator notes that Petitioner's functional capacity evaluation deemed as valid by all of her providers and not questioned as valid by Dr. Fernandez would dictate that she cannot return to that job as she cannot perform frequent gripping activities. The Arbitrator notes Petitioner testimony and her demonstration at trial wherein she showed her difficulty making a fist with her right hand is credible. As noted above, the Arbitrator is not persuaded by Dr. Fernandez' opinions contained in his report.

Based on all the above, the Arbitrator finds that a causal relationship exists between Petitioner's present right hand condition of ill-being and the accident sustained on October 12, 2017.

With respect to J) WERE THE MEDICAL SERVICES PROVIDED TO THE PETITIONER REASONABLE AND NECESSARY AND WHETHER THE RESPONDENT HAD PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, the Arbitrator finds as follows:

The findings of fact and conclusions of law stated above are adopted herein. Having found the requisite causal relationship, the Arbitrator awards the unpaid medical bills submitted at trial as Petitioner's Exhibit 1. The Arbitrator awards payment of those bills reasonably related and necessary for Petitioner's treatment to her right hand from October 12, 2017 until Petitioner's date of maximum medical improvement on January 10, 2019.

Respondent shall be receive a credit under Section 8(j) of the Act for any bills previously paid or any bills paid through Respondent's group insurance company. In addition, Petitioner shall be reimbursed for any out of pocket expenses tendered as a result of her medical care with regard to her right hand, including the money paid out of pocket for prescriptions recommended by Dr. John Pinello. Lastly, Petitioner shall be held harmless for any group payments made on her behalf throughout her treatment.

With respect to K) WHAT TEMPORARY TOTAL DISABILITY BENEFITS SHOULD BE AWARDED AND WHAT MAINTENANCE BENEFITS SHOULD BE AWARDED, the Arbitrator finds as follows:

The findings of fact and conclusions of law stated above are adopted herein. The question in determining whether total disability benefits are due is whether the claimant's condition has stabilized so that she is at medical maximum improvement. Freeman v. United Coal Mining Company v. Industrial Comm'n., 318 Ill. App.3d 170, 177-178 (5th Dist. 2000).

Petitioner is requesting TTD benefits from October 12, 2017 to January 10, 2019. Respondent concedes that Petitioner is entitled to TTD from October 13, 2017 – March 31, 2018. Petitioner is requesting maintenance from January 10, 2019 – July 17, 2019. Petitioner testified she worked light duty from March 22, 2018 – June 1, 2018 and July 11, 2018 – February 3, 2019. The parties stipulate Respondent is entitled to a credit of $9,101.86 in benefits paid.

Based on Petitioner's testimony and the medical records submitted, the Arbitrator finds Petitioner was temporarily and totally disabled for the intermittent periods of October 13, 2017 through March 21, 2018; June 2, 2018 through July 10, 2018.

With respect to maintenance, Petitioner was placed at maximum medical improvement per her functional capacity evaluation by Dr. Pinello on January 10, 2019. Prior to that determination, Petitioner had been in a transitional work duty program which continued through February 22, 2019. (RX 4) Petitioner testified and Respondent tendered an exhibit (RX 11) providing that Petitioner was notified of a job placement offer for transitional work with another employer (Montgomery Historic Preservation). Petitioner credibly and unrebutted testimony provide that she appeared for a work interview, completed a background check form and was never contacted again by the place of transitional employment for work. Respondent provided no evidence that Petitioner failed to report to the transitional work offered. Subsequently, Respondent has not accommodated Petitioner's ongoing restrictions per her functional capacity evaluation.

Thereafter, Petitioner at that time, had requested vocational rehabilitation and testing which was not fulfilled by Respondent. Petitioner obtained her own vocational rehabilitation assessment through Mr. Steven Blumenthal, on April 4, 2019. Mr. Blumenthal opined that rehabilitation was necessary for Petitioner to return to work. Mr. Blumenthal based his opinion on her permanent restrictions, education and prior work experiences listed above. Mr. Blumenthal noted Petitioner had lost access to her occupation as an assembler and was unable to perform any occupation she had performed on her past work history. Mr. Blumenthal relied on the results of her FCE and post-FCE work release by her treating physician, Dr. Pinello. The vocational counselor recommended computer office skills training to learn keyboarding (two or one handed) along with the use of Microsoft Office, Word, Excel, and Outlook. Mr. Blumenthal believed that additional ergonomic assessment may be required post-completion of computer skills training, the provision of job readiness training and job placement services. Respondent submitted no vocational opinion. The only opinion to the contrary is the opinion of Dr. John Fernandez who the Arbitrator found unpersuasive.

Relying on all the above, the Arbitrator awards maintenance benefits to Petitioner from February 22, 2019 through the date of hearing, or July 17, 2019.

With respect to O): ARE VOCATIONAL REHABILITATION AND JOB PLACEMENT SERVICES NECESSARY AND CAUSALLY RELATED TO THE WORK INJURY IN QUESTION, the Arbitrator finds as follows:

The findings of fact and conclusions of law contained above are adopted herein. Relying on the credible and persuasive vocational testing and rehabilitation report submitted as Petitioner's Exhibit 9, as created by Steven Blumenthal, the Arbitrator finds Petitioner is hereby entitled to receive vocational rehabilitation and job placement services and any maintenance that may accompany Petitioner's participation in those services under the Act.

The Arbitrator notes that no vocational rehabilitation plan was submitted by Respondent for review at hearing. Petitioner, however, submitted Petitioner's Exhibit 9 and Petitioner's Exhibit 10 a vocational rehabilitation report and plan for Petitioner which outline services such as job placement, resume building and specific computer retraining in an attempt to find stable permanent employment as a result of the work injury sustained on October 12, 2017. The Arbitrator also finds persuasive Petitioner's willingly participated throughout the course of her treatment in all transitional work supplied by Respondent. Said participation is demonstrative of Petitioner's cooperation and eagerness to again contribute to the work-force. Petitioner is hereby awarded vocational rehabilitation and post-training job readiness and placement services as laid out by Mr. Blumenthal in Petitioner's Exhibits 9 and 10.

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

ALEJANDRO PARRILLA,

Petitioner,

vs. NO: 17 WC 27762

PRECISION STEEL WAREHOUSE, INC.,

Respondent.

21IWCC0069

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 issue of permanent disability and being advised of the facts and law, affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed August 13, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $367.28 per week for a period of 3.8 weeks, as provided in §8(e)3 of the Act, for the reason that the injuries sustained caused 10% loss of use of the left middle finger.

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.

21IWCC0069

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,500.00. 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: FEB 18 2021

L. Elizabeth Coppoletti

LEC/mck

O: 2/3/21

43

Stephen Mathis

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

PARRILLA, ALEJANDRO
Employee/Petitioner

Case# **17WC027762**
16WC034198

PRECISION STEEL WAREHOUSE INC
Employer/Respondent

21IWCC0069

On 8/13/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.89% 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:

0307 ELFENBAUM EVERS & AMARILIO
IAN ELFENBAUM
900 W JACKSON BLVD SUITE 3-E
CHICAGO, IL 60607

0560 WIEDNER & McAULIFFE LTD
JASON STELLMACH
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

21IWCC0069

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
NATURE AND EXTENT ONLY

ALEJANDRO PARILLA
Employee/Petitioner

v.

PRECISION STEEL WAREHOUSE, INC.
Employer/Respondent

Case # **17** WC **27762**

Consolidated cases: **16 WC 34198**

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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **March 13, 2019**. By stipulation, the parties agree:

On the date of accident, **June 5, 2017**, 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 $**1,836.42**, and the average weekly wage was $**612.14**.

At the time of injury, Petitioner was **31** 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 $**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 permanent partial disability benefits of **$367.28 per week** for **3.8 weeks**, because the injuries sustained caused the loss of use of **10% of the left middle finger**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from **September 3, 2015** through **March 13, 2019**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

August 8, 2019
Date

AUG 13 2019

STATEMENT OF FACTS and CONCLUSIONS OF LAW

Petitioner testified he was hired by the Respondent on 8/14/14 as a coil handler. He could not recall with certainty whether he had an initial physical. His job duties involved taking coils/metal off the lines and packaging them for customer shipments. He indicated he is essentially the last quality control check before a shipment goes out. He testified that the products he packaged would range from 1" to 4' wide, and from 2 pounds to thousands of pounds.

Petitioner had been released to light work duties in March 2017 following a 9/3/15 accident (the subject of consolidated case 16 WC 34198) but testified he did not actually return to work until May, as he first underwent work conditioning. He indicated he told the therapist it was painful for him to perform the lifting and carrying he was being asked to do in work conditioning. The September 2015 injury involved laceration injuries to Petitioner's four left fingers, the worst being the ring and middle fingers which suffered tendon and nerve damage, requiring three surgeries.

On 6/5/17, Petitioner testified he was again taking a large coil off a machine when a 10-pound coil holder fell onto his R/L hand, which had been on the table. He testified that this had never happened to him before. His

hand swelled up and he had pain, but said he put some ice on it and it felt fine. When he saw Dr. Nagle again he mentioned he was having some pain, and after an x-ray Dr. Nagle told him he had sustained a microfracture. Petitioner testified that Dr. Nagle did not recommend any treatment and that he continued to work. Dr. Nagle's 6/29/17 report noted Petitioner had made good progress with regard to the 9/3/15 injury and that the work conditioning report noted Petitioner had reached his goals and was capable of work at the heavy physical demand level, which would allow him to perform the functions of his job. He noted Petitioner had already returned to his regular job with some hand cramping with heavy lifting. Petitioner did report that he had an object fall on his dorsal left hand about three weeks prior, but that any swelling and discomfort had gradually resolved and he had no trouble using his hand as a result of the incident. However, Dr. Nagle did attribute a minimally displaced fracture to the third metacarpal head, which was "healing nicely", to this incident. Petitioner had motion of the DIP joint and his sweat pattern had returned. Petitioner was advised to follow up in three weeks and continue working full duty. (Px6).

On 11/9/17, Dr. Nagle last saw Petitioner. He reported occasional spasms but was otherwise doing well. Petitioner was mainly concerned about whether his full strength would return. Dr. Nagle noted his sensation had improved and the left hand appeared to be functioning well. He continued to work without difficulty, and Petitioner was released from care at MMI with no restrictions. Nothing specific was indicated as to the fracture. (Rx4).

WITH RESPECT TO THE ISSUE OF THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

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

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence with regard to injuries the Petitioner sustained on 6/5/17. Such a rating was submitted by Respondent at the hearing on 3/13/19, but this rating did not involve injuries related to the 6/5/17 accident. Therefore, this factor carries no weight in the permanency determination

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 coil handler at the time of the accident. While he has returned to work since that time as a utility man floating and rotating to a variety of jobs, the evidence indicates that this job change was not due to his 6/5/17 injuries. This factor carries minimal weight in the permanency determination.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 31 years old at the time of the accident. Neither party has introduced evidence which would tend to show how the Petitioner's age may impact any injuries he sustained on 6/5/17. This factor carries minimal weight in the permanency determination.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner testified that he continues to work full time and earns more than he did at the time of the accident date. He did testify, however, that he volunteers for overtime much less often to avoid any pain increase. The greater weight of the evidence would indicate that any pain increase is unlikely to be related to the 6/5/17 accident, but rather would be related to the accident of 9/3/15, which is the subject of consolidated case number 16 WC 34918. This factor carries minimal weight in the permanency determination.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner sustained a minimally displaced fracture to the third metacarpal head, which Dr. Nagle indicated was healing nicely and for which he recommended no specific treatment. The Petitioner did not testify to any significant sequalae that resulted from this fracture. The Arbitrator does note that the fracture was indicated to be displaced to a small degree, and that this injury occurred to the same hand that the Petitioner had previously injured on 9/3/15 and which required extensive treatment.

Based on the above factors, the record taken as a whole and a review of prior Commission awards involving similar injuries and outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of use of 10% of the left middle finger pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NICOLE WESTON,

Petitioner,

vs. NO: 17 WC 08811

STATE OF ILLINOIS,
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES (DCFS),

21IWCC0070

Respondent.

DECISION AND OPINION ON REVIEW

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

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

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

DATED: FEB 18 2021
d-2/9/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WESTON, NICOLE
Employee/Petitioner

Case# **17WC008811**

SOI DEPT OF CHILDREN AND FAMILY SERVICES
Employer/Respondent

21IWCC0070

On 7/27/2020, 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 0.13% 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:

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

6298 ASSISTANT ATTORNEY GENERAL
THOMAS OWEN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 6M
SPRINGFIELD, IL 62794

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

JUL 27 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
ARBITRATION DECISION

Nicole Weston
Employee/Petitioner

Case # 17 WC 008811

v.

State of Illinois Department of Children and Family Services
Employer/Respondent

21IWCC0070

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 **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. ☒ 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 **Did Petitioner have dependent children on the date of accident ?**

21IWCC0070

FINDINGS

On **3/1/17**, 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 not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**4,644.00**; the average weekly wage was $**1,055.45**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**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

Claim for compensation denied. Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on March 1, 2017.

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

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

Signature of Arbitrator

July 26, 2020
Date

ICArbDec p. 2

JUL 27 2020

FINDINGS OF FACT

Petitioner was employed by Respondent as a child protection specialist. She was hired on January 30, 2017. She was enrolled in an orientation program through March 1, 2017. The program took place at 6201 South Emerald St. in Chicago. Petitioner testified that she drove to work, and on the first day of the program was informed in a group meeting by her supervisor that she and the other employees were to park in the lot in front of the building or a second lot close by. Petitioner testified that there was no other place to park, as the nearest public street, Halsted Street, was too far and too busy to park on. Petitioner testified that she thus parked her car in the lot in front of the building. Petitioner testified she was not sure if Respondent owned the building or the lot. Petitioner testified the lot in front of the building was used by the employees and clients of Respondent. Petitioner testified that her work schedule was 8:00 a.m. to 5:00 p.m., with 2 fifteen-minute breaks and a one hour lunch break.

Petitioner testified that on March 1, 2017 she had one dependent child, a 17-year old son.

Petitioner testified that on March 1, 2017 she parked in the lot in front of the building. On her lunch break that day, she exited the building to go to her car to obtain lunch. Petitioner testified she was wearing black plastic rain boots with a zipper and decorative shoelaces which hung over the side of the boot. Petitioner testified that as she exited the building and was walking on the sidewalk between the building and the parking lot, the shoelace of her right boot was caught in an uneven crack in the sidewalk and she fell on her right knee. Petitioner identified the sidewalk she tripped on in the photo in RX 6, and the crack in the sidewalk as the type her shoelace caught on that caused her fall in RX 7. She could not definitely say that the crack shown in RX 7 was the crack in which her boot lace got caught.

After injuring her right knee in the fall, Petitioner was seen at an urgent care and by her primary care physician, Dr. Taylor. Dr. Taylor referred her to an orthopedic surgeon, Dr. Chandler, whom she saw initially on March 16, 2017. Dr. Chandler ordered an MRI, which Petitioner had on March 27, 2017. The MRI revealed a small horizontal tear of the medial meniscus, grade I sprain of the medial collateral ligament, suprapatellar effusion and rupture of a Baker's cyst. On April 10, 2017, Dr. Chandler prescribed an arthroscopy, which was done on April 20, 2017. Petitioner underwent extensive post-operative treatment with Dr. Chandler for continuing symptoms of swelling and pain to her right knee. On June 26, 2017, she had the first in a series of supartz injections. Petitioner had a course of physical therapy starting on August 7, 2017. Petitioner was referred for pain management on September 7, 2017. Petitioner had a cortisone injection on December 7, 2017.

On February 6, 2018, she had the first in a series of three Gel-Syn injections. On April 16, 2018, Petitioner was referred to a rheumatologist, Dr. Hirsin, whom she saw. More recently, Petitioner had cortisone injections on January 24, 2019 and in October of 2019. Petitioner testified she continues to see Dr. Chandler every 3 to 4 months, with her next follow-up to be scheduled in January. As well, Petitioner received unrelated treatment to her back with Dr. Lim, and for a right hand carpal tunnel release with Dr. Chandler, during the course of her right knee treatment with Dr. Chandler. (PX 1, 2&4)

Dr. Chandler authored a narrative report dated February 22, 2019. The report summarized Petitioner's accident and his course of care to Petitioner's right knee, outlined above, as a result of her fall at work on March 1, 2017. Dr. Chandler opined that the medial meniscal tear, ruptured Baker's cyst, sprain of the MCL ligament and aggravation of the patellofemoral arthritis of the right knee were all caused by the work injury of March 1, 2017. Dr. Chandler opined that MCL sprain did not resolve after therapy; that the meniscal tear improved after the arthroscopy; but the aggravation of the patellofemoral arthritis has turned into a permanent aggravation; and that so far Petitioner failed a majority of her treatment modalities with only minimal relief with the visc injections, and will need to periodically follow-up for repeat injections. (PX 3)

Petitioner testified she was off work several days in March of 2017, after her fall, and that she remained off work under the prescriptions of Dr. Chandler from April 18, 2017 through July 16, 2018. Petitioner testified she received short-term disability under SERS. Petitioner testified that she has had no other injuries or symptoms to her right knee before the March 1, 2017 accident, nor any other accidents since. Petitioner testified she now works for Respondent with the Department of Human Services, without any restrictions related to her right knee. Petitioner testified she continues to experience pain and swelling in her right knee, made worse by standing, walking and climbing stairs, for which she takes prescription medications through Dr. Taylor and Dr. Chandler, which provides some relief.

Petitioner was seen by Dr. Brian Cole for a §12 examination on August 26, 2019.

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)

C – ACCIDENT/ARISING OUT OF AND IN THE COURSE OF

Petitioner failed to prove that she sustained accidental injuries, which arose out of and in the course of her employment by Respondent on March 1, 2017.

The evidence submitted did not establish that Respondent owned, maintained or controlled the sidewalk where the fall occurred or the parking lot where Petitioner was heading at the time of the fall.

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

Petitioner's injury occurred when she was walking from the building where she was receiving training to her car, to obtain lunch. The injury arguably occurred in the course of her employment, as she on her lunch break and leaving Respondent's premises to get lunch. Another finder of fact may have found that Petitioner's injury did not occur in the course of her employment.

"The 'arising out of' component is primarily concerned with causal connection" and is satisfied if 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." Sisbro, Inc. v. Industrial

Comm'n , 207 Ill. 2d 193, 203 (2003) A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his or her duties. Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58 (1989)

The Arbitrator finds that Petitioner's knee injury did not arise out of her employment. First, it was not proved that Respondent owned, maintained or controlled the sidewalk where Petitioner fell. Second, it was not proved that the sidewalk was defective and that any sidewalk defect contributed to the accident. The risk of getting one's decorative boot lace caught in a non-defective sidewalk crack is a personal risk, not a risk of employment. The risk of such a fall is just not an employment risk. The evidence adduced does not support a finding that Petitioner's risk of getting her boot lace caught was increased by her employment. Here, the mere facts that Petitioner fell on the sidewalk that may have been under Respondent's control while obtaining her lunch do not support a finding that the injury arose out of her employment by Respondent. Illinois is not a positional risk state. Brady v. Louis Ruffalo & Sons Construction Co., 143 Ill. 2d 38 (1987)

Petitioner failed to prove that her injury arose out of her employment. The claim for compensation is, therefore, Denied.

F – CAUSAL CONNECTION

Based on Petitioner's unrebutted testimony and the medical records, along with the opinions of Petitioner's treating surgeon, Dr. Chandler, Petitioner's current right knee condition is causally related to the March 1, 2017 accident.

J - MEDICAL EXPENSES, K – TTD; and L – NATURE AND EXTENT

Based on the Arbitrator's finding above regarding accident/arising out of and in the course of, the Arbitrator needs not decide the above issues.

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

ALEJANDRO PARRILLA,

Petitioner,

vs. NO: 16 WC 34198

PRECISION STEEL WAREHOUSE, INC.,

Respondent.

21IWCC0071

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 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 July 25, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $355.20 per week for a period of 61.5 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused 30% loss of use of the left hand.

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.

21IWCC0071

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 18 2021

L. Elizabeth Coppoletti

LEC/mck

O: 2/3/21

43

Stephen Mathis

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PARRILLA, ALEJANDRO
Employee/Petitioner

Case# **16WC034198**

17WC027762

PRECISION STEEL WAREHOUSE INC
Employer/Respondent

21IWCC0071

On 7/25/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.01% 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:

0307 ELFENBAUM EVERS & AMARILIO
IAN ELFENBAUM
900 W JACKSON BLVD SUITE 3-E
CHICAGO, IL 60607-3746

0560 WIEDNER & McAULIFFE LTD
JASON STELLMACH
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

ALEJANDRO PARILLA
Employee/Petitioner

v.

PRECISION STEEL WAREHOUSE, INC.
Employer/Respondent

Case # **16** WC **34198**

Consolidated cases: **17 WC 27762**

21IWCC0071

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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **March 13, 2019**. By stipulation, the parties agree:

On the date of accident, **September 3, 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 $**30,784.00**, and the average weekly wage was $**592.00**.

At the time of injury, Petitioner was **29** 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 $**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 permanent partial disability benefits of **$355.20 per week** for **61.5 weeks**, because the injuries sustained caused the loss of use of **30% of the left hand**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from **September 3, 2015** through **March 13, 2019**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

July 23, 2019
Date

JUL 25 2019

STATEMENT OF FACTS and CONCLUSIONS OF LAW

Petitioner testified he was hired by the Respondent on 8/14/14 as a coil handler. He could not recall with certainty whether he had an initial physical. His job duties involved taking coils/metal off the lines and packaging them for customer shipments. He indicated he is essentially the last quality control check before a shipment goes out. He testified that the products he packaged would range from 1" to 4' wide, and from 2 pounds to thousands of pounds.

On 9/3/15, Petitioner testified that towards the end of his shift he was running a coil and told the machine operator something was wrong where pieces of steel were possibly scratching each other. The operator went to look, and when the Petitioner tried to grab the steel, the operator pressed a button which pulled it out of his hands. He testified that he sustained a severe laceration and that he felt like his hand was gone. The laceration occurred through the glove he was wearing. The plant manager came by, took off the glove, looked at the injury and wrapped it. Petitioner was taken by ambulance to Gottlieb Hospital.

At Gottlieb (Loyola), Petitioner was treated by Dr. Karnezis and reported a work injury where a metal sheet cut through his left hand. He was unable to flex or extend his fingers. He was diagnosed with left hand index,

middle, ring and small finger complex lacerations with nerve, tendon and artery involvement. Dr. Karnezis' report indicates he performed: 1) irrigation and debridement and digital neuroplasty of the right [sic] index and small fingers; 2) irrigation and debridement of the right [sic] middle and ring fingers with repair of the flexor digitorum superficialis and profundus tendons zone 1 and repair and reapproximation of the radial and ulnar digital nerves and arteries; and, 3) application of the dorsal blocking splint. It was clear from a review of the report that the middle and ring fingers sustained the most significant trauma with avulsion/transection of the tendons and arteries. The middle phalanx of the left middle finger was fractured at the volar plate, which was avulsed. The A4 pulley of the ring finger was transected and had to be repaired. (Px1; Px3; Rx2).

The next day Petitioner followed up with Dr. Karnezis, who indicated that Petitioner sustained a "massive" injury at work where sheet metal cut down to the bone of his middle finger and down into the tendons of his index and small finger on his left hand. Petitioner was continued off work, splinted and given a sling and pain medication. A short-leg splint was applied on 9/4/15, and on 9/18/15, Dr. Karnezis prescribed physical therapy and continued Petitioner off work. (Px3).

Petitioner began physical therapy at Athletico and continued to follow up with Dr. Karnezis. He remained off work and was in a splint through 11/13/15. At that point an ultrasound was recommended to see if there was an avulsion of the FDP in the middle and/or ring fingers. (Px3). Petitioner testified Petitioner testified he had to let the hand heal for 4 to 6 weeks with no hand movement to avoid sutures breaking. Once the therapist started moving the hand around, there was excruciating pain, trying to get the hand into a fist. (Px5).

On 10/2/15, Dr. Karnezis noted the Petitioner had no tendon injuries to the left index and small fingers and they were doing well, while the middle and ring fingers were gradually regaining motion. More aggressive therapy was recommended, with the doctor noting the possibility of a future tenolysis for adhesions and a small possibility of flexor tendon rupture. On 10/16/15, it was noted Petitioner had a nodule on the left small finger with some loss of sensation, dryness and numbness to the middle and ring fingertips, and continued reduced middle finger flexion with weakness, while flexion of the left ring finger was symmetrical with the right side. Aggressive therapy and off work status continued. (Px3).

Petitioner testified that he was referred by the Respondent for examination with orthopedic surgeon Dr. Fernandez. On 11/12/15, Petitioner reported numbness throughout the left middle finger and partial numbness in the left ring finger with some cold sensitivity and pain with difficulty making a fist, particularly the middle finger. Dr. Fernandez examined the Petitioner and reviewed his medical records. He recommended only one day per week of formal therapy with an emphasis on a home program. Noting Petitioner would likely still have deficits and require a tenolysis of the two troublesome fingers. (Px4).

Petitioner returned to Dr, Karnezis on 11/13/15 with ongoing complaints. Noting the formation of scarring and the possibility of rupture of the flexor tendon versus scar contracture, an ultrasound was prescribed. The 12/1/15 ultrasound revealed complete retears of the left middle and ring finger FDP tendons with retraction. On 12/2/15, Dr. Karnezis noted the middle finger remained most problematic with good flexion but some numbness in the other fingers. On 12/11/15, Dr. Karnezis indicated he reviewed the ultrasound and noted the tendon ruptures with ongoing loss of motion and sensation in the middle and ring fingers. He indicated they could continue to work on passive range of motion and keep an eye on things or could consider staged flexor tendon reconstruction versus fusions. Petitioner remained off work. (Px3).

Petitioner was reexamined by Dr. Fernandez on 12/23/15. Petitioner had improved since the last visit but reported ongoing variable pain, worse with activities, and mainly functional complaints of weakness and stiffness. Dr. Fernandez noted the ultrasound findings and diagnosed left middle greater than ring finger loss of

motion and strength with tendon adhesions, as well as possible ruptures of the profundus tendons in the left ring and middle fingers. He recommended 4 additional weeks of therapy and would need to discuss tenolysis surgery to sever the adhesions in the middle finger versus two-stage tendon reconstruction. However, he recommended trying the less invasive tenolysis first. Without surgery, Dr. Fernandez opined Petitioner would likely need permanent light duty restrictions. (Px4).

On 1/15/16, Dr. Karnezis noted Petitioner remarkably had tip-to-palm motion in the left ring finger but had no ability to fully flex the middle finger. Petitioner reported he had been working essentially his regular job and had increasing pain, noting he didn't want to disappoint his employer and so was using the left hand despite Karnezis' specific instructions not to. He recommended Petitioner be off work for two weeks. Petitioner last saw Dr. Karnezis on 2/1/16. The left ring finger DIP joint was stiff and ongoing stiffness and loss of flexion in the middle finger. A new ultrasound was prescribed to evaluate the middle finger flexor digitorum superficialis excursion. (Px3).

Petitioner saw Dr. Fernandez a third time on 2/18/16. He mainly complained of functional problems, ongoing reduced flexion in the noted two left fingers, particularly the middle finger, with some ongoing pain. Following his examination and review of records and x-rays, Dr. Fernandez noted the loss of left middle finger flexion as well as loss of distal joint function in the ring finger. He recommended that Petitioner either live with his functional limitations or undergo tenolysis surgery and, if an FDS rupture was found, the noted two stage tendon reconstruction in the middle finger. He did not recommend surgery to the ring finger given Petitioner had reasonable function that wouldn't warrant the risk of worsening the condition with surgery. (Px4).

Petitioner testified that he wanted more of a specialist than Dr. Karnezis after talking to Dr. Fernandez, who said he would have treated him in a different way. Respondent's nurse case manager provided the names of several possible hand specialists, and the Petitioner chose Dr. Nagle.

Petitioner initially saw Dr. Nagle on 4/7/16. He also opined that Petitioner required no further treatment for his left ring finger but found the left long finger was significantly impaired. Dr. Nagle recommended exploration of the long finger flexor tendon sheath with consideration of tenolysis of the residual FDS. If there was too much scarring or if the FDS was found to be incompetent, then he suggested that they move forward with a two-stage tendon reconstruction. If Petitioner decided to undergo the surgery, Dr. Nagle anticipated maximum medical improvement (MMI) between six to twelve months from the date of surgery. Petitioner returned to Dr. Nagle on 5/23/16. On examination, Petitioner demonstrated improved sensation in the long finger. Dr. Nagle advised that he did not think Petitioner would require further surgery on his nerves. An ultrasound of the long finger was ordered. At this time, petitioner was released to return to work with no use of his left hand. (Px2).

The ultrasound was completed on 6/27/16 and again demonstrated that the FDP was ruptured and there was a 2.5-centimeter space between the proximal and distal aspects. Dr. Nagle continued to recommend exploration of the middle finger with consideration of a tenolysis of the residual FDS. (Px2). Petitioner testified that at this point his middle finger was the main concern because he couldn't close the finger and had hypersensitivity.

Dr. Nagle performed the initial surgical stage on 7/25/16, involving excision of the flexor tendons of the left middle finger and insertion of a silicone rod, excision of a neuroma of the radial digital nerve and repair of the nerve with synthetic tube and allograft. It was noted detachment of the flexor tendons (FDS and FDP) and the ulnar radial digital nerve. Petitioner underwent the third surgery, Dr. Nagle's second stage, on 11/7/16. At that time the doctor removed the rod, added wiring and a tendon graft from the index finger, and completed the reconstruction. (Px1).

Petitioner returned to Dr. Nagle the following day, reporting some discomfort at the surgical site, but no numbness. Physical examination revealed no evidence of rupture and the normal cascade of Petitioner's fingers had been restored. Petitioner was to begin physical therapy, which was performed at Athletico. (Px2; Px5).

When Petitioner returned to Dr. Nagle on 12/6/16, he reported no pain. He was able to place and hold his fingers in a nearly full fist. Dr. Nagle advised Petitioner to continue with therapy and to discontinue splinting in approximately two weeks. On 3/28/17, Dr. Nagle noted that Petitioner had made significant improvement with range of motion of the middle finger. He recommended work conditioning for one month followed by a functional capacity evaluation (FCE). Petitioner was released to light-duty work with a lifting restriction of no more than 10 pounds with the left upper extremity. The work conditioning program on 4/11/7 at Athletico. At the time of the first session, he was able to perform 71.43% of his job demands. (Px2; Px5).

As of 5/2/17, it was noted that Petitioner was capable of performing 100% of his regular job duties, which was noted to fall within the heavy physical demand level category. On 5/9/17, Nagle released Petitioner to work without restrictions.

While he was released to light duty in March 2017, Petitioner testified he did not actually return to work until May, as he first underwent work conditioning. He indicated he told the therapist how painful it was to perform the lifting and carrying he was being asked to do (wood basket with metal plates) in work conditioning.

On 6/5/17, Petitioner testified he was again taking a large coil off a machine when a 10-pound coil holder fell onto his R/L hand, which had been on the table. He testified that this had never happened to him before. His hand swelled up and he had pain, but said he put some ice on it and it felt fine. When he saw Dr. Nagle again he mentioned he was having some pain, and after an x-ray Dr. Nagle told him he had sustained a microfracture. Dr. Nagle did not prescribe anything for this and the Petitioner continued to work.

On 6/29/17, Dr. Nagle noted Petitioner had made good progress and that the work conditioning report noted Petitioner had reached his goals and was capable of work at the heavy physical demand level, which would allow him to perform the functions of his job. He noted Petitioner had already returned to his regular job with some hand cramping with heavy lifting. Petitioner did report that he had an object fall on his dorsal left hand about three weeks prior, but that any swelling and discomfort had gradually resolved and he had no trouble using his hand as a result of the incident. However, Dr. Nagle did attribute a minimally displaced fracture to the third metacarpal head, which was "healing nicely", to this incident. Petitioner had motion of the DIP joint and his sweat pattern had returned. Petitioner was advised to follow up in three weeks and continue working full duty. (Px6).

On 11/9/17, Dr. Nagle last saw Petitioner. He reported occasional spasms but was otherwise doing well. Petitioner was mainly concerned about whether his full strength would return. Dr. Nagle noted his sensation had improved and the left hand appeared to be functioning well. He continued to work without difficulty, and Petitioner was released from care at MMI with no restrictions. (Rx4). In his final therapy evaluation on 11/9/17, Petitioner reported difficulty holding wide items and glass items due to his spasms. (Px5).

On 7/3/18, Petitioner attended an examination pursuant to Section 12 for purposes of obtaining independent impairment rating evaluation with Dr. Biafora (Hand to Shoulder Associates) at the request of the Respondent. Dr. Biafora's 7/24/18 report indicated Dr. Biafora calculated an AMA impairment rating of 23% of the middle finger, which translates to 5% of the hand. He also computed an impairment rating of 53% of the ring finger, which translates to 5% of the hand. Ultimately, Dr. Biafora calculated an AMA impairment rating of 10% of the left hand, which converts to 9% of the upper extremity, or 5% of the whole person.

The parties deposed Dr. Biafora on 11/7/18. Dr. Biafora is an orthopedic surgeon who is board certified with a sub-specialty certificate in hand surgery. Dr. Biafora possesses a special certification needed to perform and assign AMA impairment ratings. Dr. Biafora testified in detail as to the examination and how he determined the impairment rating of 10% of the left hand and explained how this converts to a 9% impairment of the upper extremity, or a 5% whole impairment. On cross examination, Dr. Biafora acknowledged that an impairment rating is not the same thing as disability, and that the AMA guide does not take into account the patient's ability to work or subjective level of pain other than a QuickDASH questionnaire score, though he questioned any "disability" that could not be explained via objective findings. He agreed the Petitioner was unable to make a complete fist on exam and had some left-hand weakness. It appeared that the FDS was not fully flexing the middle finger. While he didn't believe the complaint was very significant, he agreed the Petitioner did report some numbness in the middle and ring fingers. (Rx2).

Petitioner testified his current job involves working as a "utility" person, mainly working as a floater and doing whatever is needed at the facility. He testified that there are some duties he cannot do at work due to the weights involved, as he felt symptoms going up his arm when he tried to lift too much. While he continues to handle coils, Petitioner testified his plant manager took him off machines where coils were heavier and weighed too much for him due to left-hand weakness. He testified tries to do as much as he can without hurting himself but doesn't get to choose his work activities, as they are assigned by Respondent. He continues to have sensitivity in the middle finger and still doesn't like using his hand because things feel odd, like sandpaper. He doesn't want to hit anything with the left hand because it causes pain. He feels afraid of blowing out a tendon and so hasn't really tried to push his hand even though his doctor said he is fine and can do everything. He gets pain with cold weather that feels like numbness/needles. He testified he has pain above and below the laceration area on the palmar side of the hand and has a numbness/needles feeling towards the distal end of his fingers. When he bends the index finger, the middle finger moves with it, and he said it doesn't "feel right" when he tries to prevent this from happening. Petitioner testified that he used to play games on his computer and typed well, but he now can't really type because it's hard to reach for the keys. He also used to work out a lot and likes outdoor activity, testifying he no longer plays basketball or football, roller blades or bikes. Petitioner testified that Dr. Nagle indicated he might need a future surgery if the tendon becomes loose and needs to be tightened back up or replaced. Petitioner reports sharp pains like needles on his fingers and the palm side of his hand.. He does not have much feeling below the cut and numbness in his fingertips. Cold weather intensifies his symptoms. As a result, he must use extra caution when working since the metal coils are not clean and there can be splinters. He treats his pain with over the counter pain medication and ice. Petitioner demonstrated for the Arbitrator that when he moves his index finger, his middle finger moves with it. The Arbitrator also observed Petitioner's scar that ran from the top of his left middle finger down to his wrist.

On cross examination, Petitioner testified that he is right hand dominant. He agreed that when Dr. Nagle released him from care in November 2017 he was given no work restrictions. As a utility worker for Respondent since that time, he testified he works full time and is earning a little more than he was at the time he was injured. He indicated he often turns down overtime because he doesn't want to deal with the pain that day when working 40 hours is sometimes too much for him. He uses both hands in his job. He will take ibuprofen occasionally for pain, maybe once or twice a week, such as where he has to work on a big machine. He will occasionally take a leftover prescribed medication. He has no current medical appointments pending. He acknowledged that he has been reluctant to try the hobbies he noted on direct but hasn't tried them. While he agreed that Dr. Nagle indicated he could do everything that he wants, Petitioner testified he doesn't feel confident to try.

WITH RESPECT TO THE ISSUE OF THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

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

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 10% of the left hand, or 9% of the left upper extremity/5% of the whole person, as determined by Dr. Biafora pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The Arbitrator gives this factor some weight in the determination of permanency.

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 coil handler at the time of the accident. He now works as a utility worker or "floater" covering a variety of jobs for various co-workers. He continues to handle coils regularly and has a labor-intensive job, though he testified that his manager doesn't make him work with the heavier coils. At the time of trial, the Petitioner was working full time without restrictions as a utility worker. The Arbitrator gives this factor some weight in the permanency determination.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 29 years old at the time of the accident. While the Arbitrator notes that neither party in this case produced any medical evidence to support how the Petitioner's age may impact any permanent disability resulting from the accident, the Petitioner is significantly young and at an early point in his work life, and has already undergone repair of the left ring finger flexor tendons, repair and subsequent revision reconstruction of the left middle finger flexor tendons with the use of a tendon graft from the index finger. This factor carries some weight in the permanency determination.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner was released without restrictions and is working full duty. He now works as a "floater." While he still handles coils, his plant manager took him off machines with heavy coils. He testified that he uses extra caution now due to numbness in his fingers. He does currently earn more per hour than he was at the time of the

accident, but testified he no longer seeks overtime hours due to his pain. The Arbitrator gives this factor some weight in the permanency determination.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner underwent multiple hand surgeries due to his 9/2/15 work injury. The injury involved lacerations of the left small and index fingers to the tendons and severing of tendons and nerves in the middle and ring fingers. Following the initial surgery, the flexor tendons in the ring and middle fingers again detached and retracted. The flexor tendons are responsible for allowing the fingers to flex and close into a fist or to bring the fingertips to the palm. Petitioner's ring finger nevertheless had satisfactory, though not full, flexion, so it was not addressed further. He underwent a two-stage reconstructive surgery for the middle finger, which involved the use of a tendon graft from the index finger. He testified that he still experiences ongoing symptoms to his left hand. At trial, Petitioner explained that he has sharp pains like needles on his fingers and the palm side of his hand, as well as numbness in his fingertips that is intensified by cold weather. He noted a "sandpaper" type feeling on the impacted fingertips. The progress notes from his last visit of 11/9/17 noted occasional spasms and weakness in the left hand. Petitioner reported difficulty holding wide items and doing things like removing lids due to weakness. Dr. Biafora, Respondent's Section 12 examiner, also noted weakness in the left hand, limited range of motion, sensitivity to the ring finger and subjective pain in the left hand when gripping. Dr. Biafora testified that there were no signs of symptom magnification in any of the medical records or during his own examination. Petitioner was released by his treating physician, Dr. Nagle, without work restrictions. While Petitioner is right-hand dominant and appears to be able to close the left hand enough to make a fist. Although Petitioner testified that he avoids certain activities such as riding his bike, skateboarding, rollerblading and basketball, he acknowledged that Dr. Nagle informed him that he was capable of performing activities in an unrestricted fashion and that he does not currently take any prescribed pain medication, using Ibuprofen on an occasional basis after working on bigger machines. Overall, the Petitioner has had a reasonably solid recovery, but he did have a significant injury to the middle two fingers of his left hand, which included nerve damage, and has ongoing complaints at a significantly young work life age. The Arbitrator gives this factor significant weight in the permanency determination.

Based on the above factors, the record taken as a whole and a review of prior Commission awards involving similar injuries and outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of use of 30% of the left hand pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Leggett,
Petitioner,

21IWCC0072

vs.

NO: 14 WC 7943

Illinois Department of Transportation,
Respondent.

DECISION AND OPINION ON REVIEW

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

On February 18, 2014, Petitioner sustained multiple injuries while working for Respondent after falling off his truck, striking his head on a guardrail, and falling to the ground face first. The Arbitrator awarded Petitioner $100,428.52 in medical expenses, 265&6/7 weeks of temporary total disability benefits, and found Petitioner permanently and totally disabled for life as of August 28, 2019. The Arbitrator also awarded Respondent credit of $209,121.43 in paid temporary total disability/maintenance benefits. We agree with the Arbitrator's analysis and award of benefits. However, the Arbitrator did not include the language in the decision directing the Rate Adjustment Fund ("RAF") to pay cost-of-living benefits as required by statute. Therefore, the Commission includes that language and otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 30, 2019, is hereby changed as stated above and is otherwise affirmed and adopted.

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

21IWCC0072

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

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, 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.

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: FEB 22 2021
O-2/18/21
DLS/dw
046

Deborah L. Simpson

Barbara N. Flores

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LEGGETT, ROBERT
Employee/Petitioner

Case# **14WC007943**

ILLINOIS DEPT OF TRANSPORTATION
Employer/Respondent

21IWCC0072

On 10/30/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% 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:

1414 O'CONNOR LAW GROUP LLC
BRYAN J O'CONNOR
140 S DEARBORN ST SUITE 320
CHICAGO, IL 60603

6202 ASSISTANT ATTORNEY GENERAL
COURTNEY SCHOCH
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CHICAGO, IL 60601

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
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 30 2019

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

21IWCC0072

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

Robert Leggett,
Employee/Petitioner

v.

Illinois Dept. of Transportation,
Employer/Respondent

Case # 14 WC 7943

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 **8-27-2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **permanent total disability/odd lot status v. Sec. 8(d)(2)**

FINDINGS

On **2-18-2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**63,642.00**; the average weekly wage was $**1223.88**.

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

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**113,186.64** for TTD, $**0** for TPD, $**95,934.79** for maintenance, and $**0** for other benefits, for a total credit of $**209,121.43**.

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

See Findings of Fact and Conclusions of Law Below.

ORDER

Petitioner has proven by a preponderance of the credible evidence he sustained accidental injuries arising out of and in the course of his employment by Respondent on February 18, 2014.

Petitioner has proven by a preponderance of the credible evidence his current condition of ill-being is causally related to the accident sustained on February 18, 2014.

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, to the following medical providers, as provided in Sections 8(a) and 8.2 of the Act:

Prescription Partners, LLC	3/11/15 thru 4/5/17	$5,280.52
Elk Grove Radiology	4/23/14, 4/24/14	$116.00
Condell Medical Center	9/5/14-11/30/15	$45,000.00

Gray Medical	2-19-15 - 4-10-15	$12,250.00
1800 McDonough Road Surgery Center	10-9-2018	$20,179.00
Dr. Allen (Consultants in Neurology)	10-23-14-2-13-19	$2,320.00
Suburban Orthopedics	11-27-12-3-1-19	$15,275.00

Temporary Total Disability and Maintenance

Respondent shall pay Petitioner temporary total disability benefits and maintenance benefits of $815.92/week for 265-6/7 weeks, for the following periods, as provided in Section 8(b) of the Act: from 2-19-2014 through 1-26-2016; from 2-4-2016 through 10-1-2017; from 4-17-2018 through 11-8-2018; and from 11-18-2018 through the date of trial, 8-27-2019.

Respondent shall be given a credit of $209,121.43 for temporary total disability and maintenance benefits that have been paid.

Permanent Total Disability

Respondent shall pay Petitioner permanent and total disability benefits of $815.92/week for life, commencing 8-28-2019, as provided in Section 8(f) of the Act.

SEE ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW BELOW.

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

OCT 30 2019

Date: October 30, 2019

21IWCC0072

IN THE ILLINOIS WORKERS COMPENSATION COMMISSION

ROBERT LEGGETT
Plaintiff,
v.
ILLINOIS DEPT. OF TRANSPORTATION
Defendant.

No. 14 WC 7943

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

A. Summary of Evidence at Trial

Petitioner's Job Duties

On 2-18-2014, Petitioner was employed by Respondent as a highway maintainer. Petitioner described his duties as including operating IDOT trucks and snow plows; and performing various forms of manual labor such as cleaning out and fixing sewers, attaching/removing heavy snow plow blades, cutting grass, fixing fences, trimming trees, digging post holes and removing objects, sometimes heavy, left on the roadways. (Tr. P12-16). He had to lift bags of cement weighing between 60-70 lbs, With assistance from other workers, Petitioner would also have to attach very heavy snow plow blades to trucks during the winter. (Tr. 13-14). Petitioner testified to the overhead work that he had to perform, which included throwing items found on roadways into his truck and simply reaching overhead to board the IDOT trucks. (Tr. Pp 16;20-21). Petitioner described his work duties as medium to heavy. (Tr. 17). Some of his job duties require him to work on foot alongside highways where vehicle traffic is traveling at high speeds, requiring him to keep a close lookout for traffic to avoid injury. (Tr. 16).

Petitioner worked out of IDOT's Northbrook yard. He started work at 6AM. One of his first tasks was to check the truck he would be operating, including checking gas and fluid levels and also checking levels of salt and brine which were used on the roads. (Tr. 17-20, 23-24).

Petitioner's Physical Condition Prior to Accident of 2-18-2014

Petitioner had undergone unrelated left knee surgery performed by Dr Howard Freedberg of Suburban Orthopedics in 2013 and had returned to full duty with Respondent on September 3, 2013. He had no complaints of any kind with respect to any of the body parts involved in the 2-18-14 accident from that point until the date of injury. (Tr. 17). This is confirmed in the histories reported in the medical records. (PX2-p23). Petitioner described himself as being in "great shape" prior to the accident. (Tr. 53).

Accident of 2-18-2014

On the date of injury, the truck to which Petitioner was assigned had been parked adjacent to a guardrail, which was about 4 ½ feet high. One of Petitioner's first tasks was to check the truck the level of brine which would be deposited on the roads. In order to check this, Petitioner had to step up on truck platform next to his driver's door. While on the platform, Petitioner used a 3-point stance, with one foot on the platform, one foot on the guardrail and one hand overhead holding onto the grab bar, leaning over the front of the truck. (Tr. 20-23). Petitioner had previously used guardrails for support in checking fluids. (Tr. 20, 23, 71).

Petitioner testified that the guardrail suddenly collapsed, causing him to fall off the platform. His face and body hit the guardrail and he landed face down on the ground in a puddle of water. He lost consciousness but was awakened by a co-worker's voice. (Tr. 19-24). Petitioner identified PX14A and 14B as photos of the collapsed guardrail at the Northbrook yard. (Tr. 23). Petitioner had never noticed that the guardrail, which was maintained by CMS, was loose or defective in any way. (Tr. 71). He identified photos showing the injury to the area of his forehead above the right eye after the accident (14XC), and the stitches he received in the emergency room. (PX14D).

Petitioner immediately reported the accident to his supervisor, Jerome Bean. Petitioner was taken to Glenview Hospital emergency room by a co-worker. (Tr. 25). Petitioner gave a history of the fall to the ER staff at Glenview Hospital. (PX1-pp 13,17).

Respondent produced an accident report dated 1-19-14, signed by one Louis Salas, a supervisor for Respondent, indicating that Petitioner had committed a safety violation, and that employees should not climb the guardrails. The report did not dispute or refute that Petitioner was performing his normal job duties at the time of the injury. (RX7).

Medical Treatment, Diagnoses and Evidence of Causation

According to the Glenview Hospital emergency records, Petitioner reported head/eyebrow pain, neck pain, left shoulder pain and back pain (PX1-p13,34). Per the records, Petitioner stated he was unsure if he lost consciousness but was dazed. (PX1-p17). X-rays of the cervical spine showed severe degenerative changes at C5-6. (PX1- p20). MRI showed loss of cervical lordosis and severe loss of disc space height at C5-6. (PX1-p21-22). CT of the head showed some soft tissue swelling over the right orbit, but otherwise was negative. (PX1-p22-23). The laceration over the right eye was repaired. Exam of the left shoulder showed mild tenderness. (PX1-p16).

Petitioner was discharged and his wife drove him home. Petitioner was diagnosed with concussion and prescribed Norco. (PX1-p4-6). In describing his injuries, Petitioner testified that his left shoulder was a "mess". His back and neck were causing problems and he developed horrible headaches. (Tr. 27-28).

Petitioner saw Dr Freedberg two days later on 2-20-14. Petitioner reported pain in the neck, low back, left shoulder and left hip. He reported that he had lost consciousness but did not remember for how long. He stated his neck would freeze up on occasion and had a pins and needles feeling down his left shoulder into the last two fingers of the left hand. Petitioner reported a sharp pain when he lifted his arm above the left shoulder. He also reported pressure at the back of his skull depending on positioning. Petitioner also reported pain across the lower back and into the left groin, with numbness and tingling down the left leg into the toes. He stated when walking the left leg is very weak. (PX2-pp2-6).

Dr. Freedberg's exam showed tenderness at the paraspinals and spinous processes of the neck; tenderness at paraspinals of the low back; limited range of motion of the neck and back; positive Spurling sign; and a negative straight leg raising test. Exam of the left shoulder showed

diminished strength at 4/5; swelling of the shoulder muscles and limited range of motion. (PX2-pp4-6).

Dr. Freedberg ordered MRIs of both the left shoulder and cervical spine and ordered Petitioner off work. Cervical MRI showed a small fluid cavity suspicious for myelomalacia with disc-spur complex; mild displacement of the spinal cord; and moderate bilateral foraminal stenosis, all at C5-6. There was also a very small central disc protrusion at C4-5. (PX2-pp8-9, 10).

MRI of the left shoulder showed partial tear of the left rotator cuff; small joint effusion; posterior subluxation of the humeral head in relation to the glenoid; and mild to moderate degenerative changes. (PX2-p11-12). Dr. Freedberg diagnosed Petitioner with lumbar neuritis/radiculitis; cervical radiculitis; left shoulder acromioclavicular degenerative joint disease; and rule out rotator cuff tear. (PX2-p20). Dr. Freedberg performed a left shoulder cortisone injection on 3-6-2014 (PX2-p20). Dr. Freedburg noted that there was no reported prior history of injury to Petitioner's neck, left shoulder, back or head. (PX2-p23). Dr. Freedberg opined in his exam notes dated March 6, 2014 that the cause and mechanism of Petitioner's condition of ill-being was "traumatic work". (PX2-p23). He referred Petitioner to David McNally MD for spinal care.

Dr. McNally saw Petitioner on 3-6-2014. Petitioner reported pain and significant stiffness in the back of the neck, with pain shooting into left shoulder, with aches and pain running down left arm into the left fingers. He reported numbness and tingling in the left hand which varied. His neck pain worsened when moving neck side to side or up and down. He reported dizziness after looking down and then lifting neck. Walking aggravated his spinal pain. He was experiencing dizziness. He also reported low back pain shooting down left front of groin, and across bilateral buttocks, with numbness and tingling down left leg into toes. Petitioner felt his left leg was very weak and he was using a cane for support. He was taking Norco for pain. (PX2-p13-14).

Dr. McNally"s assessment on March 6, 2014 was neck, low back, left shoulder and left hip pain post- accident, with a diagnosis of cervical spondylosis with myelopathy; spinal stenosis; cervical and lumbar strain. (PX2-p19). Dr. McNally opined that Petitioner was medically unable to work, and that these conditions were "work-related". (PX2-pp. 13).

Dr. McNally performed surgery on Petitioner's cervical spine on 4-23-2014, at Alexian Bros. Hospital. Dr. McNally noted Petitioner had severe stenosis at C5-6. Dr. McNally

performed a decompressive C5-6 anterior cervical discectomy through the posterior longitudinal ligament with removal of posterior osteophytes and decompression of the spinal cord and the neural elements and a C5-6 anterior spinal interbody fusion with allograft and instrumentation. His post-op diagnosis was cervical spondylosis with myelopathy; cervical spinal stenosis; and cervical disc degeneration. (PX7 –p5-9).

Petitioner followed up with Dr. McNally after cervical spine surgery. On 4-23-14 Petitioner reported improvement following surgery, but he still had intermittent numbness into the fingers. Petitioner reported persistent mid to low back pain with numbness into bilateral toes. Petitioner also reported headaches and dizziness since the accident. (PX2-p42). He continued to have pain in the back of his neck. (PX2-p35). Petitioner was prescribed Hydrocodone-acetemenaphine (Norco) (PX2-p42-45). On 6-26-14 Petitioner underwent a lumbar spine MRI. Per Dr. McNally's note, this showed mild facet degeneration and disc bulging. (PX2-p125).

Dr. McNally referred Petitioner to a pain management specialist at Suburban Orthopedics, Dimitry Novoseletsky MD, who first saw Petitioner on 8-25-2014. Petitioner reported severe back pain and persistent neck pain. He was wearing a back brace. (PX2-p52). Dr Novoseletsky's exam noted paraspinal tenderness throughout the cervical and lumbar spines. Dr. Novoseltsky diagnosed Petitioner with chronic axial low back pain and chronic neck pain. He recommended physical therapy and if that did not improve Petitioner's condition, a series of injections. (PX2-pp52-55). Dr. Novolseletsky noted the cause and mechanism of Petitioner's condition was "traumatic (work)". (PX2-p.52). Petitioner was medically unable to work. (PX2-pp. 52; 56; 62).

Petitioner started physical therapy and rehab at Condell Memorial Hospital for his low back problems on 9-15-14. (PX8C-p861). The therapist noted as of 9-17-14 Petitioner had intermittent low back pain aggravated with prolonged sitting, lying and standing. He was only able to walk ¼ mile before needing to sit due to pain. The low back pain also disturbed his sleep. (PX8C-p862). He continued to receive periodic therapy on his low back into 2015.

Dr. Freedberg continued treating Petitioner's left shoulder in 2014-15. Dr. Freedberg performed another cortisone injection into the subacromial space on 8-17-14. (PX2-p 46-48).

Eventually, Dr Freedberg performed left shoulder surgery on 3-13-2015, namely a left shoulder arthroscopy with chondroplasty; debridement of the labrum; biceps tenodesis repair; rotator cuff repair; and subacromial decompression with clavicle resection. His post-operative

diagnosis was left shoulder chondromalacia of the glenoid; anterior labral tear; partial tear of the supraspinatus tendon; biceps tendon tear; and acromioclavicular degenerative joint disease. (PX7-p.223-224).

Following surgery, Petitioner was sent for left shoulder therapy at Condell, which started on or about 3-30-15. (PX8B-p575). Petitioner received therapy for his left shoulder until November, 2015. (PX8-pp17-20). He was also given a TENS unit. (PX2-p128).

Petitioner remained under Dr. Novoseletsky's care for persistent neck and low back pain with radicular symptoms. Dr. Novoseletsky performed a lumbar branch block injection for radicular pain in 2015. (PX2-p102-103). Dr. Novoseletsky recommended additional injection therapy, but Respondent initially denied this. (PX2-p159). Petitioner testified he was experiencing persistent, but not constant, significant low back pain with radiating pain down the leg. (Tr. 35-36). Petitioner also saw Dr. McNally on 5-14-15 for persistent neck pain. Petitioner reported pain, popping and cracking of the neck, and limited motion. Per Dr. McNally, Petitioner had reached MMI as to his cervical spine, and his condition was likely permanent. (PX2-p122-125).

Petitioner saw Dr. Freedberg on 3-10-16 shortly after he had attempted to work light duty. Petitioner reported that the light duty work aggravated his shoulder pain. He also reported pain starting in his neck and radiating across his shoulder blade and down to his elbow. Petitioner also reported clicking with sharp pain in the shoulder. He occasionally experiences numbness and tingling that radiates down his left arm. Petitioner had limited motion and weakness. (PX149-151). Dr. Freedberg believed Petitioner's symptoms were more spinal based, and felt Petitioner was MMI as to the left shoulder condition. (PX2-p149-151).

Petitioner underwent another cervical MRI on 3-31-16. This showed the prior fusion and a tiny abnormal signal representing myelomalacia, along with unchanged degenerative conditions. (PX2A-p241). Petitioner was also sent for EMG testing on 8-10-16. The examining physician found an absent left biceps reflex. The EMG revealed chronic cervical radiculopathy in the left C5 distribution and bilateral C7 distribution. Petitioner also had a moderate median neuropathy bilaterally at the wrists. (PX9).

Petitioner continued to treat with Dr. Novoseletsky in 2017 and 2018. Dr. Novoseletsky performed a left lumbar radiofrequency neurotomy from L3-L5 on 10-9-18. Dr. Novoseletsky's

post-op diagnosis was chronic low back pain, lumbar and sacral spondylosis and lumbar and sacral facet syndrome. (PX2A-p269-70).

Petitioner had developed headaches shortly after the accident as noted by Dr. McNally in his initial exam. (PX2-p.13, 32). Petitioner's family doctor, Jonathan Brown MD, referred him to Neil Allen MD, a neurologist.

Dr. Brown referred Petitioner to Dr. Neil Allen at Consultants in Neurology who initially examined Petitioner on 10-24-14. (PX 5A). Dr. Allen is board certified in Neurology and Internal Medicine. Petitioner reported persistent neck, back and left shoulder pain, sometimes severe. He reported headaches, sometimes severe with pain at 9/10, and dizziness particularly with sudden motion. His back pain would radiate down the leg. (PX5A; Tr. p32).

Among other findings, Dr. Allen diagnosed: (1) a left peripheral vestibulopathy, probably due to Petitioner's head injury; (2) L5 radiculopathy; (3) cervical myelopathy secondary to a C5 injury; (4) tinnitus, hearing alteration and vestibular dysfunction all secondary to damage to the labrynthine and cochylar structures in the ear from the head injury; (5) post traumatic headaches appearing to come from the neck injury; (6) neck and back pain from lumbar radiculopathy and cervvical myelopathy with radicular features; and (7) left shoulder pain from supraspinatus tear. Dr. Allen also diagnosed a congenital nystagmus.

Dr. Allen issued an addendum on June 5, 2019 in response to a request from Petitioner's attorney (leading to a deposition on August 15, 2019, RX 9). In this narrative report, Dr. Allen opined, "It is noted that the findings that I have at this time, status post neck fusion, left shoulder injury, low back pain, cervical radiculopathy and posttraumatic headaches, limit Mr. Leggett's abilities and are causally related to his work injury on February 18, 2014." Dr. Allen further opined that Petitioner "...has significant limitation of function and is unable to perform the duties of his past occupation." Further, Dr. Allen opined, "Based on his deficits in coordination, balance, lifting, the presence of neck pain, limitation of movement, it is my opinion that Mr. Leggett is permanently disabled and is unable to return to work in any capacity." Respondent did not offer any rebuttal opinion into evidence (Dr. Verma's opinions were from June 05 2016, and therefore could not respond to or comment on or criticize Dr. Allen's latest, most recent 2019 opinions. Dr. Allen testified that the cervical myelopathy could be caused by a fall from a height and striking one's head and having a neck injury. (PX17-p9-10). Dr Allen recommended

continued physical therapy, and then a vestibular function evaluation after he recovered from shoulder surgery.

Petitioner underwent the vestibular evaluation at Peak & Balance Centers on 2-22-16 and then a series of vestibular therapy treatments. (PX6). Petitioner underwent a re-evaluation on 3-29-16. The therapist and evaluating physician noted continued vestibular balance deficit and somatosensory deficits. (PX6-p29-30). Petitioner continued to treat with Dr. Allen over the following years, who prescribed medication for his conditions, including Setraline for pain and depression, and Gabapentin for back pain, nerve pain and headaches. (PX17-p36).

After returning to work on light duty on 10-2-17, Petitioner saw Dr. Allen on 12-18-17 and reported that the medication was "doing its job" and he was doing "fair" on light duty. (PX5 p60). However, Petitioner returned to see Dr. Allen on 5-22-18 and reported that he was no longer able to work due to persistent dizziness and neck and back pain upon motion and lifting. Dr. Allen noted coordination deficits and diagnosed vestibulopathy and cervical radiculopathy. (PX5-p51).

Dr. Allen continued to treat Petitioner into 2019. Petitioner had decreased pinprick sensation consistent with his diagnosed L5 spinal injury. Dr. Allen had reviewed the Peak & Balance records. Dr. Allen opined Petitioner had a somatosensory deficit and a vestibular balance deficit. (PX17-p22). Dr. Allen explained how these deficits, particularly the somatosensory deficit, adversely affect a patient's balance. (PX17-p22-23). Dr. Allen opined that the somatosensory deficits, vestibular deficit and spinal cord deficit combined to block the brain from receiving messages of his body position, causing balance problems. (PX17-p24). Dr. Allen opined that Petitioner's balance deficit was caused by the fall at work in February, 2014. (PX17-p23-24). Petitioner's vestibular injury also caused Petitioner to experience fatigue. (PX17-p25). Dr. Allen noted Petitioner had an unsteady tandem gait and would sway when standing with his feet together. These conditions increased fall risk and were caused by the injury. (PX17; p33-34).

Dr. Novoseletsky examined Petitioner again on 11-26-18. Dr. Novosoletsky opined that Petitioner was medically unable to work, and also because of his medications, recommended Petitioner not drive. (PX2A-p.286-292).

Respondent's Section 12 Examination and the FCE

Respondent sent Petitioner to Dr. Nikhil Verma for an evaluation of his left shoulder pursu8ant to Section 12 on 6-3-2016. (RX 3) Dr. Verma recorded an accident history and reviewed medical records. Dr. Verma offered no conclusion opinion as to whether there was any evidence of inconsistent or contradictory accident histories found in any medical records but Dr. Verma did indicate that, "He reported a consistent history of injury" as indicated in the records form Consultants in Neurology dated October 23, 2014." Petitioner reported his shoulder pain had improved from surgery but persisted over the anterior and lateral aspects of the shoulder. According to Dr. Verma, on exam there was no reproduction of shoulder symptoms with neck rotation. There was mild pain over the AC joint and subacromial space. Left shoulder forward elevation was only 140 degrees compared to 180 on the right; external rotation was 60 degrees compared to 70 on the right; behind the back rotation was limited compared to the right. Strength was slightly diminished at 4+/5 and Petitioner had mild positive impingement signs. Dr. Verma's diagnosis was persistent left shoulder pain post arthroscopy. While Respondent disputed causation at trial, Dr. Verma agreed there was a causal relationship between the left shoulder condition and the work injury; "It does appear that there is a causal relationship between the left shoulder condition and the patient's work injury based on the mechanism of acute onset of symptoms and no history of pre-existing condition with regard to the left shoulder." Dr. Verma further agreed all Petitioner's medical treatment with respect to the left shoulder was reasonable, necessary and causally related to the left shoulder injury. Dr. Verma found, "There are no behavorial observations noted." Dr. Verma opined based on a shoulder only perspective, Petitioner could work at a medium level duty at a minimum with a 20-25 lb. lifting restriction and no overhead work or repetitive overhead activity." (RX3). Dr. Verma further indicated these work restrictions are pending the updated FCE.

Petitioner subsequently underwent a functional capacity evaluation ("FCE") on 7-11-2016. Petitioner scored a 46 of 56 on the Berg Balance Scale. Per the FCE examiner, a cutoff of 45/56 is recommended for independent safe ambulation. (PX10-p2). During the shoulder push test, the examiner commented that Petitioner performed at low function and below shoulder height with significant left shoulder and cervical pain. No compensations were demonstrated. Measurements of his biceps and forearms showed diminished girth on the left side where his shoulder was injured. (PX10-p3). Petitioner was unable to perform any lifting from floor to waist. Petitioner reported significant pain levels throughout the testing. The examiner concluded

that Petitioner performed with good compliance and effort throughout. The FCE examiner concluded that Petitioner performed at the light to medium work level but recommended no higher level if any job required prolonged standing. (PX10).

Dr. Verma did not issue a subsequent addendum report discussing this FCE.

Work Status Post-Accident of 2-18-14

Petitioner was off work continuously, per physician orders, from 2-19-2014 through 1-26-2016. See, eg, PX2-p8, 30, 36, 137. On 1-26-16 Petitioner was released for briefly for light duty (PX2-p139). Per Dr. Allen, this was light duty on a trial basis, but Dr. Allen specifically noted Petitioner might not be able to perform light work duties due to his vestibular problems (PX5-p32). Petitioner attempted to briefly work from 1-27-16 through 2-3-2016, but he testified he was unable to perform his duties as a highway maintainer. (Tr. p44). Petitioner saw Dr. Novoseletsky on 2-8-16. His exam noted impaired sensation of the right lower extremity and restricted motion in all directions due to pain. He ordered Petitioner off work again. (PX2-p144, 147). Petitioner remained off work under medical direction due to his injuries from 2-4-16 until 10-1-2017. See, eg, PX2-pp196, 203, 220; PX5-pp31, 34-36). Petitioner attempted to return to work and did work from 10-2-12017 through 4-16-2018. Petitioner testified that he was assisted in large measure by co-workers and that otherwise he would not have been able to perform his duties during this period. (Tr. 43).

Petitioner was taken off work again and did not work from 4-17-2018 through 11-8-2018. Petitioner returned to work on 11-9-2018 and attempted to perform a type of modified light duty for Respondent until 11-17-2018 but was unable to continue working. Petitioner testified to one incident that occurred during this period. He was operating a snow plow but almost lost control of the vehicle due to neck and shoulder pain. (Tr. 49-50. Dr. Allen's notes of his exam of 11-30-18 document other job-related problems. Dr. Allen noted that Petitioner reported when he tried to work during that period, he was unable to lift, bend or without loss of balance, and had almost fallen into traffic on the job. (PX5-p63-64). The last day that Petitioner worked was on 11-17-2018. Petitioner identified PX15 as a summary of the dates he was off work and dates he was working.

Plaintiff testified that he did apply for work in 2018 at Lowes, Menards and Home Depot. None of these companies offered Petitioner employment. (Tr. 48, 64). Also, Respondent

never offered Petitioner any alternative job placement within IDOT. (Tr. 49). Respondent also never offered Petitioner any vocational rehabilitation nor any assistance in obtaining new employment for Petitioner. (Tr. 55). Petitioner testified he does not believe he can safely operate a commercial vehicle. (Tr. 50).

Petitioner's Current Physical Condition

Dr. Novoseletsky's most recent exam of Petitioner was on 6-3-19. Reaffirming his prior note from his 11-26-18 exam, Dr. Novoseletsky on 6-3-19 again opined that Petitioner is medically unable to work in any capacity. He further opined that all the conditions for which he treated Petitioner were caused by the work accident on 2-18-14. Dr. Novoseletsky further recommended that Petitioner undergo additional pain management treatments for his lumbar and cervical spine, as well as a CT myelogram previously recommended by Dr. McNally. (PX2A-p.294-300).

Dr. Allen's most recent exams of Petitioner were 11-30-18, 2-8-19 and 6-1-19. (PX5-p. 63,65-66). Petitioner's main problem is pain, particularly neck pain radiating down the left arm into his fingers. Per Dr. Allen, this is from either an injury to the nerve roots or the spinal cord itself. It is part of the sequelae from his work injury. (PX 17, pp29-30, 35). Dr. Allen opined that Petitioner's neck, back and joint pain are permanent. (PX17, p37-38). Neck motion was restricted, specifically only 30 degrees of left lateral rotation and 15 degrees of flexion. (PX5C). Petitioenr still has left shoulder pain with significantly restricted motion in flexion. Petitioner has atrophy of the left biceps, likely due to chronic pain and disuse. (PX5C). He has limited motion of the lumbar spine with weakness in some of the left leg and foot muscles. Petitioner still experiences headaches, although they are rare now. When they occur, the headaches are severe. Petitioner is still unsteady when he walks and continues to suffer from dizziness. (PX17-p37-38). Dr.

Petitioner has an unsteady tandem gait due to his somatosensory deficit and this increases fall risk. (PX17- p30-33;40). Dr. Allen testified that Petitioner is not able to operate heavy machinery. Dr. Allen opined that Petitioner cannot climb, would have difficulty raising objects above table height more that 7-8 lbs. and is unable to stand on a street and manage signs because of his balance and disorientation deficits. (PX17-pp35, 40,42,43). Dr. Allen opined that Petitioner is at increased risk of falling because of instability and dizziness. (PX5C).

Dr. Allen opined that although the FCE performed in 2016 found Petitioner capable of light to medium work, because the FCE only tests balance for a brief window of time, the FCE test is not determinative on whether Petitioner could perform such work on a continuous basis. (PX17, pp. 58-59). Per Dr. Allen, Petitioner cannot perform work on a continuous basis because his balance deficit is a safety risk for him. (PX17, p68-69).

Dr. Allen further opined that following his exam of 6-4-19, based on Petitioner's deficits in coordination, balance, and lifting, coupled with his chronic pain and limitation of movement, Petitioner was permanently disabled and unable to return to work in any capacity. (PX5C).

Petitioner testified that currently his headaches are under control, but he has significant problems with dizziness and low back pain which "just destroy me." Petitioner has some radiating symptoms down his arm and has dropped things. (Tr. 51). Petitioner has pain running from the low back down the leg when walking or standing for longer periods. Petitioner testified he is back on Gabentipin for pain and Verapamil for dizziness. (Tr. 52). Petitioner testified he has little strength compared to his pre-injury condition. (Tr. 53).

Petitioner testified he cannot climb ladders and cannot squat or kneel. He wears a back brace often, which was prescribed by Dr. Freedberg. Sitting for long periods causes neck and back pain. He has gained about 25-30 lbs. since the accident. (Tr. 53-55, 65).

Vocational Evidence

Petitioner testified that the extent of his education is a high school diploma. He served in the Air Force. (Tr. 45-46). Thereafter, Petitioner worked as a printing pressman for 33 years. Then he obtained a CDL license and drove trucks. He started employment with Respondent in 2009. (Tr. 46). Petitioner testified he has no clerical skills or experience and cannot type. (Tr. 47).

Respondent retained Tracy Peterlin to conduct a vocational evaluation and labor market survey on 1-16-17. (RX 5) Peterlin opined, based on the FCE, that Petitioner could be a candidate for certain jobs such as lot attendant, courier driver or customer service, and provided a list of companies that use that type of employee. Peterlin noted that it was unknown if any of these companies would hire Petitioner. (RX5). This was a one-time evaluation. Respondent offered no assistance to Petitioner in performing job searches, and no formal vocational rehabilitation or training. (Tr. 55, 69).

Petitioner also retained Susan Entenberg, a vocational and rehabilitation expert. Ms. Entenberg documented Petitioner's physical limitations:

Sitting - 15 minutes, then needs to stretch
Standing-30 minutes maximum
Walking-40 minutes
Lifting - 25 pounds at table height
Bending - avoids, limited and painful
Twisting - painful
Squatting - no
Kneeling - no
Climbing - 1 flight about 10 times a day holding rail
Hand manipulation - difficulty with fine manipulation; hard to hit the phone keys, poor writing, hands shake
Reaching - to shoulder level
Driving - 40 minutes; up to twice weekly only if necessary; problem turning neck
Sleeping - 6 hours per night; wakes from pain

Entenberg opined that Petitioner's physical limitations and restrictions precluded Petitioner from any work similar to his previous occupations. This opinion was based on (1) restrictions both by his treating physicians and even those noted in the FCE, e.g. inability to lift floor to waist, occasional knee to waist lift of 30 pounds, occasional chest to overhead lift of 10 pounds, 8 pounds with left upper extremity; occasional carrying of 25 pounds, frequent carrying of 20 pounds; occasional pushing/pulling of 60 pounds of force, frequently of 30 pounds of force with single upper extremity; occasional to frequent dynamic standing; occasional static standing, walking, sitting, balancing, crouching, reaching forward and handling and low occasional climbing, stooping and twisting; and (2) the opinion of Dr. Allen indicated he could not perform work duties safely due to chronic dizziness..

Entenberg further opined that based on all the other evidence, there is no stable labor market available for Petitioner. This opinion was based on (1) that Petitioner only had a high school education; (2) Petitioner had no transferrable skills from his prior occupations and had minimal computer skills; (3) his lack of office or clerical skills; (4) his advanced age; and (5) Dr. Allen's opinions regarding dizziness, balance and safety issues. Entenberg opined the combination of his negative vocational factors would make a job search very difficult and the prognosis for placement is extremely poor. (PX11).

Medical Expenses

Petitioner presented uncontroverted evidence of unpaid medical expenses for reasonable treatment for his injuries sustained in the accident of 2-18-14. Respondent offered no contrary evidence whatsoever concerning whether the medical care was causally related to the accident or whether it was reasonable and necessary. No Utilization Reviews or a Section 12 report were submitted to attempt to challenge the reasonableness and necessity of any medical treatment Petitioner incurred or that which has been suggested for the future.

The total amount of these unpaid medical expenses is $100,422.52, as itemized in PX12 and PX 13 among the following medical care providers as follows:

	PROVIDER	DATE	TOTAL
1	Prescription Partners, LLC	3-11-15thru 1-8-17	$5,280.52
3	Elk Grove Radiology	4-23-14-4-24-14	$1,120.00
4	Condell Medical Center	9-8-14-11-30-18	$15,000.00
5	Gray Medical	2-19-15 - 4-10-15	$12,250.00
7	1800 McDonough Road Surgery Center	10-9-2018	$20,170.00
8	Dr. Allen (Consultants in Neurology)	10-23-14-2-13-19	$2,320.00
9	Suburban Orthopedics	11-27-12-3-1-19	$15,275.00
		TOTAL	**$100,420.52**

CONCLUSIONS OF LAW

The Arbitrator adopts and incorporates the findings of fact included above into the conclusions of law sections below.

Average Weekly Wage

Per RX1, Petitioner's salary for the 12-month period preceding the accident was $63,642.00. Therefore, Petitioner's average weekly wage was $1,223.88.

B. Accident

Petitioner proved by a preponderance of the credible evidence he sustained an accidental injury arising out of and in the course and scope of his employment on 2-18-2014.

The record clearly shows there is no viable argument or dispute that Petitioner was not performing his actual job duties when this accident occurred, witnessed or not.

Respondent has paid the very large sums of $113,186.64 in TTD and $95,934.79 in maintenance (79-1/7 weeks) yet at trial disputes whether an accident occurred. This dispute is based mainly on three proposed arguments, all of which must fail: (1) that Petitioner is not credible and that he offered multiple histories that show some variance in details; (2) that Petitioner somehow violated a safety rule resulting in his injuries (an assertion that offers no legitimate defense); and, (3) most of Petitioner's current impairment and inability to work is attributed to pre-existing, non-accident related conditions. (The Arbitrator notes Respondent apparently does not concede that the accident aggravated these pre-existing conditions. Nor does Respondent acknowledge that no expert medical opinion was offered to dispute this).

The Arbitrator finds and concludes these histories never vary off the main course in any substantive, significant manner. Respondent is unable to offer a persuasive argument with supporting facts that a compensable accident did not actually occur, suggesting Petitioner has failed to prove accident because his histories do not all fully corroborate each other in every detail; however, the Arbitrator finds that Petitioner's histories, while not all corroborating each other in their specific details, sufficiently provide evidence to support his claim of sustaining a compensable accidental injury while performing his job duties. There was no persuasive evidence to support an argument that Petitioner was not injured in an accident arising out of and in the course of his employment.

Further, as noted above, Petitioner's treating physicians opined his pre-existing conditions - which restrict his physical capabilities even more and render him even more unbale to work - were aggravated due to the work accident, period. That aggravation by operation of law becomes an integral part of Petitioner's claim and that aggravation is included in an assessment of his capabilities and overall permanent disability.

Lastly, Respondent has characterized Petitioner's trial testimony as "mercurial", a term the Arbitrator finds both inaccurate and unsuitable. The Arbitrator found Petitioner to be not at all of the sort. Petitioner's accident testimony was more than sufficient to sustain and prove his claims.

Respondent apparently claims, per RX6, that Petitioner committed a safety violation and should have used a ladder to perform his task at the time of the accident. An injury is accidental if it is traceable to a definite time, place and cause, which occurred during the course of employment, unexpectedly without design by the employee. *International Harvester v. Ind.Comm.*, 56 Ill.2d 64 (1973). Petitioner's testimony satisfies this standard. If an employee is performing normal job duties, which Petitioner clearly was doing, it is clearly not a defense to defeat an accident claim that he may have violated a safety rule. *Chadwick v Ind.Comm.*, 179 Ill.App.3d 715 (4th Dist., 1989). **The Arbitrator also notes with emphasis that Respondent cited no case to support its position that Petitioner's alleged violation of safety rule rose to such a level that it should act to remove him from the scope of his employment and thereby defeat his claim.**

The Arbitrator finds that Petitioner met his burden of proof and proved that he sustained injuries in a compensable accident within the course of his employment.

C. Average Weekly Wage

The Arbitrator finds that Petitioner's salary for the 12-month period preceding the accident was $63,642.00. Therefore, Petitioner's average weekly wage was $1223.88, and his TTD rate was $815.92.

D. Causal Connection

Petitioner has proven by (much more than) a preponderance of the credible evidence that there is a causal connection between his current condition of ill-being and the proven accident of February 18, 2014.

The Arbitrator must comment that the evidence proving causation is so abundant and so persuasive - and unrebutted - that it is inexplicable causation was at issue in this trial. This is supported by the fact that Respondent offered not a single medical opinion to

challenge - let alone rebut - the conclusion that causation has been proven. Respondent's single opportunity to dispute causation was presented to Dr. Verma in 2016, who declined to dispute causation and instead offered causation regarding the left shoulder - being the only body part regarding which he was apparently asked to offer opinions. Respondent made no additional efforts to obtain any medical opinion to dispute causation. On the other hand, causation was credibly established by Petitioner's treating providers, who offered well-reasoned and persuasive opinions the Arbitrator accordingly adopts.

The following are medical opinions regarding causation which the Arbitrator finds are very credible, reliable, well-reasoned, persuasive, supported by the evidence and which are accordingly adopted:

- **Dr Freedberg opined in his exam notes dated March 6, 2014 that the cause and mechanism of Petitioner' condition of ill-being was "traumatic work".** (PX2-p23).
- Dr. McNally''s assessment on March 6, 2014 was neck, low back, left shoulder and left hip pain post-accident, with a diagnosis of cervical spondylosis with myelopathy; spinal stenosis; cervical and lumbar strain. (PX2-p19). **Dr. McNally opined that Petitioner was medically unable to work, and that these conditions were "work-related".** (PX2-pp. 13).
- **Dr. Novolseletsky noted the cause and mechanism of Petitioner's condition was "traumatic (work)".** (PX2-p.52).
- **Dr. Novoseletsky on 6-3-19 again opined that Petitioner is medically unable to work in any capacity. He further opined that all the conditions for which he treated Petitioner were caused by the work accident on 2-18-14.**
- **Dr. Allen issued an addendum on June 5, 2019 in response to a request from Petitioner's attorney (leading to a deposition on August 15, 2019, RX 9). In this narrative report, Dr. Allen opined, "It is noted that the findings that I have at this time, status post neck fusion, left shoulder injury, low back pain, cervical radiculopathy and posttraumatic headaches, limit Mr. Leggett's abilities and are causally related to his work injury on February 18, 2014."**

Again, not one of the above opinions was challenged - let alone rebutted - by any expert opinion offered by Respondent.

Petitioner sustained multiple injuries in the accident of 2-18-2014, including injuries to his head, neck, low back and shoulders. Petitioner has had continuous medical care since the accident and remains under the care of Dr. Neil Allen, a neurologist, and Dr. Dimitry Novosaletsky, a pain management physician.

With respect to his neck, Petitioner sustained a cervical strain, an aggravation of a preexisting degenerative condition, and development of a cervical myelopathy, as diagnosed by Dr Thomas McNally and Dr. Neil Allen. Petitioner required a cervical fusion with instrumentation at C5-6. Following surgery, he continued to experience neck pain and limited motion, plus radicular symptoms which Dr. Allen diagnosed as cervical radiculopathy and myelopathy attributable to an injury to C5. The cervical radiculopathy was confirmed by EMG testing, which also noted an absent left biceps reflex.

With respect to his left shoulder injury, Petitioner sustained a torn rotator cuff, anterior labral tear, biceps tendon tear and aggravation of acromioclavicular degenerative joint disease. Dr. Freedberg opined that all these conditions of ill-being were caused by the 2-18-14 work accident, as did Dr. Verma, Respondent's IME physician.

With respect to the low back, Petitioner sustained a lumbar injury resulting in lumbar radiculopathy and persistent low back pain, as diagnosed by Dr. Allen and Dr. Novoseletsky. Both of these doctors opined that the work accident caused Petitioner's lumbar spine condition of ill-being.

With respect to his head injury, Petitioner sustained a concussion and then developed post traumatic headaches and dizziness. Petitioner was diagnosed by Dr. Neil Allen with a balance disorder/vestibular dysfunction, as well as a hearing alteration caused by the head injury. Petitioner continues to experience dizziness and balance problems. Dr Allen opined that all these conditions were caused by the work injury of 2-18-14.

The evidence indicates that Petitioner had no prior history of injury to his head, neck, low back or left shoulder, and did not have any ongoing problems or deficits as to these body parts. He had no history of dizziness or balance disorder. (PX17-p66-67). No contrary medical evidence was presented on causal connection. The Arbitrator finds that the Petitioner's

conditions of ill-being of his head, including balance and dizziness, cervical spine, lumbar spine and left shoulder were caused by the work accident of 2-14-18.

E. Temporary Total Disability and Maintenance

Petitioner has proven by a preponderance of the credible evidence that he was off work because of injuries sustained in the 2-18-14 accident from 2-19-2014 through 1-26-2016; from 2-4-2016 through 10-1-2017; from 4-17-2018 through 11-8-2018; and from 11-18-2018 through the date of trial, 8-27-2019, as outlined in PX15. Based on the medical evidence and the testimony of Petitioner, the Arbitrator finds that Petitioner was temporarily totally disabled and/or entitled to maintenance during those periods, which total 265-6/7 weeks, at the TTD rate of $815.92, under Sec 8(b) of the Act.

F. Credits

The parties stipulated that Respondent is entitled to a credit of $113,186.64 in TTD paid; and $95,934.79 in maintenance benefits paid, or a total credit of $209,121.43.

G. **Nature and Extent of Injuries**

Petitioner has proven by a preponderance of the credible evidence that he is permanently and totally disabled based, at least, on an "odd-lot" status, if not permanent total disability based on medical conditions standing alone. The Arbitrator finds and concludes the great weight of the credible evidence proves Petitioner is permanently and totally disabled.

The Arbitrator must comment that Respondent's only expert offering any medical opinion regarding permanency was its Section 12 examiner Dr. Verma (again) and then only on June 3, 2016, and who only opined regarding Petitioner's left shoulder condition and opined that Petitioner had reached MMI and further opined that "an FCE should be obtained to determine the need for ongoing work restrictions" and "Please note work restrictions are pending the updated FCE." (Dr. Verma did opine that "Current work capabilities include likely medium level duty at a minimum with 20-25 pound lifting restriction and no overhead work or repetitive overhead activity.")

However, the Arbitrator emphasizes that while the FCE did take place on July 11, 2016, as noted above, Dr. Verma never provided an addendum report offering his updated

opinions regarding that FCE and therefore never offered his final opinion on restrictions. (and never offered any opinions contrary to those which Dr. Allen and Dr. Novoselsky offered).

The following are medical and related professional opinions regarding permanent disability and Petitioner's work ability which the Arbitrator finds are very credible, reliable, well-reasoned, persuasive, supported by the evidence and which are accordingly adopted:

- Dr. Allen issued an addendum narrative report on June 5, 2019. Dr. Allen opined, "It is noted that the findings that I have at this time, status post neck fusion, left shoulder injury, low back pain, cervical radiculopathy and posttraumatic headaches, **limit** Mr. Leggett's abilities and are causally related to his work injury on February 18, 2014." Dr. Allen further opined that Petitioner "...has significant limitation of function and is unable to perform the duties of his past occupation." Further, Dr. Allen opined, "Based on his deficits in coordination, balance, lifting, the presence of neck pain, limitation of movement, it is my opinion that Mr. Leggett is permanently disabled and is unable to return to work in any capacity."
- **Dr. Allen opined that Petitioner's neck, back and joint pain are permanent.**
- **Dr. Allen opined that although the FCE performed in 2016 found Petitioner capable of light to medium work, because the FCE only tests balance for a brief window of time, the FCE test is not determinative on whether Petitioner could perform such work on a continuous basis.** (PX17, pp. 58-59). **Per Dr. Allen, Petitioner cannot perform work on a continuous basis because his balance deficit is a safety risk for him.** (PX17, p68-69).
- **Dr. Allen further opined that following his exam of 6-4-19, based on Petitioner's deficits in coordination, balance, and lifting, coupled with his chronic pain and limitation of movement, Petitioner was permanently disabled and unable to return to work in any capacity.** (PX5C).

- The Arbitrator emphasizes Respondent did not offer **any** rebuttal opinion against treating physician Dr. Allen's opinions into evidence (Dr. Verma's opinions were from June 2016 and therefore could not respond to or comment on or criticize Dr. Allen's latest, most recent 2019 opinions.)
- Treating physician Dr. Novoseletsky's most recent exam of Petitioner was on 6-3-19. Reaffirming his prior note from his 11-26-18 exam, **Dr. Novoseletsky on 6-3-19 again opined that Petitioner is medically unable to work in any capacity.** The Arbitrator emphasizes Respondent did not offer **any** rebuttal opinion against treating physician Dr. Novosoletsky's Allen's opinions into evidence nor any opinion even commenting on or criticizing it.
- Respondent retained Tracy Peterlin to conduct a vocational evaluation and labor market survey on 1-16-17. (RX 5) Peterlin opined, based on the FCE, that Petitioner could be a candidate for certain jobs such as lot attendant, courier driver or customer service, and provided a list of companies that use that type of employee. Peterlin noted that it was unknown if any of these companies would hire Petitioner. (RX5). This was a one-time evaluation. Respondent offered no assistance to Petitioner in performing job searches, and no formal vocational rehabilitation or training. (Tr. 55, 69).
- Petitioner also retained Susan Entenberg, a vocational and rehabilitation expert. Entenberg documented Petitioner's physical limitations and **opined that Petitioner's physical limitations and restrictions precluded Petitioner from any work similar to his previous occupations**. This opinion was based on (1) restrictions both by his treating physicians and even those noted in the FCE, e.g. inability to lift floor to waist, occasional knee to waist lift of 30 pounds, occasional chest to overhead lift of 10 pounds, 8 pounds with left upper extremity; occasional carrying of 25 pounds, frequent carrying of 20 pounds; occasional pushing/pulling of 60 pounds of force, frequently of 30 pounds of force with single upper extremity; occasional to frequent dynamic standing; occasional static standing, walking, sitting, balancing, crouching, reaching forward and handling and low occasional climbing, stooping and twisting; and (2) the opinion of Dr. Allen indicated he could not perform work duties safely due to chronic dizziness..

- Entenberg further opined that based on all the other evidence, there is no stable labor market available for Petitioner. The opinion was based on (1) that Petitioner only had a high school education; (2) Petitioner had no transferrable skills from his prior occupations and had minimal computer skills; (3) his lack of office or clerical skills; (4) his advanced age; and (5) Dr. Allen's opinions regarding dizziness, balance and safety issues. Entenberg opined the combination of his negative vocational factors would make a job search very difficult and the prognosis for placement is extremely poor. (PX11).
- The Arbitrator affords significantly greater weight to the better-informed, more credible and more persuasive opinions of Entenberg over those of Peterlin and accordingly adopts them.

The combined medical evidence and opinions of Drs. Allen, Freedberg, McNally and Novoseletsky establish that Petitioner's headaches, dizziness and balance disorders, as well as Petitioner's cervical and lumbar pain, deficits and radicular symptoms are permanent and significantly debilitating. The evidence also supports that the condition of ill-being in Petitioner's left shoulder is also permanent as noted even by Dr. Verma, Respondent's IME physician. Further,the medical evidence indicates that Petitioner has sustained significant permanent disability which directly prevents his employability. Based on their most recent exams, both Dr. Novoseletsky (PX2A-p300) and Dr. Allen (PX5C) have each opined that Petitioner is permanently disabled from gainful employment. Dr. Novoseletsky further recommended that Petitioner not drive due to his medical condition and pain medications. (PX2A-p299).

Respondent offered no contrary medical evidence as to Petitioner's headaches and vestibular/balance/dizziness disorders, or that of his cervical and lumbar spines. The objective testing, such as the EMG, confirmed cervical radiculopathy and even an absent left biceps reflex.

As noted, the FCE examiner concluded that Petitioner fell into the light to medium work demand status, although if the job required standing throughout the day, Petitioner fell into the light category. However, the evidence considered as a whole weakens and contradicts the conclusions of the FCE, which conclusions the Arbitrator does not adopt.

First, the FCE evaluation is over three years old. Second, as Dr. Allen testified, the FCE is performed on one date over a few hours and is unable to determine whether Petitioner could

perform these functions on a continuous basis. While conceding the FCE was valid and useful, Dr. Allen noted that it really does not accurately assess Petitioner's work status, because due to his vestibular and somatosensory disorders, dizziness and balance problems arise suddenly. (PX17-p59, 68-70). Petitioner's balance is dependent on the onset of dizziness, so the FCE is not necessarily an accurate measure of his balance. The FCE examiner's opinion regarding Petitioner's ability to perform light duty work does not take into account Petitioner's negative vocational factors regarding office or clerical type jobs, such as his lack of clerical or computer skills and his limited education and advanced age. Even per the FCE, Petitioner was unable to lift weights from floor to waist, and unable to stand throughout the day.

Petitioner also presented persuasive vocational evidence that there is no stable job market for Petitioner. Entenberg opined that that based on restrictions both by his treating physicians and even those noted in the FCE, Petitioner was precluded from any type of his past occupational experience. More important, based on other factors, e.g., high school education only, age, no transferrable skills from his prior occupations, no clerical skills and minimal computer skills, plus his his dizziness and safety issues, there is no stable labor market for Plaintiff. (PX11). The Arbitrator accepts and agrees with these opinions.

Under the Act, a claimant is deemed permanently and totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists. *Caradco Window & Door v. Ind. Comm., 86 Ill. 2d 92 (1981).* Stated another way, an employee is totally and permanently disabled for the purposes of workers' compensation benefits when he or she is unable to make some contribution to industry sufficient to justify payment of wages, that is, when he or she cannot perform any services except those which are so limited in quantity, dependability or quality that there is no reasonably stable market for them. *Interlake v Ind.Comm.*, 86 Ill2d 168 (1981). See also *ARA Services v Ind.Comm.*, 226 IllApp3d 225 (1992).

In determining whether the employee is capable of performing any useful services, the Commission must consider the age, training, education and skills of the employee, the extent of the injury, and the nature of the employment. *Caradco, supra.* Where an employee's entire work career is basically in one field, and because of his medical condition, lack of other skills and age, the employee is able to show that his injuries have left him without a reasonably stable market for his skills, so that he is for practical purposes unemployable, he is deemed permanently and totally disabled under the Act. *A.M.T.C. of Illinois v. Ind.Comm.*, 71 Ill.2d 482, 489 (1979). The

Arbitrator further notes that although Petitioner remains under active medical care, this fact does not prevent a finding of permanency. See, e.g., *Illinois Municipal Ins. Co. v. Ind. Comm.*, 203 Ill.App.3d 1018 (1990). A person need not be to a state of total physical helplessness, but is totally disabled when he cannot perform services except those that are so limited in quantity, dependability or quality that there is no reasonably stable market for them. *Interlake, Inc. v. Ind. Comm.*, 80 Ill.2d 168, 176 (1980).

In this case, Petitioner has presented medical evidence from two physicians that Petitioner is unable to work in any occupation. Petitioner also presented vocational expert evidence that there is no stable job market for Petitioner, and he would fall into the "odd lot" category. Together, Petitioner presented far more than sufficient evidence to establish that he falls into the "odd lot" category of permanent total disability. *City of Chicago v. IWCC*, 375 Ill.App.3d 1080 (2007). Thus, the burden shifted to Respondent to show that some kind of suitable work is regularly and continuously available to Petitioner. *Interlake, supra; City of Chicago, supra.* In the face of significant and unrebutted medical evidence and opinions indicating permanent total disability, Respondent was unable to credibly and reasonably show that some kind of suitable work is regularly and continuously available to Petitioner.

The Labor Market Survey dated 1-15-17 (RX5), submitted by Respondent, failed to satisfy that burden, especially since Respondent offered no assistance to Petitioner in obtaining employment or offered any type of training. Respondent failed to provide sufficient evidence that some kind of suitable work is regularly and continuously available to Petitioner. Petitioner does not need to present evidence of a detailed job search where he presents competent evidence from a vocational expert, plus medical testimony, concerning his unemployability. *City of Chicago, supra.* (affirming Commission award of odd lot status on basis of expert Entenberg's opinion). Petitioner retains the overall burden to establish permanent total disability but need not elect to rely solely on medical evidence of total disability but may present both medical evidence of total disability and evidence of odd lot status. *Bob Red Remodeling v IWCC*, 2014 IL. App(1st) 130974WC,

Based on the copious medical evidence of disability, Petitioner's testimony and Eisenberg's opinions, the Arbitrator finds and concludes Petitioner has met his burden of proof, and falls into the odd lot category and is therefore permanently and totally disabled under Sec.

8(f) of the Act effective 8-27-2019, date of hearing Petitioner is entitled to the sum of $815.92 for life, commencing on 8-28-2019.

H. Medical Expenses

The Arbitrator finds that unpaid medical expenses in the gross amount of $100,420.52 (PX12, 13) are related to medical care that Petitioner received for injuries causally connected to the accident of 2-18-14. The Arbitrator finds this treatment reasonable and necessary. There is no credible or persuasive evidence to the contrary in the record. The Arbitrator awards these expenses, to be reduced in accordance with the Medical Fee Schedule.

I. Summary Conclusions of Law

1. Petitioner proved by a preponderance of the credible evidence he sustained an accidental injury arising out of and in the course and scope of his employment on 2-18-2014.
2. Petitioner's multiple conditions of ill-being of his head, left hip, cervical spine, lumbar spine and left shoulder, and his dizziness and balance disorders, as noted herein, are causally connected to the accident of 2-18-2014.
3. Petitioner's average weekly wage is $1,223.88.
4. Petitioner was temporarily totally disabled or entitled to maintenance from 2-19-2014 through 1-26-2016; from 2-4-2016 through 10-1-2017; from 4-17-2018 through 11-8-2018; and from 11-18-2018 through the date of trial, 8-27-2019. These periods total 265-6/7 weeks. Pursuant to Sec. 8(b) of the Act, Petitioner is entitled to temporary total disability or maintenance for all these periods at the TTD rate of $815.92.
5. Respondent is entitled to the following credits: $113,186.64 in TTD paid; and $95,934.79 in maintenance benefits paid, for a total credit of $209,121.43.
6. In accord with Sec. 8(a) of the Act, Petitioner is awarded unpaid medical expenses contained in PX 12 & 13, in the sum of $100,420.52, to be reduced and paid in accordance with the Sec. 8.2 Medical Fee Schedule, for the following health care providers whose treatment the Arbitrator finds reasonable and necessary:

PROVIDER	DATE	TOTAL

Prescription Partners, LLC	3-11-15 thru 4-5-17	$5,280.52
Elk Grove Radiology	4-23-14, 4-24-14	$116.00
Condell Medical Center	9-5-14-11-30-15	$45,000.00
Gray Medical	2-19-15 - 4-10-15	$12,250.00
1800 McDonough Road Surgery Center	10-9-2018	$20,179.00
Dr. Allen (Consultants in Neurology)	10-23-14-2-13-19	$2,320.00
Suburban Orthopedics	11-27-12-3-1-10	$18,275.00

7. Petitioner is permanently and totally disabled pursuant to Sec. 8(f) of the Act. Therefore, Petitioner is entitled to permanent total disability benefits in the weekly amount of $815.92, commencing on 8-28-2019, for the duration of his life.

Robert M. Harris

Arbitrator Robert M. Harris

October 28, 2019

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

ADELINA ROBERTS,

Petitioner,

vs.

JBS USA,

Respondent.

21IWCC0073

NO: 18 WC 10166

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 on September 10, 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.

21IWCC0073

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,500. 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.

FEB 22 2021

DATED:
o: 2/18/21
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0073

ROBERTS, ADELINA
Employee/Petitioner

Case# **18WC010166**
18WC013348

JBS USA
Employer/Respondent

On 9/10/2020, 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 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5354 STEPHEN KELLY ATTORNEY AT LAW
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PEORIA, IL 61604

2461 NYHAN BAMBRICK KINZIE & LOWRY
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CHICAGO, IL 60602

21IWCC0073

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

- [ ] 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

ADELINA ROBERTS,
Employee/Petitioner

v.

JBS USA
Employer/Respondent

Case # **18** WC **10166**

Consolidated cases: **18 WC 13348**

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 **7/29/20**. By stipulation, the parties agree:

On the date of accident, **3/29/16 and 11/13/17**, Respondent was operating under and subject to the provisions of the Act.

On these dates, the relationship of employee and employer did exist between Petitioner and Respondent.

On theses dates, 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 accidents.

In the year preceding the injury, Petitioner earned $**33,822.88**, and the average weekly wage was $**650.44** on 3/29/16.

In the year preceding the injury, Petitioner earned $**36,617.36** and the average weekly wage was $**704.18** on 11/13/17.

At the time of injury on 3/29/16, Petitioner was **57** years of age, ***married*** with **no** dependent children.

At the time of injury on 11/13/17, Petitioner was **59** years of age, ***married*** 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 $**390.26**/week for a further period of **62.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **petitioner a 12.5% loss of use of her person as a whole for the left shoulder** in case 18 WC 10166.

Respondent shall pay Petitioner the sum of $**422.51**/week for a further period of **150** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **petitioner a 30% loss of use of her person as a whole for the right shoulder** in case 18 WC 13348.

Respondent shall pay Petitioner compensation that has accrued from **3/29/16** through **7/29/20**, and shall pay the remainder of the award, if any, in weekly payments for the injury on 3/29/16.

Respondent shall pay Petitioner compensation that has accrued from **11/13/17** through **7/29/20**, and shall pay the remainder of the award, if any, in weekly payments for the injury on 11/13/17.

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 M. Lulia

Signature of Arbitrator

8/20/20
Date

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT: 21IWCC0073

Petitioner, a 57 year old back trimmer sustained an accidental injury to her left shoulder that arose out of and in the course of her employment by respondent on 3/29/16 (18 WC 10166). When petitioner was 59 and working in the same position she sustained an injury to her right shoulder that arose out of and in the course of her employment by respondent on 11/13/17 (18 WC 13348). Petitioner has worked for respondent since 1/8/91.

Petitioner had prior bilateral shoulder problems that resulted in a surgery to her left shoulder in 2003 and her right shoulder in 2004 with Dr. Ludwig. She was eventually released to full duty release without restrictions or medications following these surgeries. At the time of these accidents petitioner was working full duty and was not under any active treatment.

On the date of these injuries petitioner was married and had no dependents. Petitioner has completed school through high school. Petitioner came to the United States of America from Honduras in 1983. English is her second language.

On 3/29/16 petitioner was working on the rib backs, trimming and scaling them back. She had been working in this position for about three years. Her duties included looking at the rib backs and trimming any defects off then. On 3/29/16 while petitioner was walking the catwalk going to her break she slipped on some moisture that was on the catwalk. She grabbed the railing with her left hand as she slipped and hung on. She did not fall to the ground, but hung onto the rail with her left arm as she slipped and began to fall.

Following the accident, petitioner had pain in her left arm. She testified that it hurt when she would lift and pick up the ribs. She testified that she reported the accident to her supervisor. She was able to complete her shift. After her shift she presented to the onsite nurse for care. The nurse put ice on her left shoulder. Petitioner followed up with the company nurse and continued working her full duty job until she was sent to MOHA in August of 2016.

On 8/17/16 petitioner presented to Dr. Brower at MOHA. Petitioner provided a consistent history of the accident. She also gave a history of her prior shoulder surgeries which Dr. Brower noted she had excellent results from. Dr. Brower examined her and assessed a left AC joint strain. He recommended Capsaicin for her, and instructed her to continue taking Aleve.

On 9/1/16 petitioner returned to MOHA and was seen by Dr. Gordon. She reported no improvement. He examined her and his impression was left shoulder pain with questionable internal derangement, and history of bilateral shoulder surgical interventions by Dr. Ludwig. He recommended an MRI arthrogram of the left shoulder.

On 9/13/16 petitioner underwent the MRI arthrogram of the left shoulder. The impression was marked thinning of the rotator cuff tendons with associated tears and intra-tendinous delamination; mild tendinopathy of the long head biceps; and mild degenerative arthritis.

On 9/29/16 petitioner returned to MOHA and was seen by Dr. Clem. She reported that she was not improving. Dr. Clem reviewed the results of the MRI arthrogram and examined petitioner. His assessment was partial thickness tear of the undersurface of the subscapularis tendon and partial thickness tear of the undersurface of the infraspinatus tendon along with focal full thickness tear of the distal supraspinatus. Dr. Clem referred petitioner to orthopedics. She continued her regular duty job.

On 10/10/16 petitioner presented to Dr. Ludwig. Dr. Ludwig examined petitioner and reviewed x-rays and an MRI arthrogram of the left shoulder. He assessed left shoulder pain and complete tear of the left rotator cuff. He recommended that she undergo a left shoulder arthroscopy with rotator cuff repair and SAD.

On 10/26/16 petitioner underwent a left shoulder arthroscopy with arthroscopic repair of the subscapularis and supraspinatus, biceps tenotomy, and subacromial decompression. This procedure was performed by Dr. Ludwig. Petitioner followed-up post-operatively with Dr. Ludwig on 11/07/16, 12/1/16, 1/16/17, 2/27/17, and 4/17/17. Petitioner's post-operative treatment also included a course of physical therapy at Apex from 11/15/16-4/7/17.

On 4/17/17 petitioner reported no excessive pain. She rated her pain at a 2-3/10. Her range of motion showed restricted T10 degrees active internal rotation, restricted 160 degrees active abduction, restricted 60 degrees active external rotation, and restricted 155 degrees active flexion. Her left shoulder flexion and abduction were 160. Her biceps were 5/5, and radial pulse on the left was 2+. Dr. Gordon released petitioner without restrictions and released her on an as needed basis. He instructed her to start work hardening and increase to full duty work.

On 11/13/17 petitioner sustained an accident to her right shoulder. She reported that the cryovac was broken on this day and she had to transfer all the rib product that weighed between 5-15 lbs by hand, at or above chest level, from one line to the next. She testified that this aggravated her right shoulder.

On 12/12/17 petitioner presented to MOHA and was seen by Dr. Clem. She stated that her left shoulder pain was at a 3/10, but she was there mainly for her right shoulder. Petitioner gave a consistent history of the accident. She also reported that when her left shoulder was injured, she overcompensated with her right shoulder and this overcompensation caused the initial onset of her right shoulder pain. These symptoms were significantly increased with the cryovac incident on 11/13/17, and she had not improved. Following an examination, Dr. Clem assessed left shoulder pain improving with conservative treatment and noted that it was

at baseline. He further assessed a right shoulder strain with no improvement in symptoms. He recommended conservative treatment for the left shoulder. For the right shoulder he recommended nabumetone.

On 1/4/18 petitioner returned to MOHA and was evaluated by Dr. Clem. She reported that her left shoulder had resolved and she was still experiencing problems with the right shoulder. Dr. Clem prescribed a course of physical therapy. He also gave her a trial of Voltaren.

On 1/25/18 petitioner returned to MOHA and was seen by Dr. Gordon. She was still complaining of right shoulder pain. She had no left shoulder pain. She stated that physical therapy at Apex from 1/9/18 through 1/23/18 had not been of any real benefit, but the medications helped a little. Following an examination, Dr. Gordon recommended an MRI arthrogram of the right shoulder. He stopped therapy and gave her Voltaren. She reported that she was doing the job of "peeling ribs". Dr. Gordon said she could continue doing that job.

On 2/8/18 petitioner underwent an MRI arthrogram of the right shoulder. The impression was changes of the right rotator cuff tendon repair with full thickness tearing of the posterior infraspinatus, measuring 7mm x 9mm; near complete full thickness tear of the majority of fibers of the right superior subscapularis tendon, with a few remaining intact inferior fibers; medial subluxation of the right long head biceps tendon, which demonstrated severe tendinopathy along its intraarticular course; moderate right glenohumeral joint chondrosis; intact right glenoid labrum; changes of prior distal right clavicular resection and likely acromioplasty.

On 2/14/18 petitioner returned to MOHA and was seen by Dr. Gordon. He noted the results of the MRI arthrogram. Following an examination, and review of the MRI arthrogram, he recommended an orthopedic evaluation. He recommended that she not lift greater than 5 pounds with the right upper extremity, or perform any activities above chest level.

On 2/26/18 petitioner presented to Dr. Ludwig for her right shoulder. Petitioner gave a history of her injury and treatment to date. Following a physical exam and review of the MRI arthrogram, Dr. Ludwig assessed right shoulder pain. He performed a subacromial cortisone injection. He kept her on her current restrictions.

On 3/26/18 petitioner returned to Dr. Ludwig. She reported that she got relief from the injection, but also had a reaction to the injection that consisted of a rash and itching on her arms, legs and buttocks for 3 days after the injection. Dr. Ludwig performed some x-rays and again reviewed the MRI arthrogram. He assessed a right rotator cuff tear and partial tear of the right subscapularis tendon. Petitioner reported that she had been very busy on the rib line and that aggravated her shoulder. Dr. Gordon told her she could try to bid on a different job or be placed on a different line where she would not have to do such rigorous activities. He also told her she could consider surgery.

On 5/30/18 petitioner followed-up with Dr. Ludwig. She reported that her right shoulder "was not very good". She stated her motion was not good and her shoulder was painful. Following an examination, Dr. Gordon told her she had a recurrent tear of her right supraspinatus; a new tear of the subscapularis; and some medial subluxation of the biceps tendon. It was decided that they would proceed with surgery.

On 7/25/18 petitioner underwent a right shoulder arthroscopy with debridement of the glenohumeral joint, an arthroscopic rotator cuff repair of subscapularis, and a biceps tenodesis. This procedure was performed by Dr. Ludwig. His postoperative diagnosis was right shoulder complete tear of the subscapularis with retraction, complete tear of supraspinatus and infraspinatus with retraction, partial tear with medial subluxation of the biceps tendon, grade 3 and grade 4 chondromalacia of the humeral head with grade 3 chondromalacia of the glenoid. Postoperatively petitioner followed up with Dr. Ludwig and underwent physical therapy at Apex from 9/11/18 through 1/24/19. She followed up with Dr. Ludwig on 8/2/18, 9/6/18, 10/15/18, 11/28/18, and 1/28/19.

On 1/28/19 Dr. Ludwig noted that petitioner had 3 tendons torn but only 1 was fixable. He also noted significant arthritis in the shoulder as well. He noted that she was currently working a job for respondent where she was labeling. He believed this would be an excellent full time position for petitioner. He was of the opinion that petitioner had reached maximum medical improvement. He recommended that she continue with home exercises to try and maintain as much range of motion and strength that she can. Dr. Ludwig was of the opinion that petitioner would need permanent restrictions of no work above waist level and no lifting above 5 pounds with both arms, so about 2 ½ lb per arm maximum. He did not think petitioner should be doing any kind of repetitive lifting beyond the labeling. Dr. Ludwig released petitioner on an as needed basis.

On 7/9/19 petitioner underwent a Section 12 examination performed by Dr. Joshua Alpert, an orthopedic surgeon, at Midwest Bone and Joint Institute, at the request of the respondent. He examined both her right and left shoulders. Petitioner provided a consistent history of her left and right shoulder injuries. With respect to her left shoulder she stated that she uses her left shoulder mostly, and occasionally has some difficulty doing heavy overhead lifting. She reported that she only lifts for short periods of time. She denied any numbness, tingling, or other complaints for her left shoulder. With respect to her right shoulder, she stated that she was using it a lot after her left shoulder injury. She gave a history of her treatment and surgery and stated that it could not be fully repaired by the doctor. Her current complaints for her right shoulder were that she could not lift more than 90 degrees and it was weak. She stated that she uses her left arm for activities. She stated that it is stiff, she cannot pick up her grandkids, she cannot vacuum, and cannot do her hair. She denied any problems with her right shoulder after her surgery in 2004 until this injury.

Dr. Alpert performed a physical exam and noted on the left that she had forward elevation to 90 degrees, abduction to 90 degrees, full internal and external rotation, 4/5 rotator cuff strength testing, normal belly press, normal left off, intact sensation to light touch, and no obvious muscle atrophy. On the right, she had full

Petitioner testified that she has no computer skills or knowledge. She also testified that she has only worked for respondent since coming to the United States of America.

Petitioner did not lose any time from work as a result of her left or right shoulder injury.

On 7/14/14 petitioner had a settlement contract in case 04WC35988 approved. It was related to an accident date of 12/10/02 and was for 20% loss of use of the left arm and 17.5% of the right arm.

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 that with respect to the left shoulder that petitioner had a 0% impairment for her left shoulder. As it relates to her right shoulder, Dr. Alpert determined that she had a 6% upper extremity impairment, or 4% whole person impairment. Therefore, the Arbitrator gives some weight to this factor.

With respect to factor (ii), the occupation of the injured employee, the petitioner was a rib back trimmer on the date of both accidents. Following her injury and treatment for her left shoulder, petitioner returned to her rib back trimmer job. However, after her treatment for her right shoulder, petitioner was released with permanent restrictions that prevented her from returning to the job of rib back trimmer. In fact, petitioner was placed in the position of labeler while on light duty. Although this job had previously been reserved for employees on light duty, petitioner now works the labeler job as her full duty job. This job is within her restrictions. Additionally, the petitioner testified that the labeler job was a permanent job prior to her being placed in it on a permanent basis. She testified that before this became her permanent job the employees were unable to bid on it because it was specifically reserved for employees on light duty. Based on this testimony, the arbitrator finds this is a legitimate full time position with respondent. For these reasons the arbitrator gives greater weight to this factor.

With respect to factor (iii), the age of the employee. Petitioner was 57 and 59 years old, respectively, on the dates of injury. Petitioner is likely to be in the work force for no more than a decade. There was no testimony as to when petitioner was looking to retire. Given that petitioner has permanent restrictions that only allow her to work in a light duty job for respondent, and the permanent job she is currently working, that of a

passive and active range of motion, 5/5 rotator cuff strength testing, pain with impingement testing, intact sensation to light touch, no muscle atrophy, neurologically intact, and no significant weakness. Dr. Alpert also performed a record review. Her QuickDASH form score was 97.

Dr. Alpert was of the opinion that petitioner did well with respect to her left shoulder and was not having many issues regarding her left shoulder. He was of the opinion that she was at maximum medical improvement for her left shoulder. With respect to the right shoulder, Dr. Alpert noted that the subscapularis was repaired, but not the supraspinatus and infraspinatus. He was of the opinion that petitioner had significant pain, stiffness, and weakness with some mild glenohumeral osteoarthritis and full thickness retracted rotator cuff tear on the right. He was of the opinion that she had reached maximum medical improvement with respect to the right shoulder and was working with permanent restrictions.

Dr. Alpert also reported that he was asked to do an Impairment Rating as per the Sixth Edition AMA Guides to the Evaluation of Permanent Impairment. With respect to the left shoulder he determined that she had a 0% impairment for her left shoulder. As it relates to her right shoulder, Dr. Alpert determined that she had a 6% upper extremity impairment, or 4% whole person impairment.

After her left shoulder surgery petitioner continued working her regular duty job until her right shoulder injury. After her surgery on her right shoulder petitioner was still working, but in the tenders area. There she worked with another employee labeling the tenders. She testified that this work was below waist level. She testified that the labeling machine dispenses 4 labels which she puts on both hands and labels each tender with them.

Petitioner testified that the labeling job is within her permanent restrictions. She testified that the labeling job is a permanent full duty position with respondent, but not one you could bid on it because it was a job for employees on light duty. However, this is now petitioner's permanent job and she does it by herself. Petitioner testified that she is currently earning more money in her current position as a labeler than she was on the dates she was injured.

Petitioner testified that currently her left shoulder is good if she does nothing. When she picks it up, bends it back, or lifts over her restrictions, she has pain. Activities she has problems with are reaching in the cabinet above her head for a cup, or holding a pot for too long. With respect to her right shoulder she testified that currently her right shoulder hurts, even doing minor or little things if above the waist level. She testified that her right shoulder is worse than her left, and therefore she relies more on her left shoulder. She stated that her range of motion in her right shoulder is not good, and the strength in her right shoulder is les than her left shoulder. She testified that gardening hurts her right shoulder. She also reported difficulty lifting her grandchildren.

labeler, is a position that was previously restricted to employees on light duty, the Arbitrator gives greater weight to this factor.

With respect to factor (iv), the future earnings of the petitioner, the petitioner was 57 and 59 years old, respectively, on the dates of injury. Petitioner is currently 61 years old and has provided no indication when she would be retiring. Although petitioner agreed that she makes more now than she was earning on the dates she was injured, no evidence was offered as to what petitioner would be currently earning in the position of the rib back trimmer if she was still working that job, given that the rib back job she was working on the dates of injury was a Grade 2 job. For these reasons, the Arbitrator gives some 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 left shoulder arthroscopy with arthroscopic repair of the subscapularis and supraspinatus, biceps tenotomy, and subacromial decompression. She also underwent a right shoulder arthroscopy with debridement of the glenohumeral joint, an arthroscopic rotator cuff repair of subscapularis, and a biceps tenodesis. When petitioner last followed up with Dr. Ludwig on 1/28/19 Dr. Ludwig noted that petitioner had 3 tendons torn but only 1 was fixable. He also noted significant arthritis in the shoulder as well. He noted that she was currently working a job for respondent where she was labeling. He believed this would be an excellent full time position for petitioner. He was of the opinion that petitioner had reached maximum medical improvement. He recommended that she continue with home exercises to try and maintain as much range of motion and strength that she can. Dr. Ludwig was of the opinion that petitioner would need permanent restrictions of no work above waist level and no lifting above 5 pounds with both arms, so about 2 ½ lb per arm maximum. He did not think petitioner should be doing any kind of repetitive lifting beyond the labeling. On 7/9/19 Dr. Alpert performed a physical exam and noted on the left that she had forward elevation to 90 degrees, abduction to 90 degrees, full internal and external rotation, 4/5 rotator cuff strength testing, normal belly press, normal left off, intact sensation to light touch, and no obvious muscle atrophy. On the right, she had full passive and active range of motion, 5/5 rotator cuff strength testing, pain with impingement testing, intact sensation to light touch, no muscle atrophy, neurologically intact, and no significant weakness. Dr. Alpert also performed a record review. Her QuickDASH form score was 97. Dr. Alpert was of the opinion that petitioner did well with respect to her left shoulder and was not having many issues regarding her left shoulder. He was of the opinion that she was at maximum medical improvement for her left shoulder. With respect to the right shoulder, Dr. Alpert noted that the subscapularis was repaired, but not the supraspinatus and infraspinatus. He was of the opinion that petitioner had significant pain, stiffness, and weakness with some mild glenohumeral osteoarthritis and full thickness retracted rotator cuff tear on the right. He was of the opinion that she had reached maximum medical improvement with respect to the right shoulder and was working with permanent restrictions.

Petitioner testified that currently her left shoulder is good if she does nothing. When she picks it up, bends it back, or lifts over her restrictions, she has pain. Activities she has problems with are reaching in the cabinet above her head for a cup, or holding a pot for too long. With respect to her right shoulder she testified that currently her right shoulder hurts, even doing minor or little things if above the waist level. She testified that her right shoulder is worse than her left, and therefore she relies more on her left shoulder. She stated that her range of motion in her right shoulder is not good, and the strength in her right shoulder is less than her left shoulder. She testified that gardening hurts her right shoulder. She also reported difficulty lifting her grandchildren. 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 12.5% loss of use of her person as a whole pursuant to Section 8(d)2 of the Act with respect to her left shoulder with respect to the accident on 3/29/16 (18 WC 10166), and a 30% loss of use of her person as a whole pursuant to Section 8(d)2 of the Act with respect to her right shoulder on 11/13/17 (18 WC 13348).

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

ADELINA ROBERTS,

Petitioner,

vs.

JBS USA,

Respondent.

21IWCC0074

NO: 18 WC 13348

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 on September 10, 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.

21IWCC0074

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $63,500. 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: FEB 22 2021
o: 2/18/21
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0074

ROBERTS, ADELINA
Employee/Petitioner

Case# **18WC010166**

18WC013348

JBS USA
Employer/Respondent

On 9/10/2020, 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 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5354 STEPHEN KELLY ATTORNEY AT LAW
MATTHEW A BREWER
2710 N KNOXVILLE AVE
PEORIA, IL 61604

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

21IWCC0074

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

- [ ] 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

ADELINA ROBERTS,
Employee/Petitioner

v.

JBS USA
Employer/Respondent

Case # **18** WC **10166**

Consolidated cases: **18 WC 13348**

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 **7/29/20**. By stipulation, the parties agree:

On the date of accident, **3/29/16 and 11/13/17**, Respondent was operating under and subject to the provisions of the Act.

On these dates, the relationship of employee and employer did exist between Petitioner and Respondent.

On theses dates, 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 accidents.

In the year preceding the injury, Petitioner earned $**33,822.88**, and the average weekly wage was $**650.44** on 3/29/16.

In the year preceding the injury, Petitioner earned $**36,617.36** and the average weekly wage was $**704.18** on 11/13/17.

At the time of injury on 3/29/16, Petitioner was **57** years of age, ***married*** with **no** dependent children.

At the time of injury on 11/13/17, Petitioner was **59** years of age, ***married*** 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 $**390.26**/week for a further period of **62.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **petitioner a 12.5% loss of use of her person as a whole for the left shoulder** in case 18 WC 10166.

Respondent shall pay Petitioner the sum of $**422.51**/week for a further period of **150** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **petitioner a 30% loss of use of her person as a whole for the right shoulder** in case 18 WC 13348.

Respondent shall pay Petitioner compensation that has accrued from **3/29/16** through **7/29/20**, and shall pay the remainder of the award, if any, in weekly payments for the injury on 3/29/16.

Respondent shall pay Petitioner compensation that has accrued from **11/13/17** through **7/29/20**, and shall pay the remainder of the award, if any, in weekly payments for the injury on 11/13/17.

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

8/20/20
Date

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT: 21IWCC0074

Petitioner, a 57 year old back trimmer sustained an accidental injury to her left shoulder that arose out of and in the course of her employment by respondent on 3/29/16 (18 WC 10166). When petitioner was 59 and working in the same position she sustained an injury to her right shoulder that arose out of and in the course of her employment by respondent on 11/13/17 (18 WC 13348). Petitioner has worked for respondent since 1/8/91.

Petitioner had prior bilateral shoulder problems that resulted in a surgery to her left shoulder in 2003 and her right shoulder in 2004 with Dr. Ludwig. She was eventually released to full duty release without restrictions or medications following these surgeries. At the time of these accidents petitioner was working full duty and was not under any active treatment.

On the date of these injuries petitioner was married and had no dependents. Petitioner has completed school through high school. Petitioner came to the United States of America from Honduras in 1983. English is her second language.

On 3/29/16 petitioner was working on the rib backs, trimming and scaling them back. She had been working in this position for about three years. Her duties included looking at the rib backs and trimming any defects off then. On 3/29/16 while petitioner was walking the catwalk going to her break she slipped on some moisture that was on the catwalk. She grabbed the railing with her left hand as she slipped and hung on. She did not fall to the ground, but hung onto the rail with her left arm as she slipped and began to fall.

Following the accident, petitioner had pain in her left arm. She testified that it hurt when she would lift and pick up the ribs. She testified that she reported the accident to her supervisor. She was able to complete her shift. After her shift she presented to the onsite nurse for care. The nurse put ice on her left shoulder. Petitioner followed up with the company nurse and continued working her full duty job until she was sent to MOHA in August of 2016.

On 8/17/16 petitioner presented to Dr. Brower at MOHA. Petitioner provided a consistent history of the accident. She also gave a history of her prior shoulder surgeries which Dr. Brower noted she had excellent results from. Dr. Brower examined her and assessed a left AC joint strain. He recommended Capsaicin for her, and instructed her to continue taking Aleve.

On 9/1/16 petitioner returned to MOHA and was seen by Dr. Gordon. She reported no improvement. He examined her and his impression was left shoulder pain with questionable internal derangement, and history of bilateral shoulder surgical interventions by Dr. Ludwig. He recommended an MRI arthrogram of the left shoulder.

On 9/13/16 petitioner underwent the MRI arthrogram of the left shoulder. The impression was marked thinning of the rotator cuff tendons with associated tears and intra-tendinous delamination; mild tendinopathy of the long head biceps; and mild degenerative arthritis.

On 9/29/16 petitioner returned to MOHA and was seen by Dr. Clem. She reported that she was not improving. Dr. Clem reviewed the results of the MRI arthrogram and examined petitioner. His assessment was partial thickness tear of the undersurface of the subscapularis tendon and partial thickness tear of the undersurface of the infraspinatus tendon along with focal full thickness tear of the distal supraspinatus. Dr. Clem referred petitioner to orthopedics. She continued her regular duty job.

On 10/10/16 petitioner presented to Dr. Ludwig. Dr. Ludwig examined petitioner and reviewed x-rays and an MRI arthrogram of the left shoulder. He assessed left shoulder pain and complete tear of the left rotator cuff. He recommended that she undergo a left shoulder arthroscopy with rotator cuff repair and SAD.

On 10/26/16 petitioner underwent a left shoulder arthroscopy with arthroscopic repair of the subscapularis and supraspinatus, biceps tenotomy, and subacromial decompression. This procedure was performed by Dr. Ludwig. Petitioner followed-up post-operatively with Dr. Ludwig on 11/07/16, 12/1/16, 1/16/17, 2/27/17, and 4/17/17. Petitioner's post-operative treatment also included a course of physical therapy at Apex from 11/15/16-4/7/17.

On 4/17/17 petitioner reported no excessive pain. She rated her pain at a 2-3/10. Her range of motion showed restricted T10 degrees active internal rotation, restricted 160 degrees active abduction, restricted 60 degrees active external rotation, and restricted 155 degrees active flexion. Her left shoulder flexion and abduction were 160. Her biceps were 5/5, and radial pulse on the left was 2+. Dr. Gordon released petitioner without restrictions and released her on an as needed basis. He instructed her to start work hardening and increase to full duty work.

On 11/13/17 petitioner sustained an accident to her right shoulder. She reported that the cryovac was broken on this day and she had to transfer all the rib product that weighed between 5-15 lbs by hand, at or above chest level, from one line to the next. She testified that this aggravated her right shoulder.

On 12/12/17 petitioner presented to MOHA and was seen by Dr. Clem. She stated that her left shoulder pain was at a 3/10, but she was there mainly for her right shoulder. Petitioner gave a consistent history of the accident. She also reported that when her left shoulder was injured, she overcompensated with her right shoulder and this overcompensation caused the initial onset of her right shoulder pain. These symptoms were significantly increased with the cryovac incident on 11/13/17, and she had not improved. Following an examination, Dr. Clem assessed left shoulder pain improving with conservative treatment and noted that it was

at baseline. He further assessed a right shoulder strain with no improvement in symptoms. He recommended conservative treatment for the left shoulder. For the right shoulder he recommended nabumetone.

On 1/4/18 petitioner returned to MOHA and was evaluated by Dr. Clem. She reported that her left shoulder had resolved and she was still experiencing problems with the right shoulder. Dr. Clem prescribed a course of physical therapy. He also gave her a trial of Voltaren.

On 1/25/18 petitioner returned to MOHA and was seen by Dr. Gordon. She was still complaining of right shoulder pain. She had no left shoulder pain. She stated that physical therapy at Apex from 1/9/18 through 1/23/18 had not been of any real benefit, but the medications helped a little. Following an examination, Dr. Gordon recommended an MRI arthrogram of the right shoulder. He stopped therapy and gave her Voltaren. She reported that she was doing the job of "peeling ribs". Dr. Gordon said she could continue doing that job.

On 2/8/18 petitioner underwent an MRI arthrogram of the right shoulder. The impression was changes of the right rotator cuff tendon repair with full thickness tearing of the posterior infraspinatus, measuring 7mm x 9mm; near complete full thickness tear of the majority of fibers of the right superior subscapularis tendon, with a few remaining intact inferior fibers; medial subluxation of the right long head biceps tendon, which demonstrated severe tendinopathy along its intraarticular course; moderate right glenohumeral joint chondrosis; intact right glenoid labrum; changes of prior distal right clavicular resection and likely acromioplasty.

On 2/14/18 petitioner returned to MOHA and was seen by Dr. Gordon. He noted the results of the MRI arthrogram. Following an examination, and review of the MRI arthrogram, he recommended an orthopedic evaluation. He recommended that she not lift greater than 5 pounds with the right upper extremity, or perform any activities above chest level.

On 2/26/18 petitioner presented to Dr. Ludwig for her right shoulder. Petitioner gave a history of her injury and treatment to date. Following a physical exam and review of the MRI arthrogram, Dr. Ludwig assessed right shoulder pain. He performed a subacromial cortisone injection. He kept her on her current restrictions.

On 3/26/18 petitioner returned to Dr. Ludwig. She reported that she got relief from the injection, but also had a reaction to the injection that consisted of a rash and itching on her arms, legs and buttocks for 3 days after the injection. Dr. Ludwig performed some x-rays and again reviewed the MRI arthrogram. He assessed a right rotator cuff tear and partial tear of the right subscapularis tendon. Petitioner reported that she had been very busy on the rib line and that aggravated her shoulder. Dr. Gordon told her she could try to bid on a different job or be placed on a different line where she would not have to do such rigorous activities. He also told her she could consider surgery.

On 5/30/18 petitioner followed-up with Dr. Ludwig. She reported that her right shoulder "was not very good". She stated her motion was not good and her shoulder was painful. Following an examination, Dr. Gordon told her she had a recurrent tear of her right supraspinatus; a new tear of the subscapularis; and some medial subluxation of the biceps tendon. It was decided that they would proceed with surgery.

On 7/25/18 petitioner underwent a right shoulder arthroscopy with debridement of the glenohumeral joint, an arthroscopic rotator cuff repair of subscapularis, and a biceps tenodesis. This procedure was performed by Dr. Ludwig. His postoperative diagnosis was right shoulder complete tear of the subscapularis with retraction, complete tear of supraspinatus and infraspinatus with retraction, partial tear with medial subluxation of the biceps tendon, grade 3 and grade 4 chondromalacia of the humeral head with grade 3 chondromalacia of the glenoid. Postoperatively petitioner followed up with Dr. Ludwig and underwent physical therapy at Apex from 9/11/18 through 1/24/19. She followed up with Dr. Ludwig on 8/2/18, 9/6/18, 10/15/18, 11/28/18, and 1/28/19.

On 1/28/19 Dr. Ludwig noted that petitioner had 3 tendons torn but only 1 was fixable. He also noted significant arthritis in the shoulder as well. He noted that she was currently working a job for respondent where she was labeling. He believed this would be an excellent full time position for petitioner. He was of the opinion that petitioner had reached maximum medical improvement. He recommended that she continue with home exercises to try and maintain as much range of motion and strength that she can. Dr. Ludwig was of the opinion that petitioner would need permanent restrictions of no work above waist level and no lifting above 5 pounds with both arms, so about 2 ½ lb per arm maximum. He did not think petitioner should be doing any kind of repetitive lifting beyond the labeling. Dr. Ludwig released petitioner on an as needed basis.

On 7/9/19 petitioner underwent a Section 12 examination performed by Dr. Joshua Alpert, an orthopedic surgeon, at Midwest Bone and Joint Institute, at the request of the respondent. He examined both her right and left shoulders. Petitioner provided a consistent history of her left and right shoulder injuries. With respect to her left shoulder she stated that she uses her left shoulder mostly, and occasionally has some difficulty doing heavy overhead lifting. She reported that she only lifts for short periods of time. She denied any numbness, tingling, or other complaints for her left shoulder. With respect to her right shoulder, she stated that she was using it a lot after her left shoulder injury. She gave a history of her treatment and surgery and stated that it could not be fully repaired by the doctor. Her current complaints for her right shoulder were that she could not lift more than 90 degrees and it was weak. She stated that she uses her left arm for activities. She stated that it is stiff, she cannot pick up her grandkids, she cannot vacuum, and cannot do her hair. She denied any problems with her right shoulder after her surgery in 2004 until this injury.

Dr. Alpert performed a physical exam and noted on the left that she had forward elevation to 90 degrees, abduction to 90 degrees, full internal and external rotation, 4/5 rotator cuff strength testing, normal belly press, normal left off, intact sensation to light touch, and no obvious muscle atrophy. On the right, she had full

Petitioner testified that she has no computer skills or knowledge. She also testified that she has only worked for respondent since coming to the United States of America.

Petitioner did not lose any time from work as a result of her left or right shoulder injury.

On 7/14/14 petitioner had a settlement contract in case 04WC35988 approved. It was related to an accident date of 12/10/02 and was for 20% loss of use of the left arm and 17.5% of the right arm.

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 that with respect to the left shoulder that petitioner had a 0% impairment for her left shoulder. As it relates to her right shoulder, Dr. Alpert determined that she had a 6% upper extremity impairment, or 4% whole person impairment. Therefore, the Arbitrator gives some weight to this factor.

With respect to factor (ii), the occupation of the injured employee, the petitioner was a rib back trimmer on the date of both accidents. Following her injury and treatment for her left shoulder, petitioner returned to her rib back trimmer job. However, after her treatment for her right shoulder, petitioner was released with permanent restrictions that prevented her from returning to the job of rib back trimmer. In fact, petitioner was placed in the position of labeler while on light duty. Although this job had previously been reserved for employees on light duty, petitioner now works the labeler job as her full duty job. This job is within her restrictions. Additionally, the petitioner testified that the labeler job was a permanent job prior to her being placed in it on a permanent basis. She testified that before this became her permanent job the employees were unable to bid on it because it was specifically reserved for employees on light duty. Based on this testimony, the arbitrator finds this is a legitimate full time position with respondent. For these reasons the arbitrator gives greater weight to this factor.

With respect to factor (iii), the age of the employee. Petitioner was 57 and 59 years old, respectively, on the dates of injury. Petitioner is likely to be in the work force for no more than a decade. There was no testimony as to when petitioner was looking to retire. Given that petitioner has permanent restrictions that only allow her to work in a light duty job for respondent, and the permanent job she is currently working, that of a

passive and active range of motion, 5/5 rotator cuff strength testing, pain with impingement testing, intact sensation to light touch, no muscle atrophy, neurologically intact, and no significant weakness. Dr. Alpert also performed a record review. Her QuickDASH form score was 97.

Dr. Alpert was of the opinion that petitioner did well with respect to her left shoulder and was not having many issues regarding her left shoulder. He was of the opinion that she was at maximum medical improvement for her left shoulder. With respect to the right shoulder, Dr. Alpert noted that the subscapularis was repaired, but not the supraspinatus and infraspinatus. He was of the opinion that petitioner had significant pain, stiffness, and weakness with some mild glenohumeral osteoarthritis and full thickness retracted rotator cuff tear on the right. He was of the opinion that she had reached maximum medical improvement with respect to the right shoulder and was working with permanent restrictions.

Dr. Alpert also reported that he was asked to do an Impairment Rating as per the Sixth Edition AMA Guides to the Evaluation of Permanent Impairment. With respect to the left shoulder he determined that she had a 0% impairment for her left shoulder. As it relates to her right shoulder, Dr. Alpert determined that she had a 6% upper extremity impairment, or 4% whole person impairment.

After her left shoulder surgery petitioner continued working her regular duty job until her right shoulder injury. After her surgery on her right shoulder petitioner was still working, but in the tenders area. There she worked with another employee labeling the tenders. She testified that this work was below waist level. She testified that the labeling machine dispenses 4 labels which she puts on both hands and labels each tender with them.

Petitioner testified that the labeling job is within her permanent restrictions. She testified that the labeling job is a permanent full duty position with respondent, but not one you could bid on it because it was a job for employees on light duty. However, this is now petitioner's permanent job and she does it by herself. Petitioner testified that she is currently earning more money in her current position as a labeler than she was on the dates she was injured.

Petitioner testified that currently her left shoulder is good if she does nothing. When she picks it up, bends it back, or lifts over her restrictions, she has pain. Activities she has problems with are reaching in the cabinet above her head for a cup, or holding a pot for too long. With respect to her right shoulder she testified that currently her right shoulder hurts, even doing minor or little things if above the waist level. She testified that her right shoulder is worse than her left, and therefore she relies more on her left shoulder. She stated that her range of motion in her right shoulder is not good, and the strength in her right shoulder is les than her left shoulder. She testified that gardening hurts her right shoulder. She also reported difficulty lifting her grandchildren.

labeler, is a position that was previously restricted to employees on light duty, the Arbitrator gives greater weight to this factor.

With respect to factor (iv), the future earnings of the petitioner, the petitioner was 57 and 59 years old, respectively, on the dates of injury. Petitioner is currently 61 years old and has provided no indication when she would be retiring. Although petitioner agreed that she makes more now than she was earning on the dates she was injured, no evidence was offered as to what petitioner would be currently earning in the position of the rib back trimmer if she was still working that job, given that the rib back job she was working on the dates of injury was a Grade 2 job. For these reasons, the Arbitrator gives some 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 left shoulder arthroscopy with arthroscopic repair of the subscapularis and supraspinatus, biceps tenotomy, and subacromial decompression. She also underwent a right shoulder arthroscopy with debridement of the glenohumeral joint, an arthroscopic rotator cuff repair of subscapularis, and a biceps tenodesis. When petitioner last followed up with Dr. Ludwig on 1/28/19 Dr. Ludwig noted that petitioner had 3 tendons torn but only 1 was fixable. He also noted significant arthritis in the shoulder as well. He noted that she was currently working a job for respondent where she was labeling. He believed this would be an excellent full time position for petitioner. He was of the opinion that petitioner had reached maximum medical improvement. He recommended that she continue with home exercises to try and maintain as much range of motion and strength that she can. Dr. Ludwig was of the opinion that petitioner would need permanent restrictions of no work above waist level and no lifting above 5 pounds with both arms, so about 2 ½ lb per arm maximum. He did not think petitioner should be doing any kind of repetitive lifting beyond the labeling. On 7/9/19 Dr. Alpert performed a physical exam and noted on the left that she had forward elevation to 90 degrees, abduction to 90 degrees, full internal and external rotation, 4/5 rotator cuff strength testing, normal belly press, normal left off, intact sensation to light touch, and no obvious muscle atrophy. On the right, she had full passive and active range of motion, 5/5 rotator cuff strength testing, pain with impingement testing, intact sensation to light touch, no muscle atrophy, neurologically intact, and no significant weakness. Dr. Alpert also performed a record review. Her QuickDASH form score was 97. Dr. Alpert was of the opinion that petitioner did well with respect to her left shoulder and was not having many issues regarding her left shoulder. He was of the opinion that she was at maximum medical improvement for her left shoulder. With respect to the right shoulder, Dr. Alpert noted that the subscapularis was repaired, but not the supraspinatus and infraspinatus. He was of the opinion that petitioner had significant pain, stiffness, and weakness with some mild glenohumeral osteoarthritis and full thickness retracted rotator cuff tear on the right. He was of the opinion that she had reached maximum medical improvement with respect to the right shoulder and was working with permanent restrictions.

Petitioner testified that currently her left shoulder is good if she does nothing. When she picks it up, bends it back, or lifts over her restrictions, she has pain. Activities she has problems with are reaching in the cabinet above her head for a cup, or holding a pot for too long. With respect to her right shoulder she testified that currently her right shoulder hurts, even doing minor or little things if above the waist level. She testified that her right shoulder is worse than her left, and therefore she relies more on her left shoulder. She stated that her range of motion in her right shoulder is not good, and the strength in her right shoulder is less than her left shoulder. She testified that gardening hurts her right shoulder. She also reported difficulty lifting her grandchildren. 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 12.5% loss of use of her person as a whole pursuant to Section 8(d)2 of the Act with respect to her left shoulder with respect to the accident on 3/29/16 (18 WC 10166), and a 30% loss of use of her person as a whole pursuant to Section 8(d)2 of the Act with respect to her right shoulder on 11/13/17 (18 WC 13348).

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

Ashley Landrus,

Petitioner,

21IWCC0075

vs.

NO: 16 WC 2840

State of Illinois/DJJ IYC St. Charles,

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 permanent disability and the Arbitrator's decision to re-open proofs, and being advised of the facts and law, affirms with changes as stated below the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The decision of the Arbitrator delineates the facts of the case in detail. As relevant to the issues on review, the Commission writes additionally to address the Arbitrator's decision to re-open proofs.

At arbitration on July 12, 2019, Respondent objected to the admission of medical bills on the basis that they were not certified. Petitioner responded, stating that all the medical bills were certified by the record keepers, but did not attach the certification pages to the bills when introducing exhibits. Petitioner also mistakenly told the Arbitrator that these bills were also contained in earlier numbered exhibits, thus the Arbitrator rejected them as duplicative.

Eleven days later, Petitioner filed a motion to re-open proofs and to submit substituted medical bill exhibits, noting that these bills were not in fact duplicative of earlier exhibits, and requesting their admission as they had been certified at the time of trial, pursuant to §16 of the Act. The Arbitrator granted Petitioner's motion, stating that, had he truly understood the issue at

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arbitration, he would have offered Petitioner the opportunity to keep proofs open to confirm certification. The Arbitrator stated that he re-opened proofs to avoid prejudice, as he believed the records were properly certified prior to trial. The only bill that was not in Petitioner's Exhibit No. 8 had no balance. Thus, the Arbitrator saw no prejudice in admitting a document which created no additional liability for the Respondent.

Section 16 of the Act provides, in pertinent part, that:

> "The records, reports, and bills kept by a treating hospital, treating physician, or other treating healthcare provider that renders treatment to the employee as a result of accidental injuries in question, certified to as true and correct by the hospital, physician or other healthcare provider or by designated agents of the hospital, physician, or other healthcare provider, showing the medical and surgical treatment given an injured employee by such hospital, physician or other healthcare provider, shall be admissible without any further proof as evidence of such matters. There shall be a rebuttable presumption that any such records, reports, and bills received in response to Commission subpoena are certified to be true and correct. This paragraph does not restrict, limit, or prevent the admissibility of records, reports, or bills that are otherwise admissible. This provision does not apply to reports prepared by treating providers for use in litigation."

820 ILCS 305/16 (West 2017).

The decision to grant or deny a motion to re-open proofs lies within the Arbitrator's discretion and will not be disturbed on appeal absent an abuse of that discretion. *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Comm'n,* 386 Ill. App. 3d 779, 785-86 (2008). "The arbitrator may grant a continuance and extend the time for closing proofs if there is a showing of 'good cause.'" *Lefebvre v. Industrial Comm'n*, 276 Ill. App. 3d 791, 795 (1995) (quoting 50 Ill. Admin. Code §§7020, 7030 et seq. (1991)).

The Commission finds that the Arbitrator did not abuse his discretion in re-opening proofs for the purpose of allowing certification pages for medical records in this case. The records were clearly certified prior to trial and no prejudice to the Respondent is evident. Thus, the Commission affirms the Arbitrator's decision to re-open proofs for this limited purpose.

All else is affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that the Arbitrator properly re-opened proofs upon Petitioner's motion to include timely certification pages.

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.

21IWCC0075

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.

FEB 22 2021

DATED:
o: 1/7/21
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0075

LANDRUS, ASHLEY Case# **16WC002840**

Employee/Petitioner

STATE OF ILLINOIS/DJJ IYC ST CHARLES

Employer/Respondent

On 11/1/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 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:

0924 BLOCK KLUKAS MANZELLA & SHELL
BRYAN SHELL
19 W JEFFERSON ST
JOLIET, IL 60432

0000 ASSISTANT ATTORNEY GENERAL
NDUBUISI VINCENT OBAH
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

0350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

NOV 1 - 2019

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

21IWCC0075

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

Ashley Landrus
Employee/Petitioner

v.

State of Illinois/DJJ IYC St. Charles
Employer/Respondent

Case # **16** WC **02840**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Geneva**, on **July 12, 2019 and** in the city of **Wheaton**, on **August 5 and 7, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0075

FINDINGS

On **January 10, 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 in part*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**60,120.00**; the average weekly wage was $**1,156.15**.

On the date of accident, Petitioner was **32** 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 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $651.00 to Empact Emergency Physicians, and $16,754.01 to ATI Physical Therapy, 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 permanent partial disability benefits of $693.69/week for 30 weeks, because the injuries sustained caused the 6% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

October 29, 2019
Date

NOV - 1 2019

Statement of Fac 21IWCC0075

This matter was tried on July 12, 2019. Petitioner's motion to reopen proofs was presented and granted on August 5, 2019. At that time Petitioner's revised Exhibits 7, 8, 9, 10, 10A and 11 were admitted. On August 7, 2019, RX 1 was presented and admitted. The Parties also stipulated at that time that temporary compensation was not an issue, finding all benefits claimed were paid. The Arbitrator, in reviewing the exhibits has redacted PX 6, PX 6A and rejected PX 2 to remove personal identifying information.

Petitioner Ashley Landrus testified that she was employed by Respondent, State of Illinois Department of Juvenile Justice at the Illinois Youth Center in Saint Charles, Illinois, as a Juvenile Justice Specialist. She has a bachelor's degree in criminal justice. She previously worked in a pharmacy before beginning her career as a correctional officer. She has been employed by Respondent since May 2013. Prior to January 10, 2016, the Petitioner did not have any other injuries, or Workers' Compensation claims. Her duties as a Juvenile Justice Specialist were to wake the youths, take them to breakfast, shower, school, lunch, recreation or other programs, such as anger management. Petitioner testified that at 2:30 PM on January 10, 2016, Petitioner performed shakedowns of rooms looking for contraband. One youth had an extra blanket, which is not allowed Petitioner took the blanket from his room, which he witnessed. A few hours later, she entered the same room. The 5' 8" and 190-pound youth attacked her, punching Petitioner violently multiple times to her face, head and upper body. She testified that other officers took him off of her. She blacked out for a moment. She stood up but was shaken. Petitioner testified that there was video surveillance which she viewed on January 11, 2016.

Petitioner testified that she was taken to medical on the grounds and then drove herself to the emergency room at Rush Copley Medical Center. Petitioner was seen January 10, 2016 (PX 1). The history given was that she was a correctional officer and was punched multiple times in the face by an inmate falling on her lower back and briefly losing consciousness. Her complaints were headache, blurry vision, lower back pain, facial pain, and left third digit pain. Physical examination noted positive frontal tenderness of her head/neck, mild swelling of the third finger and positive tenderness to palpation of her lumbar spine (PX 1, p 14). CT scan of the facial bones, lumbar spine and an x-ray of her left hand were all negative. Petitioner was diagnosed with headache, blurry vision, lower back pain, facial pain and left hand third digit pain. Petitioner was discharged with a prescription for Vicodin and Ibuprofen (PX 1).

On January 19, 2016, Petitioner saw Dr. Mark Farag at Midwest Anesthesia and Pain Specialists (PX 3). He recorded a consistent history of the attack. Petitioner complained of headaches that were 8/10 in pain, which have persisted despite the use of Ibuprofen, neck pain and low back pain. Petitioner also reported anxiety about going back to work. Physical examination noted tenderness in the cervical paraspinal and upper thoracic muscles, right greater than left and central low back tenderness. Strength was 5/5. Sensation was intact. Dr. Farag noted no strong radicular component or associated neurological deficit. He diagnosed severe/acute headache, neck and low back pain. He stated the pain she experiences is a result of the January 10, 2016 injury. Dr. Farag recommended medication including Ibuprofen, Tylenol, Lansoprozol and Amytriptyline. Petitioner was also going to find a psychiatrist/psychotherapist to discuss her anxiety about going back to work (PX 2, p 3-4).

On February 2, 2016, Dr. Farag noted Petitioner had started physical therapy. Petitioner continued taking medications, but noted that she still had headaches a few hours per day. She still had constant neck and low back pain. Dr. Farag noted that she did speak to two psychotherapists, but they did not accept Workers' Compensation insurance. Dr. Farag recommended continuing medication and physical therapy. He kept

Petitioner off work (PX 2, p 7). Petitioner began physical therapy at Athletico on January 28, 2016 (PX 4). She provided the physical demands or her job (PX 4, p 37). The initial evaluation noted pain and decreased mobility in the neck and back and migraines (PX 4, p 38). On March 1, 2016, Dr. Farag noted 20% improvement in the low back, but not much in the neck, with the neck feeling worse in the first two weeks of physical therapy. After examination, Dr. Farag diagnosed Petitioner with cervicalgia, myalgia, lumbar strain, lumbago, traumatic injury and headache and recommended continuing with medications, physical therapy and ordered a cervical MRI (PX 3, p 8-9). On March 29, 2016, Dr. Farag noted the cervical MRI had not occurred. He recommended a cervical epidural steroid injection, noting her headaches may be stemming from her neck (PX 3, p 10-11). Petitioner's last physical therapy visit was on April 21, 2016. It was noted she had no significant lumbar limitations. Her cervical spine was still slightly limited. She had no improvement over the last 3 weeks. The limitations inhibit her ability to return to full duty, as well as the unpredictability of her job (PX 4, p 119). Dr. Farag's final visit was April 26, 2016. He noted her low back is much improved, but her neck pain and headaches remain the same. She has no radiation, numbness, tingling or weakness. He noted that Petitioner recently started seeing a psychologist, or psychiatrist for her mental anguish from the work injury. He continued to recommend a cervical MRI, a brace, and continued physical therapy (PX 3, p 12-13).

The Petitioner sought a second opinion from Dr. Mark Lorenz at Hinsdale Orthopedics on May 25, 2016 for complaints of right sided neck pain (PX 5, p 8-11). Dr. Lorenz recorded the description of accident. His physical examination revealed pain on palpation over the right cervical paraspinal region, pain with cervical range of motion especially with forward flexion and left lateral rotation. Spurling maneuver caused pain radiating into the right shoulder. He noted tenderness in the shoulder on passive range of motion. Dr. Lorenz diagnosed cervicalgia, right shoulder pain and headaches status post trauma. He recommended a cervical MRI and referred Petitioner for a neurology consult for frequent headaches after trauma with loss of consciousness. He kept Petitioner off work (PX 5, p 9-11).

Petitioner's June 14, 2016 cervical MRI impression was small very shallow posterior central disc protrusion at C3-4 abutting the anterior thecal sac but not causing central canal or foraminal stenosis (PX 5, p 12). A June 14, 2016 MRI of the right shoulder impression was mild supraspinatus and infraspinatus tendinosis, no full thickness rotator cuff tear, question very small superior labral tear (PX 5, p 14). Dr. Lorenz reviewed the cervical MRI on June 22, 2016 and opined that the Petitioner was not a surgical candidate, referring her for cervical physical therapy and continued the referral for a neurology consult, as well as a referral to Dr. Chudik for evaluation of her right shoulder pain (PX 5, p 16).

Dr. Steven Chudik examined the Petitioner on June 27, 2016 noting a chief complaint of right shoulder pain. Petitioner reported it began approximately 1/01/2016 from an injury at work. The history notes initial therapy for the low back and currently seeing Dr. Lorenz for her neck. Petitioner reported her shoulder symptoms are not severe, but she experiences aching. Physical examination noted tenderness at the AC joint and subacromial bursa. There was full strength and full passive range of motion. Dr. Chudik noted positive Neer's and Hawkin's tests. His impression was impingement. He ordered physical therapy for the shoulder alongside her neck protocol (PX 5, p 20).

Petitioner began therapy at ATI on July 25, 2016. The primary diagnosis was cervicalgia, sprain/strain-cervical. Petitioner also reported achiness in the shoulder (PX 6, p 23). On August 15, 2016, Dr. Chudik advanced Petitioner to a work conditioning program and to perform a Functional Capacity Evaluation (PX 5, p 28). Petitioner also saw Jennifer Silva PA for her cervical spine. She noted 85% improvement, but still noted

pain in the right paraspinal region/trapezius. She also recommended transition to work conditioning for the cervical strain (PX 5, p 31-32).

Petitioner underwent an FCE on September 9, 2016, where she had valid test showing that she was capable of the Heavy demand level work. Her regular job was noted to be Medium (PX 6, p 74). Petitioner was released from Dr. Chudik's care on September 12, 2016. Dr. Chudik noted that the Petitioner's shoulder felt good and she was ready to return to work (PX 5, p 35). Petitioner was released by Dr. Lorenz on September 15, 2016 Dr. Lorenz noted that the Petitioner was feeling well and is able to return to work (PX 5, p 38-39).

Petitioner testified that she was put back on the same unit and saw the same youth that hit her. Petitioner was promoted to Juvenile Justice Supervisor and she received a $20,000 salary increase. In her new position, Petitioner responds to calls all over the facility. She testified that she gets anxiety that she must override. The calls take her back to the incident. Petitioner testified that currently she is treating by getting massages once a month. These massages were not recommended by any physician. Petitioner receives these massages on her own. She catches herself stretching often. Petitioner's right shoulder tenses up a lot. She takes over-the-counter medication.

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 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).

Petitioner's accident is undisputed. She was attacked by an inmate and suffering injuring as a result of being struck and falling to the floor. The emergency records from the date of the accident confirm complaints of headache, blurry vision, lower back pain, facial pain, and left third digit pain. Physical examination noted positive frontal tenderness of her head/neck, mild swelling of the third finger and positive tenderness to palpation of her lumbar spine. When Petitioner was initially seen by Dr. Farag 9 days later, he recorded complaints of headaches, neck pain and low back pain. Petitioner also reported anxiety about going back to work. Physical examination noted tenderness in the cervical paraspinal and upper thoracic muscles, right greater than left and central low back tenderness. He diagnosed severe/acute headache, neck and low back pain. He stated the pain she experiences is a result of the January 10, 2016 injury.

On March 29, 2016, Dr. Farag noted her headaches may be stemming from her neck. At the April 21, 2016 therapy session, it was noted she had no significant lumbar limitations. Her cervical spine was still slightly

limited. On April 26, 2016, Dr. Farag noted her low back is much improved, but her neck pain and headaches remain the same. She has no radiation, numbness, tingling or weakness. He noted that Petitioner recently started seeing a psychologist, or psychiatrist for her mental anguish from the work injury. He continued to recommend a cervical MRI, a brace, and continued physical therapy.

Based upon the mechanism of injury, the onset of the complaints and treatment within days of the accident and the causation opinion of Dr. Farag, the Arbitrator finds the Petitioner's conditions of ill-being in the left third finger, lower back, neck, face, headache, and mental anguish causally connected to the accident.

Petitioner sought further treatment at Hinsdale Orthopedics beginning with her May 25, 2016 visit with Dr. Lorenz. The reason for the visit was right sided neck pain. There was no mention of shoulder pain. Dr. Lorenz examination does not document any examination of the shoulder. The only indication is radiating pain to the shoulder during the Spurling test, which is looking for cervical radicular symptoms, and his finding of pain reproduced on passive range of motion in the right shoulder. Dr. Lorenz referred Petitioner to Dr. Chudik for the right shoulder evaluation. Dr. Chudik takes a history of shoulder pain since the accident. This is inconsistent with the medical records. The emergency room does not document any shoulder complaints or evaluation. Dr. Farag does not record any shoulder complaints. His records note no radiation, numbness, tingling or weakness in the upper extremities. Dr Chudik's diagnosis was impingement. His records include no specific causation opinion. A treating doctor's findings and opinions can be undermined, or even disregarded, through reliance on inaccurate or incomplete information." See *Ravji v. United Airlines*, 2012 WL 440353 at 13 (Ill. Indus. Comm'n) interpreting *Horath v. Industrial Commission*, 96 Ill.2d 349 (Ill. 1983).

Petitioner advanced no complaints in the right shoulder until after her examination with Dr. Lorenz, over 6 months after the accident. 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 gap in advancing shoulder complaints, the lack of definitive traumatic pathology noted, and the lack of a credible medical causation opinion based upon an accurate history, the Arbitrator finds that the right shoulder condition of ill-being is not 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 her conditions of ill-being in the face, headaches and anxiety, neck and back pain, and left hand are causally related to the accidental injury sustained on January 10, 2016. The Arbitrator finds that the condition of ill-being in the right shoulder is not causally related to the accident.

In support of the Arbitrator's decision with respect to (J) Medical and (N) Credit, 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). Based upon the Arbitrator's finding with respect to Causal Connection, reasonable

and necessary treatment for the face, headaches and anxiety, neck and back pain, and left hand are causally related to the accident. Treatment rendered solely for the right shoulder would not be causally related. Petitioner submitted medical bills as PX 7 through PX 11. The bills are:

Empact Emergency Physicians (PX 7)	$651.00
Midwest Anesthesia and Pain Specialists (PX 8)	$789.20
Hinsdale Orthopedics (PX 9)	$6,265.00
ATI Physical Therapy (PX 10)	$17,696.95
ATI Physical Therapy (PX 10A)	$3,007.05
Athletico (PX 11)	$18,256.00

Respondent submitted RX 1 documenting payments made for medical treatment by a group plan for which credit can be given under Section 8(j). The document reflects payments and discounts. The discounts do not exactly correspond to the billing records submitted.

The Arbitrator has reviewed the medical records and the billing and payment information admitted. The records reflect that the bills from Midwest Anesthesia and Pain Specialists (PX 8) and Athletico (PX 11) are reasonable, necessary and causally related but have been paid by Respondent and have no balance owing based upon the billing submitted and payments documented on RX 1.

The bill from Empact Emergency Physicians (PX 7) does not show payment on RX 1, but reflects a discount of the entire amount which is not reflected on the statement. Any remaining balance claimed would be Respondent's responsibility. With respect to the billing from Hinsdale Orthopedics (PX 9), the records document that Respondent has paid the majority of the charges. The only balance remaining is for office visits with Dr. Chudik for the unrelated shoulder treatment. Such charges would be denied.

The ATI Physical Therapy bills (PX 10 and PX 10A) are for physical therapy ordered by Dr. Lorenz for the neck and Dr. Chudik for the shoulder. PX 10 lists the therapy as ordered by Dr. Chudik from July 21, 2016 through August 11, 2016 and Work Conditioning from August 17, 2016 through September 9, 2016. PX 10A lists the therapy ordered by Dr. Lorenz from July 25, 2016 though August 11, 2016. RX 1 documents no payments to ATI Physical Therapy only discounts which are not reflected on the statements. The dates of therapy from July 25, 2016 through August 11, 2016 are identical for each order but the charges are different. Both doctors prescribed therapy and work hardening. The Arbitrator finds that the initial evaluation on July 21, 2016, the therapy ordered by Dr. Lorenz from July 25, 2016 through August 11, 2016, and the work hardening through September 9, 2016 required for causally related neck injury. The Arbitrator infers that the distinct physical therapy ordered by Dr. Chudik, totaling $3,949.99, was targeted for the unrelated right shoulder condition and would be denied.

Based upon the record as a whole and the Arbitrator's findings with respect to Causal Connection, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $651.00 to Empact Emergency Physicians, and $16,754.01 to ATI Physical Therapy, 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.
were

21IWCC0075

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. The Arbitrator has considered only the conditions of ill-being found causally connected as addressed above.

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 Juvenile Justice 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 there is unpredictability in the physical requirements due to the nature of the work interacting with the youths. Petitioner testified to anxiety in returning to her prior position and has been promoted since her return to work to a supervisory position, but must still respond to calls. 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 32 years old at the time of the accident. This would make her a younger worker. 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 was released to work without restrictions. She has been promoted since her return to work and is earning more than before the accident. Because of these facts, 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:

> With respect to Petitioner's left hand and finger, Petitioner had negative x-rays and no further treatment after the emergency room. She advanced no complaints in the left hand at trial.
>
> With respect to Petitioner's complaints of anxiety, no records of any treatment were offered to document her subjective complaints. The Arbitrator notes that Petitioner returned to her regular duties before her promotion. She testified that she gets anxiety that she must override. The calls take her back to the incident.
>
> With respect to Petitioner's low back complaints, Dr. Farag noted strength was 5/5. Sensation was intact. in the lower lumbar spine. Dr. Farag noted no strong radicular component or associated neurological deficit. He diagnosed low back stain and lumbago. At Petitioner's last physical therapy visit on April 21, 2016, it was noted she had no significant lumbar limitations. At Dr. Farag's final visit on April 26, 2016, he noted her low back is much improved. Petitioner sought no further treatment for her low back thereafter.

With respect to her neck and headaches, Petitioner's June 14, 2016 cervical MRI impression was small very shallow posterior central disc protrusion at C3-4 abutting the anterior thecal sac but not causing central canal or foraminal stenosis. Dr. Lorenz reviewed the cervical MRI opined that the Petitioner was not a surgical candidate. He ordered cervical physical therapy and referral for a neurology consult. The diagnosis was cervicalgia, sprain/strain- cervical. Petitioner completed therapy and work conditioning and was released to work without restrictions. She offered no records of a neurology consult or treatment She has had no treatment other than massages since September 2016.

Because of these facts, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors and the Arbitrator's finding with respect to Causal Connection, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 6% loss of use of person as a whole 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

JOHN MANNAIONI,
Petitioner,

vs. NO: 16 WC 18506

ADVANCED TECHNOLOGY SERVICES, INC.,
Respondent.

21IWCC0076

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 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 March 11, 2020 is hereby affirmed and adopted.

The bond requirement in Section 19(f)(2) of the Act is applicable only when "the Commission shall have rendered 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 the Circuit Court.

DATED: FEB 23 2021
O: 2/16/21
MP/pm
068

Marc Parker

Stephen J. Mathis

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MANNAIONI, JOHN
Employee/Petitioner

Case# 16WC018506

ADVANCED TECHNOLOGY SERVICES INC
Employer/Respondent

21IWCC0076

On 3/11/2020, 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:

2187 HEIPLE LAW OFFICES
JEREMY H HEIPLE
7620 N UNIVERSITY ST SUITE 201
PEORIA, IL 61614

0264 HEYL ROYSTER VOELKER & ALLEN
JESSICA M BELL
PO BOX 6199
PEORIA, IL 61601-6199

21IWCC0076

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

John Mannaioni
Employee/Petitioner

v.

Advanced Technology Services, Inc.
Employer/Respondent

Case # **16** WC **18506**

Consolidated cases: _____

21IWCC0076

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Peoria**, on **December 18, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 6, 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 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 $**28579.20**; the average weekly wage was $**549.60**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**0.0** for TTD, $**0.0** for TPD, $**0.0** for maintenance, and $**2.274.41** for other benefits, for a total credit of $**2,274.41**.

Respondent is entitled to a credit of $**27,829.27** under Section 8(j) of the Act.

ORDER

The arbitrator finds Petitioner failed to prove his accident arose out of and in the course of his employment with Respondent and that his current condition of ill-being is causally connected to his employment with Respondent and therefore denies Petitioner's claim for benefits. The arbitrator further notes the Petitioner failed to prove an appropriate date of accident within the time of his employment with Respondent.

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 6, 2020
Date

MAR 11 2020

Statement of Facts

John Mannaioni ("Petitioner") filed an application for adjustment of claim against Advanced Technology Services ("ATS" or "Respondent"), alleging a work related injury of November 6, 2015. The case appeared before Arbitrator Seal for arbitration on December 18, 2019 in Peoria, Illinois. At the time of hearing, a Request for Hearing was submitted as Arbitrator's Exhibit 1. Arbitrator's Exhibit 1 indicates the issues in dispute are accident, notice, causation, medical bills, temporary total disability benefits, and nature and extent of the injury. The parties agreed that the Petitioner and Respondent were operating under the Illinois Workers' Compensation Act and that the relationship between the parties was one of employee and employer. The parties further agreed that the Petitioner's average weekly wage is $549.60, that the Petitioner was 52 years old, married, with two dependent children at the time of the accident, and that Respondent had a credit for bills paid through its group medical plan and $2,274,41 in disability benefits.

At the time of arbitration, Petitioner testified that he was employed by ATS as "Production Coordinator 1," having started working at ATS on January 9, 2012. Petitioner testified regarding his job duties as a production coordinator 1, indicating his job was essentially to work with Caterpillar employees that needed assistance replacing their computers. (TT, pgs. 19-20).

Prior to his employment with ATS, Petitioner was employed by Western Southern Life Insurance Company, marketing and selling insurance and financial services products. Petitioner testified he worked in this position from August 2010 – November 2011. Petitioner testified he left his position at Western Southern Life Insurance Company because he was not making enough money. (TT, pgs. 20-21).

Petitioner testified that, in January 2011 while still employed with Western Southern Life Insurance Company, he sought treatment with Dr. Agarwal on Route 91. Petitioner testified that he reported his hands were bothering him "falling asleep or whatever." (TT, pgs. 23). This medical record, which was introduced into evidence as Petitioner's Exhibit 2, further notes:

Petitioner testified Dr. Agarwal referred him to Illinois Neurological Institute (INI) for further testing. This testing, which consisted of an EMG/NCV done in February 2011, was introduced into evidence as Petitioner's Exhibit 3.

Petitioner testified that, in March 2011, Dr. Agarwal referred Petitioner to Dr. Mahoney with Midwest Orthopedic Center. Petitioner admitted Dr. Mahoney recommended carpal tunnel release surgery in March 2011. (TT, pg. 24). Petitioner testified that he elected not to move forward with that procedure at that time, noting he "wanted to try more conservative treatments before we went into a surgery." (TT, pg. 25).

Petitioner testified that he had no other hand or arm medical treatment after Dr. Mahoney's visit in March 2011 until he started working for ATS in January 2012. Petitioner testified his hands occasionally bothered him during that time, but that it "wasn't that bad." (TT, pg. 25).

Petitioner testified that it was about a year after starting at ATS (December 2013) that he sought treatment again for his hands/arms. He reported similar symptoms as he did to Dr. Agarwal in 2011 as his hands bothering him and occasionally falling asleep. He testified that his complaints "hadn't changed substantially." (TT, pgs. 26-27).

Petitioner testified that he noticed his hands became "more problematic" in 2015. Petitioner cited to his hands falling asleep when he was driving his car and talking on his cell phone, and he denied experiencing those symptoms before 2015. He further noticed that his hand/arm problems were waking him up at night in 2015, which had never happened prior to that point. (TT, pgs. 27-28).

Petitioner testified that he noticed these problems near the end of 2015 and that he went to see Dr. Ballou, who referred him for another nerve study with Dr. Tony. Petitioner testified that Dr. Ballou then referred the Petitioner to Dr. Garst with Great Plains Orthopedics. (TT, pgs. 28-29).

Petitioner testified he was referred to Dr. Garst in December 2015 and that he moved forward with left sided carpal and cubital tunnel releases initially and then later a right sided carpal tunnel release. Petitioner testified that, since he returned to work in October 2016 after the procedures by Dr. Garst, he has not had any problems with his hands or arms. (TT, pg. 43-44). He further testified he was since laid off by ATS (along with his entire team) and sought employment elsewhere. Petitioner testified he has no problems/difficulties with his hands or arms in his new position. (TT, pg. 44-45).

Petitioner provided details regarding his job activities with ATS. Referring to Petitioner's Exhibit 1, Petitioner explained the different roles he had within ATS and the hours worked during that time. Petitioner admitted he prepared this document himself and it was not prepared by ATS. Petitioner explained that Exhibit 1 also notes how many hours a day were spent keyboarding and how many hours a day were spent on other tasks. Petitioner testified specifically regarding the job of "refresh," claiming that it was "exclusive keyboarding." He later admitted part of that job involved making phone calls. (TT, pgs. 30-32).

Petitioner testified to another project he did while employed by ATS from May 2012-December 2012 and described the tasks associated with it. Again, Petitioner testified that this project involved a "vast majority" of keyboarding, as his job involved fulfilling order requests for CAT employees. He testified regarding the computer work involved with such a request, the work required to physically retrieve the product ordered, inspect the product, and arrangements for installation/delivery of the product. (TT, pgs. 34-37).

Petitioner testified that he soon switched to a different project called "refresh," which he claimed was "exclusively keyboarding except for a small amount of time where I would go to the bathroom or something." Of an eight hour shift worked during this project, Petitioner testified he keyboarded for seven and three-quarters hours each day. (TT, pgs. 38-39).

On cross-examination, Petitioner admitted to a history of problems in both hands before his employment with ATS started. He admitted that, when he saw Dr. Agarwal in January 2011, he complained of his symptoms waking him up at night. In fact, this note from Dr. Agarwal notes Petitioner reported working as a sales rep "on a laptop quite a bit," having had symptoms "for several years." (See Px. 2). (TT, pgs. 49-50).

Petitioner further admitted that he reported symptoms waking him from sleep every night for several years and that holding a steering wheel or cell phone causes his hands to go to sleep to Blume at the time of his February 2011 EMG/NCV. (TT, pgs. 50-52, See also Px. 3).

When asked on cross-examination, Petitioner again stated that he elected not to proceed with surgery at Dr. Mahoney's recommendation because other conservative measures had not been exhausted. (TT. Pgs. 53). Dr. Mahoney's note was entered into evidence as Px. 4 Dr. Mahoney's note

indicates Petitioner reported he had tried splints, which did not provide relief for his symptoms and that he felt like he had exhausted a reasonable course of nonsurgical management and wanted to move forward with surgery. (TT, pg. 53).

Petitioner again denied seeking treatment for hand or wrist issues after his visit with Dr. Mahoney in 2011 until he started working for ATS. (TT, pgs 54-55). Respondent presented medical records from Benningfield and Associates revealing ongoing treatment and complaints of hand and wrist issues starting March 28, 2011, just a few weeks after Dr. Mahoney recommended surgery. In fact, Petitioner admitted that he sought treatment with Benningfield and Associates for persistent hand complaints in March, April, May, and June 2011. (TT, 56).

Petitioner further admitted that he continued treating with Benningfield and Associates for bilateral hand numbness and tingling in September, October, November, and December 2011. These records reflect Petitioner presented on December 28, 2011, just a few weeks before starting employment with ATS with complaints of pain in both wrists that was achy, tingling, constant, 6/10, and radiated while sleeping. (TT, pgs. 58-59). Petitioner then followed up with Benningfield and Associates on January 12, 2012 – three days after starting at ATS – with complaints of pain 4/10, but otherwise the same as his previous visit. Petitioner admitted he continued treating with Benningfield and Associates in January, February, March, April, July, September, October, November, and December 2013 for numbness and tingling in both hands. (TT, pg. 59).

Regarding his job duties, specifically pertaining to typing, Petitioner admitted that, despite testifying to "Exclusive keyboarding," it is not his testimony that he types without stopping for the entire period of time (i.e. seven hours and forty-five minutes per day). In fact, Petitioner testified that

there are breaks in between tickets, breaks to go to the bathroom, etc. Petitioner admitted he was occasionally late for work and rarely left early. (TT, pgs. 60-61).

Petitioner testified in more detail regarding his treatment with Benningfield and associates. Petitioner testified he sought treatment with Dr. Walker, who believes the carpal tunnel like complaints could have been coming from something else, thus the notes regarding the hand/wrist issues throughout the entire treatment. Petitioner then testified that he actually did not seek treatment with Dr. Walker for his hand/wrist complaints, but only for his low back. (TT. Pgs. 62, 66-68) Petitioner also testified that his complaints "worsened significantly" once he started working at ATS as compared to when he first sought treatment in 2011/2012. (TT, pg. 63).

Cassondra Catchings testified on behalf of Petitioner. Ms. Catchings testified that she is previously employed with Volt DTS, but she previously was employed with ATS. Ms. Catchings testified that she started working for ATS in November 2015 and that her job position was "order desk." Ms. Catchings testified that she worked "in the same area" as Petitioner and that they worked together approximately 50 percent of the time. Ms. Catchings testified regarding the various roles Petitioner had with ATS as compared to the jobs she had, noting there was no overlap between the jobs. On cross-examination, Ms. Catchings admitted she did not work for ATS prior to November 6, 2015. (TT, pgs. 74-76).

Michelle Tate also testified on behalf of Petitioner. Ms. Tate testified she is currently employed with SC2 within Caterpillar. Prior to SC2, she was employed with ATS. Ms. Tate testified she started with ATS in either 2011 or 2012 and ended her employment there in 2017. Ms. Tate testified her position with ATS was Production Coordinator 2, which was her position during the duration of her

employment with ATS. Ms. Tate testified that she worked with Petitioner when they both worked a "hardware" project. When describing this job, Ms. Tate indicated the position was in charge of hardware orders, which consisted of ordering hardware through "MSC," then pick the orders up, bring them in, figure out where they went, and send them to the people that ordered them. Ms. Tate testified her job duties weren't much different than Petitioner's at that time. Ms. Tate estimated that 80-85% of her day was spent keyboarding and agreed that "a lot" of Petitioner's job responsibilities involved keyboarding. (TT, pgs. 78-82).

Ms. Tate admitted on cross-examination that Production Coordinator 1 is a different job than Production Coordinator 2. Ms. Tate also admitted that, when she was at work, she had a job to do and did not sit and watch Petitioner do his job all day, every day. (TT, pg. 82).

Respondent presented evidence through the testimony of several witnesses, including Susan Bankard. Ms. Bankard testified she is employed by ATS, currently working as a Production Coordinator 2, but that she worked as Production Coordinator 1 when she first started in June 2014 and served in that position until Summer 2019. Ms. Bankard confirmed she and Petitioner worked on the same "team" during her time at ATS. Ms. Bankard testified regarding some of the jobs she and Petitioner performed at ATS, including "refresh," which consisted of identifying employees that needed their computer "refreshed." Ms. Bankard testified that the information for this project came from a spreadsheet prepared and distributed by her supervisor, Sam Pulliam. Regarding the amount of keyboarding performed during the time "refreshing" pcs, Ms. Bankard testified that the job involved more than just "typing." She testified that there was scrolling, researching, looking for contact information for employees, clicking, making phone calls, etc. (TT, pgs. 85-93)

Ms. Bankard testified that she also worked the "hardware" project described by Petitioner. Ms. Bankard testified that the hardware project involved contacting a customer to determine their hardware request, search for the product, "copy and paste and click." She did admit there was "some typing" associated with the hardware project, estimating maybe 10-15 minutes per single hardware request. She further testified that the hardware job also involved retrieving mail several times a day, processing labels for mail, and getting the hardware products to the next person to install. Ms. Bankard testified that the job description representing the hardware job consisted of 5 ¾ - 6 hours per day keyboarding was inaccurate, indicating the job did not require that much typing.

Ms. Bankard testified that her *current* job as Production Coordinator 2 requires her to be away from her desk more often than a Production Coordinator 1. (TT, pg. 98).

Johnathon Coughlon testified on behalf of Respondent. Mr. Coughlon testified that he is employed with ATS and has been for nine years. Mr. Coughlon testified that he initially worked as a p.c. install technician, but he became a site supervisor near the end of 2013. Mr. Coughlon testified his duties as a site supervisor involved managing day-to-day functions of the employees. Mr. Coughlon testified that he supervised a range of employees, including production coordinators. Mr. Coughlon testified regarding the job duties of a Production Coordinator, agreeing that a Production Coordinator 1 position could be broken down into different projects, such as refresh, hardware, etc. Mr. Coughlon testified that the job duties of a "refresh" project entailed researching the appropriate product to help the customer, checking stock of items, verifying technicians, etc. (TT, pgs. 101-114).

Mr. Coughlon testified that the research aspect of a refresh project is limited to typing in an asset tag. Otherwise, the research involved clicking and phone calls to the customer. With respect to checking stock, Mr. Coughlon testified that there was "not a lot" of keyboarding involved in this aspect of the job. This task involved primarily clicking drop-down menus within the system to choose options for the stock. With respect to the task of creating orders, Mr. Coughlon testified there was typing involved when comments needed to be added to the order, but the task consisted primarily of clicking through options for the product order. Similarly, when the Production Coordinator 1 would verify the availability of a technician, Mr. Coughlon testified the process involved minimal keyboarding and was mostly clicking through and selecting dates and info from a pre-populated field. (Tt, pgs. 101-114).

Mr. Coughlon testified that he was also familiar with a "hardware" project, indicating it was similar to the same process as a refresh, involving scheduling technicians, ordering parts, and checking stock. He also testified that the hardware project involved handling mail and physical products that were ordered, indicating there were daily mail drops, which required the Production Coordinator 1 to physically pick up the mail, check the items in the mail, print out a label, tape the label to the box, scan the items into the system, and then physically take them back to a receiving department to go to trucks for delivery. With respect to Petitioner's testimony/evidence regarding keyboarding, Mr. Coughlon disagreed with the claim that a hardware task involved 5.75 – 6 hours per day of typing, indicating the job consisted mostly of physically picking up/dropping off hardware, and then clicking through order information. He also testified that there was down time throughout the day, both for obvious things such as bathroom breaks, but also for general breaks so that no one was

overworked. Mr. Coughlon testified that a Production Coordinator 1 that successfully completed their "goal" of 20 tickets per day, they would have typed maybe 25% of the day, further indicating that might even be a little high. (TT, pgs. 114-119).

Mr. Coughlon specifically refuted Petitioner's report that a refresh project required 7.75 hours per day of typing, indicating he didn't see how it could even be possible to be typing that much considering the tasks associated with that particular project (as described above). (TT, pgs. 101-114).

Finally, Respondent presented testimony through John Soza, who testified he is an environmental health and safety manager at ATS. Mr. Soza testified he is a certified safety professional, having received the certifications for that title. Mr. Soza testified he performed an ergonomic evaluation of Petitioner's workstation and that the information contained in his report (Respondent's Exhibit 8) was received from Petitioner himself. Mr. Soza testified regarding the conclusions he made with respect to the testing of Petitioner's workstation, noting that the Petitioner's workstation and wrist positioning did not put him at risk of developing any injuries to the wrist. Mr. Soza testified that his analysis takes into account the load, the force of the load, cycle time, and vibration associated with the tasks when determining the risk of developing injuries from the position. (TT, pgs. 126-142).

Petitioner testified again on re-direct. On re-direct, Petitioner testified that his use of the term "keyboarding" actually encompasses "working with a computer, keyboarding, mousing, scrolling, clicking, like all of that." (TT, pgs. 148-149).

Arbitrator's Findings

C/D/E/F. **Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? What was the date of accident? Was timely notice of the accident given to Respondent? Is Petitioner's current condition of ill-being causally related to the injury?**

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). A claimant who suffers from a pre-existing condition may recover benefits under the Act where an accident aggravates or accelerates his condition. *International Vermiculite Company v. the Industrial Commission*, 77 Ill. 2d 1 (1979). 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, 505 N.E.2d 1026 (1987), "an employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury. There must be a showing that the injury is work related and not the result of a normal degenerative aging process."

In this case, Petitioner has failed to meet this burden. It is clear Petitioner suffered from a pre-existing condition relative to his hands/wrists prior to his employment with Respondent. This is undisputed and evidenced by the medical records submitted at arbitration. On January 17, 2011, one year before starting his employment with Respondent, Petitioner presented to his primary care physician with complaints of both hands and arms waking him up at night. He also referred to a

history of working as a patient sales rep, working on a laptop quite a bit, and reported symptoms existing for the past several years. (Px. 2)

The numbness and tingling reported in January 2011 was problematic enough that the Petitioner followed up with an EMG on February 17, 2011. This note indicates Petitioner reported a problem "with bilateral hand pain and numbness that awakens him from sleep every night and has so for several years. Holding a steering wheel or the cell phone causes his hands to go to sleep." The testing confirmed bilateral mild-moderate carpal tunnel syndrome. (Px. 3).

The Petitioner was then referred for evaluation with an orthopedic physician in March 2011 – nine months before starting employment with Respondent. At this visit, just nine months before starting employment with Respondent, Petitioner again reported numbness and tingling in his hands for six or seven years. Dr. Mahoney's note from this visit indicates Petitioner reported "significant nocturnal symptoms with numbness and tingling that awakes him from sleep. Splints have not really changed his symptoms." Dr. Mahoney further noted Petitioner reported that his symptoms are becoming "increasingly bothersome" and that he "feels like he would like to do something to try to make things better." (Px. 4)

On examination by Dr. Mahoney on March 18, 2011, Petitioner has a positive Phalen test at 20 seconds bilaterally. Dr. Mahoney notes Petitioner "feels like he has exhausted a reasonable course of nonsurgical management and would prefer to have surgery." Petitioner and Dr. Mahoney discussed surgical options and Petitioner selected endoscopic carpal tunnel surgery (as opposed to open), with the procedure to be done under local anesthesia at the OSF Center for Health Surgery Center. (Px. 4).

Not only did Petitioner have complaints of bilateral carpal tunnel syndrome prior to his employment with Respondent, but he had a diagnosis, treatment, and a surgical recommendation. Although petitioner testified at arbitration that he elected not to move forward with surgery at that time because his symptoms were not severe enough, that's clearly inconsistent with the medical record that indicates surgery was discussed in detail with the Petitioner and he elected to move forward. When questioned on this discrepancy, Petitioner attempted to change his testimony to indicate he wasn't comfortable with Dr. Mahoney.

Petitioner has presented no credible evidence to establish that there was any change to his condition in relation to his employment with Respondent. As mentioned, he had a clear diagnosis prior to his employment and that diagnosis carried treatment recommendations that included surgery. The medical indicates Petitioner thought his condition was "bothersome" enough that he wanted to proceed with surgery. Petitioner attempted to establish that his condition worsened upon his employment with ATS, but that is not supported by the medical records or his own testimony on cross-examination. Despite reporting that he was experiencing symptoms he had not previously – such as his hands becoming numb when driving his car or holding his cell phone and symptoms waking him at night – he later admitted that he complained of those very same symptoms on numerous occasions in 2011 before even working for ATS.

There is also no objective evidence that the Petitioner's condition was in any way affected by his employment with ATS. At Respondent's request, Dr. Charles Carroll compared the 2/7/2011 nerve study performed by Dr. Blume before Petitioner started working for Respondent with the EMG done

11/6/2015, which is Petitioner's alleged accident date in this claim. Dr. Carroll noted the 2015 EMG revealed *improvement* in the latencies of the median nerve. Dr. Carroll further indicates:

> "Improvement in the median nerve, NCV/EMG latencies improved over a 4 year period which would not support a theory of cause or aggravation during the period of time in question. His objective parameters actually improved which does not support a causal relationship. The improvement does not support any theory of objective aggravation during the period between the studies or with his employment for the respondent." (Rx. 3).

In addition, Petitioner's own treating physician, Dr. Garst, explained that a Phalen's test is a physical examination of the wrist done to reproduce symptoms. If a patient has symptoms in less than a minute, the testing is considered positive for carpal tunnel syndrome. Dr. Garst noted that when he saw Petitioner in December 2015, his Phalen's test was positive at 30 seconds. Dr. Garst further conceded that if a patient has symptoms on Phalen's testing at less than 30 seconds, their condition is worse. Petitioner's Phalen's test when examined by Dr. Mahoney in 2011 was 20 seconds. (Px. 10; Px. 4).

The Phalen's testing is consistent with the EMG/NCVs which also suggested Petitioner's condition was actually *worse* in 2011 before ever working for Respondent. Dr. Carroll's opinion regarding the objective medical evidence is clearly supported by the medical evidence submitted and indicates there is no objective evidence that the Petitioner's pre-existing condition was aggravated or accelerated by his employment with ATS. Further, Petitioner could not present any credible evidence of subjective changes in his symptoms after his employment with ATS. He attempted to testify about

changes in his condition, but that testimony was contradicted by his own admission on cross examination that those symptoms actually all pre-existed his employment. As stated in *Long*, "mere correlation of symptoms is not enough as causation between the accident and the resulting disability must exist." *76 Ill. 2d 561 (1979).*

Petitioner clearly suffered from carpal tunnel syndrome years before his employment with Respondent. He elected to move forward with surgery in 2011, but he did not do so. He left his former employment because he was not making enough money and then, after securing new employment with a new employer, sought medical treatment for the very same condition and to pursue the very same procedure that he had already elected to undergo before beginning his employment.

With respect to the date of accident, the Arbitrator acknowledges the repetitive trauma claim alleges a manifestation date. In *Durand v. Industrial Commission,* 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007), the Court addressed the standard for determining the manifestation date. *Durand* established a manifestation date can be set as: (a) the date the employee actually became aware of the physical condition and its relation to work through medical consultation; (b) the date the employee requires medical treatment; (c) the date on which the employee can no longer perform work activities; or (d) when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Industrial Commission,* 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007).

In this case, Petitioner (a) was aware of his physical condition and related it to keyboarding for his prior employment in on January 17, 2011; (b) required medical treatment on January 17, 2011, February 17, 2011, and/or March 18, 2011; (c) presented no evidence that his condition was

preventing him from performing his work activities at any point; and, with respect to (d), the reasonable person standard would suggest a manifestation date of January 17, 2011 since that is when Petitioner first sought treatment and reported work activities as potentially contributing to the cause. All of those potential manifestation dates per the analysis in *Durand* pre-date Petitioner's employment with Respondent in this case.

Based on the evidence in this case, the Arbitrator finds the appropriate manifestation date for Petitioner's carpal tunnel syndrome was January 17, 2011. Further, the Arbitrator finds the credible evidence in this case establishes that Petitioner's bilateral carpal tunnel syndrome was in no way affected by his employment with Respondent. As such, the Arbitrator finds Petitioner failed to prove that his accident arose out of and in the course of his employment with Respondent and that his current condition of ill-being is causally related to the injury. The petitioner failed to prove that he sustained any accident arising out of and in the course of his employment with the respondent which aggravated, accelerated, or exacerbated his clearly preexisting condition.

With respect to the left sided cubital tunnel syndrome, the Arbitrator acknowledges the Petitioner did *not* treat for this condition prior to his employment with ATS. Still, the Arbitrator finds the persuasive evidence presented indicates Petitioner failed to establish his cubital tunnel condition was related to his employment with Respondent.

With respect to causation, Dr. Carroll examined the Petitioner in 2016 and indicated that his left ulnar neuritis was not related to his employment, though he asked to review a job analysis to consider potential ergonomic causes as contributing to his condition. Dr. Carroll subsequently reviewed additional information regarding the Petitioner's job. Dr. Carroll noted Petitioner's job as Production

Coordinator and observed his workstation setup and positioning. He confirmed his opinion that there was no evidence his job with ATS caused his conditions, particularly the left ulnar neuritis. (See Rx. 1; Rx. 2).

Dr. Carroll's opinion is further confirmed by Respondent's witness, John Soza, who, after observing the workstation and discussing the circumstances with Petitioner, determined that Petitioner's ergonomic set up did not create a risk for development of injuries. (Rx. 8).

Perhaps most significantly, Petitioner lacks a persuasive opinion from a physician that *does* correlate the ulnar nerve symptoms to his work activities. While Dr. Garst does provide causation for this, his opinion is not convincing. First of all, Dr. Garst testified that he relied on the opinions in the job description Petitioner completed (Px. 1) when considering causation and that his opinions regarding causation are only assuming that job description is accurate. It was clear at arbitration that Petitioner's job description did not accurately reflect the Petitioner's job duties while working for Respondent. Numerous witnesses testified to refute the claims in Petitioner's job description. Dr. Garst also admitted he did not review medical records for treatment provided to the Petitioner prior to when he started treating him December 21, 2015, specifically noting he did not review prior EMG/NCV studies or those notes from Dr. Mahoney from the 2011 treatment. (Px. 10).

It's also clear Dr. Garst did not have a clear picture of the Petitioner's job duties or workstation. At his deposition, he admitted he relied exclusively on the job description provided by the Petitioner and did not know if the Petitioner had a headset, what "processing UPS orders entailed, what Petitioner's job description was, what his job consisted of other than generally "keyboarding and telephone," and did not know whether he was full time or part time. Dr. Garst admitted he did not

know what Petitioner's workstation looked like, he never saw photos of it, and Petitioner never described it to him. Dr. Garst also admitted medical opinions differ with respect to a relationship between "keyboarding" and cubital tunnel syndrome and explained "population studies saying the incidence in the population of carpal tunnel and cubital is no greater in people who don't keyboard – it's no greater in people who keyboard than it is in the general population." (Px. 10).

It's clear from his testimony that, when referencing "keyboarding," Dr. Garst was referring to typing. Petitioner's late testimony at trial attempting to repair the damage done to his job description suggested "keyboarding" really means "computer work," makes Dr. Garst's opinion regarding causation even less persuasive. Dr. Garst was clearly under the impression that the Petitioner's job description suggested he was *typing* for (for example) 7.75 hours per day when considering causation. The fact that Petitioner admits he was not actually typing for that period of time but was just using his computer renders Dr. Garst's opinion that was based on typing incredulous.

Based on the evidence presented, the Arbitrator finds Petitioner failed to establish a causal relationship between his cubital tunnel syndrome and his employment with Respondent.

J/K/L. Were 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? What is the nature and extent of the injury?

Because the Arbitrator determined that Petitioner failed to prove causation for his alleged conditions, all other issues pertaining to medical treatment, benefits, and permanent disability 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lamar Smith,
Petitioner,

vs. No: 15 WC 033604

21IWCC0077

City of Chicago,
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 the duration of temporary total disability and maintenance, the nature and extent of the permanent partial disability, and penalties and fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 26, 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.

21IWCC0077

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: FEB 23 2021

Marc Parker

mp/dk
o: 2/18/21
68

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, LAMAR
Employee/Petitioner

Case# **15WC033604**

CITY OF CHICAGO
Employer/Respondent

21IWCC0077

On 6/26/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4564 ARGIONIS & ASSOCIATES LLC
AL KORITSARIS
180 N LASALLE ST SUITE 1925
CHICAGO, IL 60601

0010 CITY OF CHICAGO CORP COUNSEL
LUCY HUANG
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

21IWCC0077

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

Lamar Smith
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **15** WC **33604**

Consolidated cases: _____

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

DISPUTED ISSUES

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

21IWCC0077

FINDINGS

On **October 1, 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 $**79,669.20**; the average weekly wage was $**1,532.10**.

On the date of accident, Petitioner was **59** 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 $**75,003.61** for TTD, $ for TPD, $**89,887.60** for maintenance, and $ for other benefits, for a total credit of $.

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

ORDER

Temporary Total Disability/Maintenance
Respondent shall pay Petitioner the sum of $1,021.40/week for a further period of 53 4/7 weeks for temporary total disability benefits from 10/21/15 through 10/31/16, and 62 6/7 for maintenance benefits from 11/1/16 through 1/15/19.

Permanent Partial Disability
Respondent shall pay Petitioner the sum of $755.22/week for a further period of 250 weeks, as provided in Section 8(d)(2) and 8(e)(3) of the Act, because the injuries sustained caused 50% loss of a man for loss of trade as a result of a herniated disc with impingement with permanent restrictions that he could not return to work as a Construction Laborer.

Penalties
Respondent shall pay to Petitioner penalties of $675.00, as provided in Section 16 of the Act; $1,125.00, as provided in Section 19(k) of the Act; and $2,250.00 as provided in Section 19(l) of the Act.

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

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

Signature of Arbitrator

June 25, 2019
Date

JUN 26 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

LAMAR SMITH,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	15 WC 33604
	)	
CITY OF CHICAGO	)	
	)	
Employer/Respondent.	)	Chicago

MEMORANDUM OF DECISION OF THE ARBITRATOR

The disputed issues in the above proceeding are:

(4) Is Petitioner's Current Condition of ill-being related to the injury;
(8) TTD and Maintenance benefits;
(L) Nature and Extent of the Injury; and
(O) Penalties under Sections 19(k), 19(l) and 16.

STATEMENT OF FACTS

On October 1, 2015, Petitioner Lamar Smith suffered accidental injuries that arose out of and in the course of his employment with the City of Chicago. Petitioner testified that on that date he was employed as a construction laborer by the City of Chicago – Department of Water. He testified that as a construction laborer he is responsible for lifting sewer covers, mixing cement, climbing in and out of trenches, assisting the plumbers in carrying materials, sweeping, and digging ditches. He testified that he is required to lift over one hundred pounds as part of his job duties. Further, he testified that he was working with no physical restrictions in a full duty capacity prior to October 1, 2015.

Petitioner testified that he injured his lower back while working for the City of Chicago on October 1, 2015. He testified that he was attempting to lift a sewer cover, while on his service truck. He testified that upon doing so, he felt a pop in his lower back. He testified that he notified his supervisor and that he sought medical attention the next day. Petitioner testified that he injured his lower back approximately ten years ago, while working for the City of Chicago. He testified that following treatment for that injury, he returned to work for the City of Chicago in a full duty capacity. Petitioner testified that when he returned following that incident, he worked full duty with no limitations until the injury he sustained on October 1, 2015.

On October 2, 2015, Petitioner presented at MercyWorks complaining of lower back pain radiating into the left leg with numbness and tingling. Petitioner's Exhibit 1, p. 3 (hereinafter

Pet. Ex. 1, p. 3). On physical examination, positive straight leg raise test noted for both legs. *Id.* He was prescribed medication, provided a home exercise program and was given a prescription for a lower back MRI. *Id.* Further, Petitioner was allowed to work in a full duty capacity at that time. (Pet. Ex. 1, p. 2).

On October 16, 2015, he underwent an MRI of the lumbar spine at Hawthorne Works Medical Imaging. (Pet. Ex. 2, p. 4-5). The MRI a herniated disc at L5-S1, resulting in effacement of the left lateral recess. (Pet. Ex. 2, p. 5). The MRI also showed mild narrowing of the neural foramen bilaterally at L5-S1. The Petitioner testified that following the MRI, he returned to MercyWorks for a follow-up visit. On October 20, 2015, he returned to MercyWorks complaining of the same lower back symptoms with left leg numbness and tingling. (Pet. Ex. 1, p. 2). The record notes that the MRI was reviewed by the treating physician, Dr. Diadula during the visit. *Id.* The record also notes that the Petitioner was referred to a spine specialist for further treatment. *Id.* Petitioner testified that he saw Dr. Mark Lorenz of Hinsdale Orthopedics, who was the same specialist he saw when he injured his lower back approximately ten years ago.

On November 19, 2015, he presented to Hinsdale Orthopedics with complaints of lower back pain with numbness down his left leg. (Pet. Ex. 2, p. 6). Dr. Lorenz notes that review of the MRI showed a left sided disc herniation at L5-S1. (Pet. Ex. 2, p. 7). Dr. Lorenz recommended that Petitioner begin physical therapy and was referred to his colleague Dr. Bardfield for pain management. (Pet. Ex. 2, p. 8). Petitioner was also taken off work by Dr. Lorenz during this visit. (Pet. Ex. 2, p. 9). Petitioner testified that he stayed off work per Dr. Lorenz's order and began receiving disability benefits at this time. Further he testified that he began therapy at ATI per Dr. Lorenz's recommendation. On November 4, 2015, Petitioner presented to Dr. Bardfield for a consultation and complained of lower left sided back pain. (Pet. Ex. 2, p. 15). The record described the work injury, noting that Petitioner injured his lower back while attempting to lift a manhole cover. (Pet. Ex, 2, p. 16). Dr. Bardfield recommended that Petitioner finish the course of physical therapy that he started and then return to be reassessed. (Pet. Ex. 2, p. 17). Petitioner testified that he finished the physical therapy and then returned for a follow-up visit.

On January 8, 2016, Petitioner returned to see Dr. Bardfield complaining of the same lower back symptoms. (Pet. Ex. 2, p. 25). Dr. Bardfield notes that Petitioner completed his course of physical therapy but some improvement but that the pain is still significant. (Pet. Ex. 2, p. 26). Petitioner testified that Dr. Bardfield recommended that he attempt work conditioning at this time. The record notes that he was kept off work at this time and that he would be reassessed in 5 weeks. (Pet. Ex. 2, p. 27). Petitioner testified that he did follow the work conditioning recommendation and that it took place at ATI. On February 12, 2016, Petitioner returned to Dr. Bardfield for follow-up. (Pet Ex. 2, p. 32). The record notes that he began work conditioning, but his symptoms remained the same. *Id.* Dr. Bardfield recommended continued work conditioning and reassessment in four weeks. *Id.* He was kept off work at this time. *Id.* Petitioner testified that he continued with work hardening over the next several months and continued to follow-up with Dr. Bardfield during that time. Further he testified that following the work hardening program, he was sent for a functional capacity evaluation (hereinafter "FCE").

On May 18, 2016, Petitioner underwent a FCE at ATI physical therapy. (Pet. Ex. 3, p. 94-99, Ex. 3a, p. 100). The FCE report notes that the evaluation was determined valid, indicating that Petitioner gave effort during the evaluation. (Pet. Ex. 3, p. 94). The report notes that the occupation of construction laborer classifies as a heavy occupational physical demand level. *Id.* The report notes that Petitioner demonstrated a medium physical demand level ability during the evaluation. *Id.* Further, the report notes that the patient's capabilities fall below the DOT level for his type of work. *Id.* The whole body assessment chart shows that Petitioner was able to frequently lift up to forty two (42) pounds frequently. (Pet. Ex. 3, p. 95). Petitioner testified that he is required to lift of to one hundred (100) pounds regularly as a construction laborer for the City of Chicago.

On June 1, 2016, Petitioner returned to see Dr. Bardfield, following the FCE, complaining of pain of 7 of 10 in his lower back. (Pet. Ex. 2, p. 67). Dr. Bardfield notes that he reviewed the FCE results and that Petitioner's functional level fell well below the demands of his job. (Pet. Ex. 2, p. 68). Dr. Bardfield placed permanent restrictions on the Petitioner during the visit, noting that he is unable to return to job as a Construction Laborer. *Id.* Petitioner testified that he continued to follow-up with Dr. Bardfield for pain management after he was given permanent restrictions by Dr. Bardfield. He testified that he also was given a home exercise program by Dr. Bardfield. Petitioner testified that he saw Dr. Bardfield every couple of months and continues to do so in order to get refills on pain medication. Further, he testified that he continues to take pain medication when necessary.

Petitioner testified that he informed his employer of the permanent restriction and that the City of Chicago was unable to accommodate those restrictions. He testified that he received a letter from his employer regarding a job search program that he would be required to begin in order to maintain his disability benefits. He testified that he presented to the DePaul Center for orientation on the job program. He testified that as part of the program, he was required to search for ten (10) jobs per week and turn in the job searches every Monday morning. He testified that he was required to fill out a job log form each week, listing the various jobs and the type of work. He testified that he cooperated with the program and completed the job log form every week. He testified that he continued to get disability benefits while he was involved in the job search program. Petitioner was shown the stack of job form logs during the trial and authenticated the documents. (Pet. Ex. 4). Petitioner confirmed that the handwriting shown on the forms was his handwriting.

Petitioner testified that he would apply for various types of non-construction type labor jobs. He testified that most of the jobs that he would apply for were warehouse or factory jobs that involved cleaning, sweeping and some light lifting. He testified that he would sometimes receive phone calls from the places that he applied to but was never brought in for an interview. He testified that when he would speak to the prospective employers and they would learn of his lower back injury that they would tell him that they will call him if they have something for him but that he would never hear from them again.

He testified that in November of 2018, he received a phone call from a counselor in the

job program informing him that since he could not return to work as a construction laborer that he should not be writing "labor" in the box describing the type of work, but rather the exact position he was applying for. He testified that in the two years prior, he was never told by any personnel through the program, that he was doing something incorrect with respect to the job search log's he was turning in weekly. Further, he testified that when he was informed of this, he complied with the request for the future job search log forms that he would fill out prior to submission. He testified that he stopped receiving disability benefits in November of 2018. He testified that he continued to cooperate with the job search program even though he was not receiving his disability benefits. He testified that Monday, January 13, 2019 was the last time prior to the trial that he submitted the job search log.

CONCLUSIONS OF LAW

The Arbitrator adopts the Statement of Facts in support of the Conclusions of Law.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of 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). Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin &*

Bayley/Hucks, 08 ILWC 004187 (2010).

The Arbitrator finds Petitioner's testimony to be credible based upon his demeanor during the hearing and the medical evidence. The Arbitrator also notes that although Respondent's attorney questioned Petitioner's credibility, there was no witness called

4. **CAUSAL RELATION**

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).

It is well settled that employers take their employees as they find them. Therefore, even though an employee may have a pre-existing condition which may make him more susceptible to an injury, compensation for the injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co., v. Industrial Comm'n*, 92 Ill. 2d 30, 36, 440 N.E.2d 861 (1982). Furthermore, an accidental injury need not be the sole causative factor, or even the primary causative factor as long as it was a causative factor in the resulting condition of ill-being. *Rock Road Construction Co., v. Industrial Comm'n*, 37 Ill. 2d 123, 127, 227 N.E.2d 65 (1967). Although this is well settled law in the state of Illinois, the Petitioner's work related injury was the primary causative factor in the resulting condition of ill-being. If a pre-existing condition was asymptomatic prior to the injury and then became symptomatic as a result of the injury, aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Id* at 67-68.

The Arbitrator finds Petitioner's current condition of ill-being is causally related to his work injury of October 1, 2015. Accordingly, based on the credible testimony of the petitioner as well as the medical records and opinions of Dr. Lorenz, Dr. Bardfield, and Dr. Diadula, including the MRI of the lumbar spine and the FCE report, the Arbitrator finds that the petitioner has affirmatively demonstrated a causal relationship between his work-related injury of October 1, 2015 and his current condition of ill-being. Immediately prior to this injury, Petitioner did not have any issues with his lower back was working full duty. Petitioner admitted that he sustained a prior lower back injury while working for the Respondent approximately ten years ago,

however he recovered from that injury and returned to work without any physical limitations. Therefore, the Arbitrator notes that the prior injury is insignificant.

The Arbitrator notes that following the October 1, 2015 work injury, Petitioner complained immediately of lower back pain with numbness and tingling down his left leg. The Arbitrator notes that the MRI of the lower back revealed objective evidence of a disc injury at the L5-S1 level of the lumbar spine. Further, the Arbitrator notes that Petitioner's subjective pain complaints correspond with the objective findings on the lumbar spine MRI. The records show that the injury caused an immediate disability to Petitioner's lower back. The mechanism of injury described as lifting a sewer cover that weighed in excess of one hundred (100) pounds, is a competent cause to sustain a lower back disc injury. No evidence was presented by Respondent that would call into question whether Petitioner's current condition of ill-being is causally related to the October 1, 2015 work related injury. Further, with respect to the Petitioner's neck and left shoulder, the Arbitrator finds continued impairment.

8. **TTD AND MAINTENANCE BENEFITS**

Having found an accident that arose out of an in the course of Petitioner's employment, and that Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator awards temporary total disability benefits to the Petitioner as well as maintenance benefits. The medical records show that Mr. Smith was kept off work from October 20, 2015 through the present time of January 15, 2019. (Pet. Ex. 1, 2). Petitioner testified that he has been kept on an off-work restriction by Dr. Lorenz and Dr. Bardfield and the same is confirmed by the submitted records. Further, the evidence shows that Mr. Smith remained off work after he was placed on permanent restrictions that his employer was unable to accommodate.

The evidence shows that Mr. Smith competently participated in a job search program through the City of Chicago from January of 2016 to the present. The Arbitrator notes that Petitioner submitted job search logs into evidence that corroborates his testimony regarding the job search program participation. (Pet. Ex. 4). Further, review of the job search logs confirms that the Petitioner was not applying for construction laborer jobs but rather general labor positions of factory and warehouse work. The Arbitrator notes that the job search logs submitted show that the Petitioner continues to be actively involved in an active job search and is therefore entitled to continued Maintenance benefits under The Act. The Arbitrator finds Respondent shall pay Petitioner the sum of $1,021.40/week for a further period of 53 4/7 weeks for temporary total disability benefits from 10/21/15 through 10/31/16, and 62 6/7 for maintenance benefits from 11/1/16 through 1/15/19. The Arbitrator awards a credit to the Respondent for any TTD and/or Maintenance benefits that was already paid to Petitioner at the time of the trial.

10. **NATURE AND EXTENT**

An AMA impairment rating was not done in this matter; however, Section 8.1(b) of the Act requires consideration of five factors in determining permanent partial disability:

1. The reported level of impairment;

2. Petitioner's occupation;
3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) also states, "No single 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 a physician must be examined." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

1. Reported level of impairment

An AMA impairment rating was not done in this case. This does not preclude an award for partial permanent disability.

2. Petitioner's Occupation

Petitioner was diagnosed with a herniated disc at L5-S1 that was treated conservatively with medication therapy, physical therapy and a work conditioning program. Once the Petitioner reached maximum medical improvement, he was sent for an FCE. This evaluation revealed objective evidence of impairment with respect to lifting, climbing, pushing, pulling, etc. He was only able to perform at a Medium physical demand level with the ability to lift a maximum of 42 pounds. His employment position as a construction requires regular lifting up to 100 pounds. As such, he is unable to return to his former employment with the City of Chicago as a construction laborer. Therefore, as such, the Arbitrator determines that the Petitioner is entitled to an award for loss of trade.

The Arbitrator notes that the record reveals that Petitioner was employed as a construction laborer for the City of Chicago Water Department at the time of the accident and that he was unable to return to work in his prior capacity as a result of said injury. Therefore, the Petitioner suffered a loss of trade due to his injuries and is unable to return to that position. This factor is given great weight.

3. Petitioner's age at the time of injury

The Arbitrator notes that Petitioner was 59 years old at the time of the work-related injury sustained on October 1, 2015. The Arbitrator also notes that despite his age, the Petitioner demonstrated that he wishes to continue working. Petitioner has been involved in a job-search program looking for alternative employment for the last two years and continued doing so up to the date of the trial. There is no evidence that Petitioner is going to retire due to his age. This is relevant and receives some weight.

4. Petitioner's future earning capacity

Petitioner's future earning capacity, the Arbitrator notes is greatly diminished. The parties stipulated to an average weekly wage of $1,532.10, which equates to $38.30 per hour on a standard 40-hour work week. Per his testimony which was uncontroverted Petitioner has been a construction laborer for many years and therefore does not have any other transferrable skills. As such, the Petitioner will not be able to earn nearly as much as he was earning as a union construction laborer. This factor is given great weight.

5. Evidence of disability corroborated by medical records

The evidence of disability corroborated by the treating medical records and the FCE, is significant. Petitioner underwent a valid FCE, wherein he provided consistent effort throughout the entire examination. The results of the evaluation indicated that Petitioner demonstrated the ability to function in the Medium Physical Demand Category. Mr. Rivers demonstrated the ability to lift to 42 lbs. overall on a frequent basis. These deficits are significant when comparing his capabilities of constantly lifting to and in excess of 100 pounds regularly as a construction laborer.

Therefore, based on the medical evidence provided, the fact that the Petitioner's injury resulted in loss of trade, Petitioner has proved that he sustained a 50% loss of person as a whole, (weeks 250 x $735.37 = $188,805.00).

11. PENALTIES AND FEES

Section 19(k) of the Act authorizes the assessment of a penalty if the petitioner establishes that the respondent is guilty of unreasonable or vexatious conduct, which does not present a real controversy but are merely frivolous or further delay. *820 ILCS, 305/19.* Penalties under Section 19(k) are discretionary rather than mandatory. *Smith v. Industrial Commission, 170 Ill. App. 3d 626, 525 N.E. 2d 81 (1988).* Section 19(l) of the Act provides, in part, for additional compensation when the respondent "shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of weekly compensation benefits due to an injured employee during the period of temporary total disability". *820 ILCS, 305/19(l).* Findings of the same behavior by the respondent also allows the Commission to "assess all or any part of the attorney's fees and cost against the respondent. *820 ILCS, 305/16.*

The purpose of the aforementioned sections of the Act is to "expedite the compensation of industrial injured workers and penalize an employer who unreasonably or in bad faith, delays or withholds compensation due an employee." *Avon Products v. Industrial Commission, 82 Ill. 2d 297, 412, N.E. 2d 468 (1980).* However, this is not intended to inhibit contests of liability or appeals by employers who honestly believe an employee not entitled to compensation." *Id.* An employer is entitled to challenge liability when the challenge is based upon a reasonable belief that compensation would not be appropriate under the Act. Therefore, a good faith challenge of liability will not warrant the assessment of penalties against the employer. *Id.*

Reasonableness is the foremost test for determining whether penalties are appropriate. These sections were created to prevent the bad faith, unreasonable delay or nonpayment in the payment

of benefits to injured employees. Where there is a reasonable controversy, which results in the withholding of benefits, the Illinois Courts have refused to assess penalties. To do so would be to deprive the employer's rights to pursue a challenge based upon a reasonable belief as well as to deny their right to an appeal. *O'Neal Brothers Construction Company v. Industrial Commission, 93 Ill.2d 30, 442 N.E.2d 895 (1982)* Doing so "would be substantially burdened were penalties to be imposed on all employers who appeal and lose", as well as unjust. *Id.*

The Arbitrator finds that penalties and fees should be imposed upon Respondent pursuant to Section 19(k), Section 19(l) and Section 16 of the Act. Petitioner presented its motion for penalties pursuant to Sections 19(k) and 19(l), as well as attorney's fees pursuant to Section following the trial. Petitioner alleges that maintenance benefits were terminated without justification as Petitioner was compliant with the Respondent's job search program. Petitioner then filed a Request for hearing set for January 15, 2019, that proceeded on that date.

At trial, Petitioner testified regarding his cooperation with the City of Chicago job program over the course of a two-year period. The Petitioner testified that when he was unable to return to work as a construction laborer, he was notified by the City about starting a job program. He testified that he presented to an orientation wherein he was informed what his responsibility was as it relates to the job program. He testified that he was required to complete ten (10) job searches per week and turn them into the City of Chicago every Monday morning. Petitioner testified that he complied with this program and kept copies of each job search log that was created weekly. Further, the Petitioner submitted copies of those job searches as evidence at the trial. (Pet. Ex. 4).

Arbitrator's review of the documents submitted reveals that Petitioner testified credibly with respect to his efforts. Petitioner testified that he applied for various types of jobs, including warehouse and factory labor positions. Petitioner described the type of jobs within those industries as factory line work and general labor positions, including cleaning, sweeping, etc. Petitioner testified that he did not apply for construction labor positions as his treating physician released Petitioner with permanent restrictions which was not to return to "construction labor." His physician never stated that he was unable to work safely in other lighter types of general labor positions. Review of the evidence and Petitioner's testimony, the Arbitrator agrees that Petitioner was not applying for jobs that he was unable to physically handle. Further, the Respondent did not present any evidence that would contradict Petitioner's testimony or documents submitted as Petitioner's Exhibit 4. Further, counsel for the Respondent attempted to argue additional facts relating to non-compliance, that were not supported by the evidence. The only document relating to the "non-compliance" that was submitted by Respondent was a letter sent to Petitioner, informing him that benefits were being terminated for "non-compliance." The letter did not explain what the non-compliance was nor were any witnesses called by Respondent to testify regarding the basis for termination of benefits. As such, Petitioner's testimony as well as the submitted evidence of the job searches show that Petitioner was in compliance with the active job search and therefore his benefits were unjustly severed.

Based on the aforementioned history, Respondent improperly cut off Petitioner's TTD and Maintenance benefits. As a result, Petitioner has been without benefits from November 24,

2018 through the present (February 5, 2019). Currently, it has been seventy five (75) days or 10 5/7. Consequently, Respondent is hereby ordered to pay $2,250.00 ($30 per day x 75 days) to Petitioner as penalties under Section 19(l), and $1,125.00 (50% of total TTD benefits owed) since the delay has been unreasonable as penalties under Section 19(k). Respondent is also ordered to pay $675.00 (20% of total penalties under Sections 19(l) and 19(k) to Petitioner as penalties under Section 16.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☐ Affirm and adopt (no changes)
☒ Affirm with changes
☐ Reverse
☒ Modify Strike remainder of decision

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEFFREY TURNER,

Petitioner,

vs. NO: 18 WC 20355

STATE OF ILLINOIS,
CHOATE MENTAL HEALTH CENTER,

21IWCC0078

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, average weekly wage/benefit rates, temporary total disability, medical expenses, and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part 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, herein, affirms the denial of accident. The Commission, further herein, modifies the decision, and strikes the remainder of the Arbitrator's decision, all remaining issues are rendered moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that with affirming the denial of accident, and the remainder of the decision being stricken, all other issues are rendered moot.

21IWCC0078

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

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

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

DATED: FEB 2 6 2021
o- 1/12/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

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

TURNER, JEFFREY
Employee/Petitioner

Case# **18WC020355**

18WC024533
18WC024534

ST OF IL/CHOATE MENTAL HEALTH
Employer/Respondent

21IWCC0078

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

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

APR 16 2020

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

21IWCC0078

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)

JEFFREY TURNER
Employee/Petitioner

v.

STATE OF ILLINOIS/CHOATE MENTAL HEALTH
Employer/Respondent

Case # 18 WC 20355

Consolidated cases: 18 WC 24533
18 WC 24534

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 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, **5/14/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$67,668.82**; the average weekly wage was **$1,301.32**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **2** dependent children.

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

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

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

ORDER

Because Petitioner did not sustain an accident that arose out of and in the course of his employment and his condition of ill-being is not causally related to his work injury of 5/14/2018, benefits are denied.

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

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

Signature of Arbitrator

4/16/20
Date

APR 16 2020

21IWCC0078

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JEFFREY TURNER,)
)
Employee/Petitioner,)
)
v.) Case No. 18 WC 20355
)
STATE OF ILLINOIS/CHOATE MENTAL)
HEALTH,)
)
Employer/Respondent.)

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on February 11, 2020, pursuant to Section 19(b) of the Act, along with consolidated cases 18 WC 24533 and 18 WC 24534. The parties agree that on May 14, 2018, Petitioner was employed as a Mental Health Tech II at Choate Mental Health. Petitioner alleges he injured his left hand, finger, right hand, and contracted MRSA as a result of being scratched by a patient. The issues in dispute are accident, causal connection, average weekly wage, medical bills, temporary total disability, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner is employed as a Mental Health Tech II for Respondent's Choate Mental Health Center and has worked for Respondent for five years. Petitioner testified he was assisting with a combative patient when the patient lunged and scratched him on his right and left hands. Petitioner testified the patient's roommate had MRSA. Petitioner went straight to the facility nurse for treatment and then to the RSS (head of the department) to report the incident. Petitioner testified the RSS and nurse told him they would document the incident and take care of the situation. Petitioner testified there was blood on his hands when he reported to the nurse. He testified that the nurse treated his injuries but did not put bandages over the scratches.

Petitioner testified there were other employees in the room when the altercation occurred, but he could not recall who was in the room. He could not recall the name of the RSS on duty to whom he reported the accident but did recall it was a female.

Petitioner testified he knew that the roommate of the person who scratched him had MRSA, because the nurses posted it in a group folder and the nurses are good at keeping techs informed of what conditions the patients have. He testified he accompanied the MRSA patient/roommate to Union County Hospital on a couple of occasions to be treated.

Petitioner testified Respondent does not require staff to be in full hospital protective clothing, wear gloves or masks, while working with the individuals. He was not ordered or trained to wear protective clothing when dealing with patients. He came in contact with the patients and their personal affects. Petitioner testified that when he returned to work Respondent provided him material to read and sign regarding precautions when dealing with MRSA.

Petitioner testified he continued to work his shift after the accident and that night he began feeling sick, with difficulty breathing and chest pains. On May 16, 2018, Petitioner left work on his lunch break and went to Carbondale Memorial Hospital where blood work was performed and he was released. Petitioner testified he presented to his primary care physician the next day who assessed his hands and chest and noted swelling. Petitioner was prescribed an antibiotic. He testified he felt very lethargic and tired that evening and the entire left side of his body was swollen. On May 19, 2018, his wife took him to the emergency room where he was admitted with suspected pneumonia. He testified he was hospitalized through May 24, 2018 and was diagnosed with MRSA. Petitioner was discharged with a PICC line to administer intravenous antibiotics. He went to St. Joseph's Memorial Hospital in Murphysboro, Illinois daily to change the antibiotic.

Petitioner testified his condition improved and Dr. Bobo, infectious disease doctor, released him to return to work in mid-June. He returned to work for one day when his primary care physician took him back off work as he was very lethargic. He returned to work on August 27, 2018 and was taken back off work on September 27, 2018 for blood clots in his right leg and lung issues. Petitioner testified he remained off work until April 2019 while he continued to treatment for blood clots. Petitioner testified he has never had blood clots prior to his accident and will continue to develop blood clots in the future.

Petitioner testified he developed a cardiovascular condition. In June 2019, Petitioner went to St. Francis Medical Hospital where he was diagnosed with an enlarged heart. Petitioner testified he had no history of cardiac problems prior to his accident. He testified he has been diagnosed with pneumonia approximately three times since the accident. Petitioner testified he returned to Dr. Bobo's office in July 2019 at which time he was released to return to work.

Petitioner was shown a wage statement of his earnings for pay periods ending 5/15/17 through 4/30/18. (Respondent's Exhibit 3). Petitioner testified his regular earnings for that period were $39,477.25 and overtime earnings were $42,275.66. He testified he worked overtime every week. He testified that overtime was mandatory but he was allowed to volunteer due to his

seniority. He testified he often volunteered because he could pick the unit in which he worked. Petitioner testified that if he did not volunteer he would likely get mandated. If mandated, he could have to work in an unfamiliar unit that could be more dangerous. Petitioner testified he was not able to state which overtime hours were mandated and which were voluntarily worked.

Petitioner testified that since the accident he sleeps in a recliner. He testified he cannot do anything anymore, including his hobbies, and feels like he has lost his life. He testified he does not currently have MRSA symptoms but he is a MRSA carrier for life. Petitioner testified he was diagnosed with congestive heart failure and was put on antibiotics again last week and his pneumonia has returned. Petitioner has gained over 100 pounds since his 5/14/18 accident. He has very little energy but he has to move around due to the blood clots. He is no longer able to care for his lawn or house plants.

Petitioner testified his last day of work was on October 30, 2019. Although he was very sleepy he was able to perform his job duties. He testified his doctors told him he should not work and apply for disability due to stress and his heart condition. He testified that after he was scratched by the patient he touched various parts of his body throughout the day.

On cross, Petitioner testified that the patient that scratched him was agitated and lunged at the RRS who took papers away from the patient. It was when Petitioner intervened that he was scratched on both hands. The RRS's name was DeAnza and was out of the room when Petitioner was attacked. Petitioner testified he treated with the nurse "Kristina" who was at the nurse's station. Petitioner testified there were other witnesses present but he did not remember their names or how many were present. The witnesses were present in the bedroom with him. Petitioner testified that the patient gouged his hands pretty deep and he was bleeding. He testified the nurse cleaned his scratches and put a salve on them.

Petitioner testified it is his job to report agitated behavior of patients. That after he left the nurse's station he reported the incident to his RSS, DeAnza Merriweather. Petitioner testified he asked DeAnza if he needed to do anything and she told him it has been taken care of and she will make a note of it. He testified there is a form that is filled out to record patient's behaviors. Petitioner did not report the incident to the lead shift supervisor, Jacob Sadler, because he felt it should have been reported. Petitioner felt "Jacob Sadler was around when it was happening, because most people were around." Petitioner testified he knew the patient "JB" was being treated for MRSA because there was a piece of paper in his binder that stated what he was being treated for.

When asked whether he involuntarily scratched his chest after the incident, he could not recall. Petitioner testified he has been diagnosed with pneumonia a few times prior to the 5/14/18 accident. He has reoccurring episodes of cellulitis on his legs, but he had never had a reoccurring episode of MRSA. Petitioner testified he worked full duty without restrictions from April

through October, 2019, but was off frequently for blood clots, pneumonia, and an enlarged heart. He was diagnosed with congestive heart failure in August 2019 and is currently treating with a cardiologist.

On re-direct, Petitioner testified he was not aware that his wife or children have ever been exposed to MRSA. He testified he does not see the nurse's notes when he receives treatment at the facility.

On re-cross, Petitioner testified he has completed behavior reports in the past, but he did not for this incident because he was told by the nurse and the RRS the reports would be done and he was "shaken up" after being scratched and bleeding. Petitioner testified his visit to Logan Primary Care on 12/9/17 was unrelated to his 2/11/18 accident.

Respondent called Angela Quick as a witness. Mrs. Quick is a Mental Health Tech IV and has worked for Respondent for 22 years. Mrs. Quick is the timekeeper that schedules employee overtime hours. Mrs. Quick testified that when units are understaffed she calls volunteer employees first and then mandates employees if there are not enough volunteers. Mrs. Quick testified she is familiar with Petitioner's time, but is not familiar with his wages. She testified that approximately 90 percent of the time Petitioner volunteered to work overtime. Mrs. Quick testified that Petitioner's overtime was not consistent in that he did not work the exact same overtime every day. Mrs. Quick testified that employees that volunteer for overtime get to choose which unit they want to work on. Mrs. Quick testified that if Petitioner did not volunteer it did not mean he would get mandated to work overtime every single day.

Respondent called Cathy Kennedy as a witness. Mrs. Kennedy testified she was the workers' compensation coordinator for Respondent at the time of Petitioner's accident. Mrs. Kennedy testified Petitioner's accident was not reported to Respondent's insurer Tri-Star until May 31, 2018 and she received an email regarding the accident on June 1, 2018. Mrs. Kennedy spoke with Petitioner about the accident and he told her he treated with Kristina in the nurse's station. Mrs. Kennedy initiated an investigation and discovered the on-duty nurse on the date of injury was Kristina Harris.

Petitioner completed a Notice of Injury form on May 31, 2018 wherein he stated he reported the accident to his supervisor "Denza Meriweather". He reported he was trying to get a patient to calm down and go to bed when the patient grabbed his left and right hands. The notation indicates additional comments are on the back side of the form; however, the back side of the form offered into evidence is blank. Petitioner identified witnesses to the accident as Connie S., Tammy M., Michael C., Jacob S., and J.P.P.

Petitioner testified he reviewed the deposition transcripts of Respondent's employees and he does not recall if any of the employees were in the room when the accident occurred.

Evidence deposition of Cathy Kennedy, taken on December 12, 2019

Cathy Kennedy is the workers' compensation coordinator for Respondent. Mrs. Kennedy testified she was the comp coordinator for all of Petitioner's work-related claims and is familiar with all of his cases. Mrs. Kennedy testified she contacted Petitioner's supervisor and the employees he listed as witnesses to fill out reports. Mrs. Kennedy testified she was not able to speak with Petitioner because he was incapacitated in the hospital. With the exception of Connie Salazar, none of the witnesses Petitioner listed on the Notice of Injury were aware of the incident. Cathy testified Petitioner worked on May 14 and 15, 2018 and was off work thereafter. He was paid five service connect days and went on medical leave on June 8, 2018. Tri-Star did not approve the claim and Petitioner was placed on nonoccupational leave with no payment of TTD benefits. Petitioner returned to work on July 9, 2018 and worked one day before he went on leave again. Petitioner returned to work on August 27, 2018 worked until September 23, 2018. He worked four days until taking leave again on October 6, 2018 and returned to full duty work on April 11, 2019. Petitioner went back on nonoccupational medical leave on October 31, 2019 and has remained off work since.

Mrs. Kennedy testified she was aware of two employees that had been infected with MRSA in the past, but she was not the workers' compensation coordinator at that time. She testified that Connie Salazar reported in her witness statement that Petitioner was assisting with a patient behavior and she saw blood on Petitioner's hands-wrist area. Connie Salazar stated Petitioner went to the nurse's station to have his wounds cleaned and Petitioner showed Connie his injuries which she described as a deep scratch about 2 to 3 inches long on his upper hand-wrist area. Mrs. Kennedy testified the investigation packet (Respondent's Group Exhibit 3) was not a complete representation of her investigation because she did not include Connie Salazar's statement in the packet.

Evidence deposition of Josh Proctor, taken on December 12, 2019

Josh Proctor was employed with Choate as a Mental Health Tech in May, 2018. Mr. Proctor was working with Petitioner on the evening of May 14, 2018. Mr. Proctor testified he was not aware of any incident involving the Petitioner and a patient. Mr. Proctor testified it would be very unusual for a behavioral incident with a patient to occur on a wing and the staff not be aware. Mr. Proctor testified he completed a witness report on June 5, 2018, wherein he indicated he did not see or hear anything about the incident. Mr. Proctor testified that if a behavioral incident occurred a progress note would be prepared by the staff that witnessed it or by a supervisor or employee. The incident would also be turned in to the lead supervisor and documented in a communication log in order to inform oncoming staff.

Evidence deposition of Jacob Sadler, taken on December 12, 2019

Mr. Sadler testified he was employed at Choate Mental Health on May 14, 2018. Mr. Sadler testified he was the lead worker the night of Petitioner's accident. As the lead worker, it is his job duty to check with all staff about any incidents that have occurred on the shift to complete the shift summary report. The shift summary report includes all behaviors and incidents of physical or verbal aggression from patients to other patients and staff. Mr. Sadler had no recollection of any incident involving Petitioner and a patient on the evening of May 14, 2018. Mr. Sadler testified he would have asked about any incident at the end of his shift so he could document in the event a staff forgot to document. He testified employees are trained to document in the progress notes and report the incident to the nurse, RSS, or the lead worker so the information can be transferred to the next shift and for data collection. On June 5, 2018, Mr. Sadler completed a witness report wherein he indicated he was not aware of any incident that occurred with Petitioner.

Evidence deposition of Kristina Harris, taken on December 12, 2019

Kristina Harris testified she was a registered nurse licensed in Illinois since 2009. In May, 2018, she was employed at Choate as an RN-II Supervisor and was working in that position on the evening of May 14, 2018. At the time of Petitioner's alleged injury, if an employee was injured at work, the nurse on duty treats the employee and completes a report. The employee would also have seen the unit doctor, who would have completed a separate report. Both reports are included in the workers compensation packet. Ms. Harris does not remember treating Petitioner for any injury on May 14, 2018 and she did not complete any reports. On the night of May 14, 2018, Ms. Harris was provided the summary report by the lead worker on duty for her review and signature. Ms. Harris testified she completed a workers' compensation witness report on June 5, 2018. Ms. Harris did not recall treating Petitioner for a scratch by a patient but did recall treating an individual that was scratched by a cat. Ms. Harris believed she would have recalled treating Petitioner for scratches by a patient. Ms. Harris definitely would have completed a report about her treatment. On cross, Ms. Harris testified that typically an employee that was injured by a patient would treat with the nurse on duty, but not always. She agreed it could take time for a MRSA infection to manifest.

Evidence deposition of Tammy Mathis, taken on December 12, 2019

Tammy Mathis testified she had been employed with Choate for twenty-two years. She was a mental health tech III on May 14, 2018. She could not recall if she was working on May 14, 2018. She testified she worked day shift and Petitioner was assigned to midnights, which overlapped when they worked overtime. Ms. Mathis testified most of the time, the staff are aware of a behavior that occurs on the wing. The employees are responsible for reporting an incident to a nurse or to their supervisor so the next shift is aware what has occurred. Ms. Mathis

testified that all staff are trained to immediately complete a behavior note after a behavior or before the shift ends, describing what happened and who was involved. Ms. Mathis completed a behavior report on June 8, 2018, detailing Petitioner's accident. Ms. Mathis testified she was told that Petitioner's accident occurred after she was gone for the day and out of the building. Petitioner testified she does not personally report all of her injuries/contacts with patients. She testified she may not report a superficial injury that was under her clothes, but if it was exposed she would report it. Ms. Mathis testified she knows and trusts coworker Connie Salazar and would have no reason to dispute her recordation of Petitioner's accident.

MEDICAL EVIDENCE

Petitioner presented to Carbondale Memorial Hospital on May 16, 2018 with chest pain. Petitioner complained of soreness when palpating his chest. Petitioner had elevated D-dimer. CT Scans showed no large central pulmonary embolus; atelectasis; and small hiatal hernia. No redness, swelling, or abrasions were noted on Petitioner's hands and he was discharged.

Petitioner presented to his primary care physician on May 17, 2018 with chest pain and shortness of breath. Dr. Keele diagnosed Petitioner with costrochondritis. Petitioner called his primary care on May 18, 2018 with complaints of itching after taking prescribed Tramadol and continued to complain of pain.

Petitioner returned to Carbondale Memorial Hospital on May 19, 2019 with worsening left chest pain and difficulty breathing. Labs and imaging were performed and he was diagnosed with pneumonia of the left lower lobe due to infectious organism. Petitioner complained of sputum times two days and denied any trauma/abrasion with any foreign body. Petitioner was admitted and diagnosed with MRSA based on blood cultures and cellulitis. Petitioner reported he had been scratched at work. No redness, swelling, erythema, or scratches were noted on physical examination. Petitioner was discharged on May 25, 2019 with a PICC line for administration of intravenous vancomycin for continued treatment. Infectious disease specialist, Dr. Linda Bobo, was consulted while Petitioner was hospitalized. Petitioner continued to treat under the care of Dr. Bobo for MRSA infection upon being discharged.

On May 31, 2018, Petitioner reported to Dr. Keele he was slowly feeling better. Dr. Keele prescribed Bactroban for Petitioner and his family to use as prophylaxis. Petitioner treated at St. Joseph's Hospital from May 25, 2018 through July 3, 2018 for administration and infusion of Vancomycin for MRSA and pneumonia.

Petitioner reported to Dr. Hale for continued swelling in his chest. Dr. Hale drained Petitioner's abscess which was negative for infection.

Petitioner returned to Carbondale Memorial Hospital on June 26, 2018 for PICC line infection. New cultures were obtained which were negative for MRSA. Petitioner was diagnosed

with contact dermatitis. The PICC line was changed and Clindamycin was prescribed for the PICC line infection.

Petitioner returned to Carbondale Memorial Hospital on July 5, 2018 where it was recommended Petitioner's PICC line be removed. Dr. Bobo released Petitioner to full duty work with no restrictions on July 9, 2018. Blood cultures taken on June 26, 2018 were negative and antibiotics were discontinued.

On July 11, 2018, Petition was released to return to work by Dr. Keele but Petitioner did not feel ready. Petitioner returned to Dr. Keele on July 25, 2018 with cough and shortness of breath. Petitioner reported his energy had increased. Petitioner had cellulitis on his right lower leg and was started on Bactrim for seven days.

Petitioner returned to Carbondale Memorial on July 27, 2018 with complaints of chills and swelling in the left ankle. Bactrim was initiated and blood cultures were obtained which were negative. Petitioner was diagnosed with cellulitis of his lower extremity.

Petitioner returned to Dr. Bobo for evaluation of small lesions on the right lower extremity. No cellulitis or MRSA was noted and Clindamycin was prescribed. Petitioner followed up with Dr. Keele on August 10, 2018 for MRSA bacterium and most recent skin infection. Petitioner reported fatigue and weakness in his legs. Petitioner was instructed to apply Bactrobain to his nostrils every day.

Petitioner followed up with Dr. Keele on August 23, 2018 for skin infection and MRSA. Petitioner stated he was feeling much better and was ready to return to work. Petitioner was concerned with his weight and reported walking two miles per day.

Petitioner followed-up with Dr. Keele on September 24, 2018 for chest congestion and productive cough. Petitioner complained of increased fatigue.

Petitioner returned to Carbondale Memorial Hospital on September 26, 2018 with complaints of right lower extremity pain. Deep vein thrombosis was identified within the right femoral vein and Cardiology was consulted. Patient admitted to using testosterone supplements for two years. Petitioner was diagnosed with acute venous thromboembolism likely secondary to testosterone use. Petitioner reported to the physician's assistant he had been in bed since MRSA infection. Petitioner was diagnosed with DVT most likely from being sedentary following bacteremia and hematology evaluation was recommended. On September 27, 2018, Petitioner was diagnosed with bilateral pulmonary embolism with right lower extremity DVT from testosterone use with immobility secondary to illness. Testosterone was discontinued and Petitioner was discharged with a prescription for Eloquis.

Petitioner followed up with Dr. Keele on October 10, 2018 for DVT and pulmonary embolism treatment. Petitioner returned to Dr. Bobo on November 12, 2018 with fear he had

MRSA again. All MRSA testing and chest x-ray were negative. Petitioner was instructed to follow up with his primary care and a hematologist. Petitioner continued to treat with Dr. Keele for chronic DVT, PE, chest pain, sudden swings in heart rate, fatigue, and other unrelated health conditions.

Petitioner returned to Carbondale Memorial several more times for treatment of rashes, shortness of breath, leg pain, and other unrelated medical conditions. Petitioner was diagnosed with pulmonary embolism, DVT, and restless leg syndrome. Petitioner was instructed to stop testosterone and follow-up with urology.

Petitioner continued to treat for cellulitis in July, 2019 and was started on preventative antibiotics due to history of MRSA. Petitioner was diagnosed with abdominal cellulitis secondary to a reaction to antibiotic treatment. Examination at Dr. Bobo's office showed no cellulitis, but contact dermatitis.

Petitioner returned to Carbondale Memorial in November, 2019 with right leg pain. He was diagnosed with DVT in the right popliteal vein. It was recommended again that Petitioner consult a hematologist. Petitioner returned to Carbondale Memorial in December, 2019 with itching and was diagnosed with allergic dermatitis.

Petitioner consulted a cardiologist on July 17, 2019 for recurrent DVT, pulmonary emboli, and cardiomegaly. Petitioner informed the cardiologist he recently contracted MRSA after lovenox injections in the abdomen. Petitioner was diagnosed right leg DVT, bilateral pulmonary embolism, morbid obesity, DOI, and chest discomfort.

Petitioner continued to experience DVT, enlarged heart, and congestive heart failure. Petitioner's doctors continued to alter his medications to find a solution that worked. Again hematology evaluation was recommended. Hematology records with Dr. Shafquat were not submitted into evidence.

Evidence deposition of Dr. Linda Bobo, taken on January 2, 2019

Dr. Linda Bobo is board certified in infectious disease and internal medicine. Dr. Bobo initially treated Petitioner when he was hospitalized in May 2018 with MRSA and a chest abscess. Petitioner informed Dr. Bobo he had been scratched on the chest by a patient while working at Choate. Dr. Bobo described the area where Petitioner was scratched as red and puffy. Dr. Bobo testified the surgeons at the hospital opened and drained some of the infection and he was given antibiotics. Petitioner was treated in Dr. Bobo's clinic where swelling was noted at the chest infection and he was referred back to a surgeon to address the infection. Dr. Bobo testified the surgeon opened the wound and found no additional infection. Dr. Bobo testified that Petitioner had MRSA, one of the most common infections in the United States. MRSA can be

contracted from environments, persons, or carriers who have openings in the skin and subsequently scratch the area.

Petitioner was treated with intravenous antibiotics because the MRSA was in his bloodstream. Dr. Bobo testified the infection could travel throughout the body and infect other organs. Dr. Bobo continued to follow-up with Petitioner with blood cultures which were negative. Dr. Bobo swabbed Petitioner's nose to test whether he was a carrier. The culture was negative and Dr. Bobo testified Petitioner was not a carrier of MRSA and will not need additional treatment. Bobo discussed internal and external risks of reoccurrence of MRSA. Petitioner had an internal risk of immunological disorder and an external risk of working in a prison. Dr. Bobo opined Petitioner contracted MRSA from a colonized inmate given the infection occurred in the area where he was scratched. Dr. Bobo had not seen Petitioner's bill, but believed her charges were customary for the type of service rendered.

On cross, Dr. Bobo testified she never examined Petitioner in May, 2018 while he was hospitalized. It was her nurse practitioner that examined Petitioner and Dr. Bobo signed off on the reports. Dr. Bobo had reviewed Petitioner's hospital and clinic records. Blood cultures were taken on June 1, 2018 and June 28, 2018 which were negative for MRSA. Petitioner returned to Dr. Bobo's office on July 31, 2018 with complaints of lesions on his right leg. An ultrasound was performed on his chest which was negative for abscess. Petitioner returned in November 12, 2018 for shortness of breath. Petitioner's MRSA cultures were negative at that time. Dr. Bobo testified MRSA can be contracted from anywhere: environmental exposure, abscess or pimple, sheets, keys, Ipads, or remote controls. People incarcerated in prison have a higher degree of contracting MRSA.

The basis of Dr. Bobo's opinion that Petitioner contracted MRSA while working at Choate is that the infection was near the area where Petitioner was scratched. Dr. Bobo testified her opinion would not change if Petitioner was scratched on the hands instead of the chest. Dr. Bobo testified MRSA can be carried on the skin and a scratch would allow MRSA to manifest.

Evidence deposition of Jacqueline Hileman, taken on December 12, 2019

Jackie Hileman testified she has been a licensed infectious control nurse since 2007. She has been board certified in infection control and epidemiology for two and a half years. She is currently employed with the Department of Human Services, Division of Mental Health, as the health facility surveillance nurse and infection preventionist. In May 2018, Hileman was employed with Choate Mental Health as an RN-I primarily working in infection control. Hileman reviewed labs, cultures, and other information that might pertain to infection control. Hileman also watched for employee and/or patient injuries that pertained to blood and bodily fluid or other infectious material. Additionally, Hileman was responsible for performing infection control surveillance to see if there were any infections emerging on the units. If there

was an emerging infection. Hileman was responsible for preventing an outbreak. Hileman administered vaccinations and performed infection control training for new employees. Hileman testified it was easy to find infectious diseases from the patient perspective because she had access to labs, cultures, and other records. Employees are trained to immediately report an injury and complete a workers' compensation packet. The employees have to be forthright about any infections because Choate does not have access to their medical records. Hileman testified part of her job duties was monitoring and reporting any patient episodes or outbreaks of MRSA. Hileman is familiar with Petitioner's case.

Hileman was asked to identify a document developed by her and Health Services to track MRSA and other infectious agents for the patient and employees at Choate. At the time of the alleged incident, Hileman prepared the infection control log for the division where Petitioner was employed. Hileman identified Petitioner's reported incident on the infectious disease log for May, 2018. Hileman reported Petitioner had sustained a scratch from a patient with the initials "CS". Hileman was familiar with CS prior to the alleged incident of May, 2018. CS does not have a history of MRSA. Once MRSA or other infectious disease were reported, Hileman began a more targeted investigation to develop a timeline of what happened and subsequent steps needed to control the infection. Hileman investigated whether anyone in the unit was infected with MRSA and no one in the unit was infected or a carrier. Hileman reviewed CS roommate and anyone living in close quarters or who worked with CS. No one within CS's close living quarters had a history of MRSA. Hileman testified that if there is nothing found within the facility, Hileman will begin community surveillance.

Employees are trained if a work injury breaks the skin they must report it to their supervisor, nurse on duty, and complete a workers' compensation packet. If there is blood or bodily fluid as part of the employee injury, the nurse completes a separate report to inform health services about the blood or body exposure. Hileman never received any nursing reports about Petitioner's injury. Hileman was not aware of Petitioner's injury until June 7, 2018 when she was notified by the workers 'compensation coordinator that Petitioner reported MRSA.

On cross, Hileman testified she is required by law to report infectious disease outbreaks if there are two or more within a certain amount of time in any one unit. She testified there were seven units at Choate in May 2018. Hileman testified patients of Choate could be carriers of MRSA who are not infected that Respondent is not aware. Hileman testified she looked at the charts of the patient that scratched Petitioner and his roommate's charts and reported no history of MRSA. She investigated the "targeted area" and surrounding unit and did not find evidence of incidents of MRSA for at least one year prior to Petitioner's accident. She testified there were no incidents of MRSA carriers; however, she testified patients are not cultured unless there is an aggressive incident, i.e. biting.

CONCLUSIONS OF LAW

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

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).

Based on the evidence, the Arbitrator finds Petitioner's accident did not arise out of his employment with Respondent. Petitioner did not recall the names of any of the witnesses that were in the room with him when he was attacked by the patient. He could not describe the scratches on his hands. Petitioner did not complete an employee notice of injury, a behavior report, a note in the communication log, or report the incident to the lead worker pursuant to his policy and training. Petitioner testified he reported to the nurse, Kristina Harris, who treated his injury with gauze and ointment. Mrs. Harris does not recall treating Petitioner and did not prepare any reports regarding treatment. Ms. Harris believed she would have recalled treating Petitioner for scratches by a patient and she testified she definitely would have completed a report if she treated him.

Coworker Josh Proctor testified he worked with Petitioner on May 14, 2018 and was not aware of any incident involving the Petitioner and a patient. Mr. Proctor testified it would be very unusual for a behavioral incident with a patient to occur on a wing and the staff not be aware. Lead worker Jacob Sadler testified he asked all staff the evening of the incident about any incidents that had occurred on the shift in order to complete a shift summary report. The shift summary report includes all behaviors and incidents of physical or verbal aggression from patients to other patients and staff. Mr. Sadler's report did not contain any incident involving Petitioner on May 14, 2018.

Connie Salazar is the only witness disclosed by Petitioner on the incident report that stated she had knowledge of Petitioner's accident. Petitioner did not call Connie Salazar as a witness. Mrs. Salazar indicated in her report she did not witness the accident. Petitioner indicated the time of injury was 9:15 p.m. The shift summary report indicates Mrs. Salazar was taking her meal break at 9:15 p.m. Petitioner testified multiple times that RSS Deanza Merriweather was involved in the altercation with the patient that attacked Petitioner and that he reported the incident and injury to Mrs. Merriweather after his treatment with the nurse. Mrs. Merriweather's

witness and supervisor report completed on June 5, 2018 indicate she had no knowledge of the incident described by Petitioner.

Although Petitioner testified he transported the patient's roommate to the hospital on several occasions to treat for MRSA, there is no evidence the roommate, or anyone at Respondent's facility, was infected with or was a carrier of MRSA. Further, the infectious control nurse, Ms. Hileman, testified there is no record of MRSA in the roommate's charts and no evidence he treated for MRSA. Conversely, Petitioner reported to Dr. Bobo he was scratched in the chest by a patient at work who Petitioner knew had MRSA.

Petitioner did not report the incident until May 31, 2018. Petitioner was aware of the protocol after a work injury because he had two earlier incidents at work that he reported within two days.

The Arbitrator finds Petitioner has not proven by a preponderance of the evidence that an accident arose out of and in the course of his employment.

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

The Arbitrator finds there was no accident arising out of and in the course of Petitioner's employment; therefore, Petitioner's current condition is not related to the work accident.

Petitioner has failed to prove he contracted MRSA from Respondent. Petitioner testified he knew the patient's roommate had MRSA because he noticed it in his binder and he took the roommate to the hospital on a couple of occasions to treat for MRSA. Petitioner did not call any nurses or other witnesses from Choate to confirm his testimony that he was exposed to MRSA at the Respondent's facility.

Jackie Hileman was the infectious disease nurse at Choate on May 14, 2018. Mrs. Hileman testified she was responsible for monitoring and overseeing prevention and control of infectious organisms such as MRSA and MDRO in the unit Petitioner worked. Log sheets that were presented to Health Services and the infection control committee on a monthly basis were void of any patients with MRSA. Mrs. Hileman reviewed the labs, cultures, and other records for all of the patients relevant to the incident, including patient that attacked Petitioner and his roommate. Mrs. Hileman testified that her investigation revealed that neither the patient, his roommate, nor any other patient on that unit had been treated for or was a carrier of MRSA. There were no other incidents of staff reporting MRSA.

Dr. Linda Bobo testified that Petitioner likely contracted MRSA from an inmate who was colonized with MRSA because prisons were susceptible to higher rates of MRSA, and because Petitioner's infection was located on his chest where he was scratched. Petitioner was scratched on his hands, not his chest. Although Bobo testified this may not change her opinion because someone's hands touch everything on their body, it did not clarify her opinion about the red and

puffy appearance of the scratch on Petitioner's chest. Petitioner testified at trial, on direct, that he involuntarily scratched his chest after he was scratched by the patient. On cross-examination, he could not recall if he scratched his own chest. Bobo also testified if Petitioner was scratched on the hands and it was MRSA, she would expect the area to be red and swollen. There is no indication in Petitioner's medical records of a documented scratch on Petitioner's hands that was red, swollen, or even irritated. Dr. Bobo testified MRSA is one of the most common infections in the United States and it can be contracted from anywhere, even someone's home. Dr. Bobo testified that MRSA in the blood stream can spread to other organs in the body, but Petitioner's MRSA had completely resolved. Dr. Bobo testified Petitioner was not a carrier of MRSA, and that he did not need additional treatment. Dr. Bobo had not reviewed the infectious disease logs from Choate, which might change her opinion. Dr. Bobo released Petitioner to work on July 12, 2018 but saw him again for cellulitis. Petitioner was cultured and it came back negative for MRSA. Dr. Bobo had released Petitioner from care with a recommendation to see a hematologist. Dr. Bobo's causation opinion was based on inaccurate facts. The preponderance of the evidence shows that Petitioner did not contract MRSA from Respondent. Petitioner is the only individual, patient or staff, that had contracted MRSA since 2016.

Dr. Bobo testified Petitioner's MRSA had resolved. Petitioner has no causation opinion linking his subsequent health conditions to his MRSA infection. Petitioner's application for adjustment of claim alleged injuries to his right and left hand only. Petitioner's records for his initial DVT in September 2018 indicate possible causes being testasterone therapy and inactivity secondary to illness. However, Petitioner testified he had been working for over a month at the time of his DVT and told Dr. Keele in August, 2018 that he was walking two miles per day. The remaining hospital admissions list a history of MRSA infection, but provide no link to those conditions being related to his MRSA infection. Several referrals were made for a hematology evaluation to rule out an underlying cause. Petitioner testified he was treating with a hematologist but did not submit the records in evidence. Those records may shed additional light on the cause of his conditions. Petitioner testified and his medical records show he has not had any subsequent MRSA infections since May, 2018.

Petitioner has failed to show by a preponderance of the evidence that his current condition of ill-being is causally related to his injury.

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

Although overtime wages are generally excluded from the calculation of an employee's compensation, an exception exists where the overtime hours are consistent and required by the employer. 820 ILCS 305/10; *Airborne Express v. Ill. Workers' Comp. Comm'n*, 372 Ill.App.3d 549, 554, 865 N.E.2d 979, 983, 310 Ill.Dec. 259 (2007). In *Airborne Express*, the court stated that overtime "includes those hours in excess of an employer's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment ***or*** which are not part of a set number of hours consistently worked each week." *Id.* at 554.

(emphasis added). The claimant in *Airborne Express* testified that he worked overtime in 31 of the prior 32-week period. The court found that the claimant was not required to work the overtime hours as a condition of his employment because the claimant used his seniority to request the overtime hours. The court also found that the wage summary sheets in evidence showed that the claimant did not work any set number of hours in excess of his regular 4-hour work week. *Id.*

In *Freesen, Inc., v. Industrial Comm'n*, the court listed three bases on which to include overtime hours into the calculation of average weekly wage: that (1) he was required to work overtime as a condition of his employment, (2) he consistently worked a number of overtime hours each week, ***or*** (3) the overtime hours he worked was part of his regular hours of employment. *Freesen, Inc., v. Industrial Comm'n*, 348 Ill.App.3d, 1035, 811 N.E.2d at 322 (2004). (emphasis added). The Commission has interpreted the case law to require that only one of the bases must be proven in order for the overtime hours to be included in the calculation of average weekly wage.

In the present case, the evidence does not show that Petitioner was mandated to work overtime as a condition of his employment. Although Petitioner testified overtime was mandatory at Respondent's facility, there is no evidence that he specifically would have been chosen to work mandatory overtime. Angela Quick, the timekeeper that schedules employee overtime hours for Respondent, testified she only mandates employees to work overtime if she cannot fill the vacant positions with employees that volunteer for overtime. Thus, it is possible that had Petitioner not volunteered he would not be mandated to work overtime if enough employees volunteered. Petitioner testified he often volunteered for overtime and he was not able to state which overtime hours were mandated and which were voluntarily worked. Mrs. Quick also testified that approximately 90 percent of the time Petitioner volunteered to work overtime. Therefore, the Arbitrator finds insufficient proof that Petitioner's overtime hours were mandatory.

The evidence shows Petitioner's regular earnings for pay periods ending 5/15/17 through 4/30/18 were $39,477.25 and overtime earnings were $42,275.66. He testified he worked overtime every week. His regular hours per week were 37.5 and his hourly rate as of February 11, 2018 was $17.57. Petitioner has proven by a preponderance of credible evidence that he consistently worked a number of overtime hours each week and the Arbitrator finds that said overtime wages should be included in the calculation of Petitioner's average weekly wage.

The Arbitrator finds the Petitioner's earnings in the year preceding the accident were:

$39,485.05 (straight time earnings)
+$28,183.77 (2/3 of overtime earnings)
$67,668.82 (includable earnings)

The Arbitrator further finds Petitioner worked 52 weeks prior to the accident. Based on the foregoing and the record taken as a whole, the Arbitrator finds Petitioner's average weekly wage is $1,301.32 ($67,668.82 includable earnings, divided by 52 weeks worked).

Issue (J): **Has Respondent paid all appropriate charges for all reasonable and necessary medical services?**

Based on the Arbitrator's decision with regard to Issues (C) and (F), the Arbitrator finds Petitioner is not entitled to medical benefits and Respondent is not liable for medical services related to Petitioner's injuries.

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

Based on the Arbitrator's decision with regard to Issues (C) and (F), the Arbitrator finds Petitioner is not entitled to prospective medical care.

Issue (L): **Is Petitioner entitled to temporary total disability benefits?**

Based on the Arbitrator's decision with regard to Issues (C) and (F), the Arbitrator finds Petitioner is not entitled to temporary total disability benefits.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

4/10/20

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 *exclude OT from wage calculation*	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEFFREY TURNER,

Petitioner,

vs. NO: 18 WC 24533

STATE OF ILLINOIS,
CHOATE MENTAL HEALTH CENTER,

21IWCC0079

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, average weekly wage/benefit rates, temporary total disability, medical expenses-including prospective medical, and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The Commission specifically addresses the issue of average weekly wage/benefit rates. The Commission, otherwise, affirms the decision of the Arbitrator as to all other issues.

Petitioner identified RX2 as his wage statement. RX2 shows Petitioner's regular wages and overtime earnings for the period 1/31/17-1/15/18. Petitioner testified he earned $39,485.05 in regular wages for this time period and $33,20330 in overtime. (T. 35, 36) Petitioner testified that some overtime was mandatory and some was voluntary. (T. 35) Petitioner testified he volunteered a lot as he did not want to go to some other place. (T. 35) He knew his job at Sycamore and he felt comfortable working with those people. (T. 35) He testified if he did not volunteer he was mandated to work somewhere. RX2 shows that during this time period, Petitioner worked overtime

during each pay period and the number of hours worked varied. (RX2)

Angela Quick testified on behalf of Respondent. Quick is employed by Respondent as a Mental Health Tech IV and her job duties include timekeeping, calling people for overtime and calling people to mandate them to work overtime. (T. 121) Quick testified that when she needs people to fill vacancies so the units are staffed, she first contacts volunteers. (T. 121) If there are not enough volunteers, then she mandates individuals. (T. 121) Quick testified she was the timekeeper at the time of Petitioner's accident of 2/11/18. Quick testified she reviewed Mr. Turner's time for one year preceding the date of accident. (RX3, T. 125) Quick was asked what percentage of that time was volunteered to which she replied 90%. (T. 126) She further testified that Petitioner's overtime was not consistent every single day. (T. 126)

Quick testified if you volunteer you get to pick the vacancy that is open. She stated as far as she knew, Sycamore always had been open. She stated there are four different units available when she calls for overtime and a volunteer can choose the unit. What she cannot fill with volunteers she fills with mandatory. Quick testified Petitioner would not necessarily have been mandated to Dogwood. She stated there is usually overtime left, but that did not mean you would get mandated overtime there every day. She indicated the employee days off are set and they rotate days off so each week they do have days off. If they volunteer, that has nothing to do with their days off. (T.126.-129)

Section 10 of the Act states that overtime is to be excluded in calculating a claimant's average weekly wage. *820 ILCS 305/10.* Although overtime wages are generally excluded from the calculation of an employee's compensation, an exception exists where the overtime hours are consistent and required by the employer. *Airborne Express v. Illinois Workers' Compensation Comm'n*, 372 Ill.App.3d 549, 545, 865 N.E.2d 979, 983, 310 Ill. Dec. 259 (2007). The Commission notes that for overtime to be included in the calculation of the average weekly wage, the claimant must show: 1) he was required to work overtime as a condition of employment; 2) he consistently worked a set number of overtime hours each week; or 3) the overtime hours worked were part of his regular hours of employment. *Freesen*, 348 Ill. App. 3d 1035, 1042.

In this case, Petitioner's regular work week consisted of 37.5 hours. (RX2) In the period 1/31/17-1/15/18, he worked 37.5 hours per week during his regular shift and 1,273.5 total hours of overtime. Overtime was worked in each week during the 52 week period and the hours varied. No evidence was admitted showing Petitioner was required to work the overtime as a condition of his employment. In addition, the wage statement admitted into evidence shows Petitioner did not work a set number of hours in excess of his regular work week. The wage statement shows Petitioner worked an irregular number of overtime hours ranging from, for example, 7.3 hours for pay period ending 3/31/17, to 36.6 hours for pay period ending 5/31/17, to 114.5 for pay period ending 6/30/17. (RX2) The Commission finds *Airborne Express* applicable here. In *Airborne Express*, the Appellate Court found that overtime should not have been included in the claimant's AWW because, "Although the claimant consistently worked overtime, he did not work a set number of overtime hours each week." *Airborne Express, Inc.* 372 Ill. App. 3d 549, 555. The same rationale applies in the case at bar. Although P may have worked overtime during the 52 weeks preceding the injury, the number of hours varied significantly and were not "a set number of overtime hours each week."

21IWCC0079

The Commission notes here that Petitioner admitted no evidence as to a consistent set number of overtime hours worked per week and presented no credible evidence of mandatory versus voluntary overtime hours and locations actually worked, or being a regular part of employment hours. As the overtime was not set and Petitioner worked voluntary overtime, it was not consistent, mandatory overtime for inclusion in the average weekly wage. Overtime is, therefore, excluded from the calculation of the AWW. As such, the Commission finds RX2 which established Petitioner earned $39,485.05 for regular hours worked for the 52 weeks preceding this accident for an average weekly wage of $759.32.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's average weekly wage, excluding overtime, is $759.32; temporary total disability (TTD) rate at $506.21; and permanent partial disability (PPD) rate at $455.59. All else is affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $455.59 per week for a period of 5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused 1% loss of Petitioner's person as a whole, affirming the decision of the Arbitrator. ($2,277.95 total PPD).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,124.00 for medical expenses under §8(a) of the Act.

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

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

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

DATED: FEB 2 6 2021
o-1/12/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TURNER, JEFFREY
Employee/Petitioner

Case# **18WC024533**

18WC024534
18WC020355

ST OF IL/CHOATE MENTAL HEALTH
Employer/Respondent

21IWCC0079

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
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

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

21IWCC0079

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

JEFFREY TURNER
Employee/Petitioner

v.

STATE OF ILLINOIS/CHOATE MENTAL HEALTH
Employer/Respondent

Case # 18 WC 24533

Consolidated cases: 18 WC 24534
18 WC 20355

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 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 _____

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned **$63,575.28**; the average weekly wage was **$1,222.60**.

On the date of accident, Petitioner was **48** 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 $0.00 for other benefits, for a total credit of $0.00.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling **$1,124.00**, equating to **$230.00** due and owing to Logan Primary Care/SIH, **$589.00** due and owing to Union County Hospital, and **$305.00** due and owing to Ciampa Oral Surgery, 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. Respondent is not liable for payment of the following medical bills as they are not causally related to Petitioner's injuries: $166.00 due and owing Logan Primary Care/SIH for date of service 12/9/17; $176.00 for date of service 2/24/18 due and owing Logan Primary Care/SIH; $238.00 due and owing Wells Dental Care for date of service 2/12/18; and $307.00 due and owing Ciampa Oral Surgery for date of service 3/5/18.

Respondent shall pay Petitioner permanent partial disability benefits of $**733.56**/week for **5** weeks, because the injuries sustained caused **1%** loss of **person as a whole,** as provided in §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

4/10/20
Date

APR 16 2020

21IWCC0079

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JEFFREY A. TURNER,
Employee/Petitioner,

v.

STATE OF ILLINOIS/CHOATE MENTAL HEALTH,
Employer/Respondent.

Case No. 18 WC 24533

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on February 11, 2020, along with consolidated cases 18 WC 24534 and 18 WC 20355. The parties agree that on February 11, 2018, Petitioner was employed as a Mental Health Tech II at Choate Mental Health when he slipped in Respondent's parking lot and injured his face, mouth and tooth. The issues in dispute are accident, average weekly wage, medical bill dated 12/9/17, and nature and extent of the injury. All other issues have been stipulated.

TESTIMONY

Petitioner is employed as a Mental Health Tech II for Respondent's Choate Mental Health Center and has worked for Respondent for five years. Petitioner testified that on February 11, 2018, he injured his face, mouth and tooth when he slipped on ice and fell to the ground in Respondent's parking lot. Petitioner testified he was starting an overtime shift at Sycamore Hall when he parked in the parking lot several feet from the building, exited his truck, closed his truck door, turned to walk away, and slipped on ice. He testified he fell and hit his mouth and chin on the ground, causing him to chip a tooth. Petitioner testified his tooth fell out and he had to look for it on the ground.

Petitioner was shown a map of Respondent's property. (Respondent's Exhibit 6). Petitioner marked an "X" on the map to indicate which parking lot he parked in the day of the accident. He corrected the location on cross-examination and put an asterisk symbol in the correct parking lot. He testified that Choate Mental Health is a State facility and its grounds and parking lot are maintained by State employees. The parking lot was icy and the only area that was salted by maintenance was the sidewalk. Petitioner testified he went straight into Sycamore Hall after he fell

and was examined by the facility nurse. He was instructed to go to the hospital. Petitioner testified he was given pain medication at the hospital and was told to follow up with his dentist. Petitioner testified he followed up with his dentist who took x-rays and referred him to an oral surgeon. Petitioner testified two of his injured teeth were extracted and he had other teeth removed that were not injured or related to this accident.

Petitioner testified he has no ongoing symptoms with regard to his facial injuries; however, his tooth is still chipped and he is not able to have the tooth repaired because of blood clot issues he alleges is related to MRSA he contracted in a separate work-related accident on 5/14/18, (Consolidated Case No. 18-WC-20355). Petitioner testified half of the tooth is missing and although he does not experience pain at this time, it is difficult to eat.

Petitioner was shown a wage statement of his earnings for pay periods ending 1/31/17 through 1/15/18. (Respondent's Exhibit 2). Petitioner testified his regular earnings for that period were $39,485.05 and overtime earnings were $33,203.30. He testified he worked overtime every week. He testified that overtime was mandatory but he was allowed to volunteer due to his seniority. He testified he often volunteered because he could pick the unit in which he worked. Petitioner testified that if he did not volunteer he would likely get mandated. If mandated, he could have to work in an unfamiliar unit that could be more dangerous. Petitioner testified he was not able to state which overtime hours were mandated and which were voluntarily worked.

On cross-examination, Petitioner testified two teeth were injured in the work accident. He clarified that one tooth was extracted and one broken tooth remained in his mouth. The extracted and chipped tooth are located next to each other. Petitioner testified on re-direct that the parking lot he parked in the day of the accident was the "employee parking lot". He testified there is a parking lot in the front of the building as well; however, he parks in the parking lot at the rear of the building which he marked on Respondent's Exhibit 6 with an asterisk. He testified that other employees working in Sycamore Hall also park in the rear parking lot. He agreed the public could also use the parking lots at Choate.

Petitioner testified that his visit to Logan Primary Care on 12/9/17 was unrelated to his 2/11/18 accident. Petitioner testified the majority of his overtime hours were volunteered overtime hours. On re-direct, Petitioner clarified again that if he did not volunteer for the overtime, he could be mandated to work in an unfamiliar unit. He stated that most of the time overtime would be mandated.

Respondent called Angela Quick as a witness. Mrs. Quick is a Mental Health Tech IV and has worked for Respondent for 22 years. Mrs. Quick is the timekeeper that schedules employee overtime hours. Mrs. Quick testified that when units are understaffed she calls volunteer employees first and then mandates employees if there are not enough volunteers. Mrs. Quick testified she is familiar with Petitioner's time, but is not familiar with his wages. She testified that approximately 90 percent of the time Petitioner volunteered to work overtime. Mrs. Quick testified that Petitioner's overtime was not consistent in that he did not work the exact same overtime every day. Mrs. Quick testified that employees that volunteer for overtime get to

choose which unit they want to work on. Mrs. Quick testified that if Petitioner did not volunteer it did not mean he would get mandated to work overtime every single day.

Cathy Kennedy testified on behalf of Respondent via evidence deposition. Mrs. Kennedy testified she was the workers' compensation coordinator for Choate Mental Health at the time of Petitioner's accident. Mrs. Kennedy testified Petitioner was given service connect days for February 11, 14, and 15, 2018, that he worked on February 12 and 13, 2018, and he was not paid temporary total disability. She testified Petitioner indicated on his Employee Notice of Injury form he was walking into work on February 11, 2018 when he slipped on ice in the parking lot and broke his tooth. Mrs. Kennedy testified that the parking lot Petitioner parked in the day of his accident was open and used by the public. She testified there are other state entities with offices at Choate and employees and visitors can use any of the approximately 12 parking lots.

Mrs. Kennedy testified that employees park in the lot closest to the building they are assigned to work out of convenience and that the parking lots are maintained by the State of Illinois. The employees are provided with placards to place in their cars but that is not policed. She testified that the only individuals on the premises that Respondent accounts for are individuals that visit Respondent.

MEDICAL EVIDENCE

Petitioner presented to Respondent's facility nurse immediately following the accident with complaints of mouth pain and one broken tooth. No bleeding was observed. Petitioner was instructed to follow up with his primary care physician.

Petitioner presented to Union County Hospital on 2/11/18 where he was diagnosed with a fractured upper tooth. Petitioner complained of pain in the upper right lateral incisor. He was prescribed Tramadol and ordered to follow up with his primary care physician.

Petitioner presented to Logan Primary Care on 2/15/18 with complaints of moderate, constant aching and sharp, shooting and throbbing pain at the right upper central incisor #8. Facial swelling was noted. The record submitted into evidence does not state what treatment, if any, was provided to Petitioner. However, the medical bill associated with visit 2/15/18 indicates Petitioner received a Ketorolac Tromethamine injection used to treat inflammation and pain. Petitioner submitted a medical record and bill from Logan Primary Care for date of service 2/24/18. This record does not contain any reference to injuries arising from this accident. Petitioner submitted records from his dentist, Dr. Wells, for dates preceding the 2/11/18 accident. Petitioner did not offer into evidence any treatment records or x-rays from Dr. Wells following his work incident.

Petitioner was examined by Dr. Ciampa on 3/5/18. Petitioner underwent three extractions at right upper #7, right lower #31, and left upper at #15.

CONCLUSIONS OF LAW

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

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).

In *DeLeon v. Fresenius Medical Care*, the Commission found the Petitioner sustained accidental injuries arising out of and in the course of her employment where she slipped and fell on ice in a parking lot. *DeLeon*, 19 I.W.C.C. 0365 (July 19, 2019). Petitioner was a patient care technician for Respondent working with dialysis patients. Respondent's facility was located in an office building shared by a childcare center and vascular clinic. There was a parking lot where members of the public and employees could park. The parking lot was not owned, maintained or controlled by the Respondent. Witnesses testified there were no specific parking spots designated for employees. Petitioner and a co-worker arrived at work at 4:00 a.m. on December 22. It was dark and the parking lot was icy and slippery. Petitioner walked from her parking spot to the door to enter the Respondent's facilities. As Petitioner approached the door she slipped on ice and fell. The co-worker testified that he saw Petitioner fall partially on the sidewalk and partially on the parking lot. The Arbitrator found that Petitioner's fall did not arise out of her employment. The Arbitrator noted the Petitioner did not fall on Respondent's premises (either the sidewalk or parking lot). The Arbitrator noted Respondent did not own or maintain the area where Petitioner fell and the parking lot was open to the general public. The Arbitrator also found the Respondent did not require Petitioner to use the entrance and the Respondent did not direct the Petitioner to park in the area where she parked. The Commission on review reversed the Arbitrator's decision. In determining whether the Petitioner's accident was in the course of employment, the Commission found the parking lot was part of the employer's premises. "Additionally, there is no dispute that Respondent's employees customarily park in the parking lot. In similar circumstances, the Illinois Supreme Court determined that "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. *De Hoyas v. Indus. Comm'n*, 26 Ill. 2d 110, 113 (1962). After analyzing the relevant facts, the Commission finds the parking lot is part of the employer's premises". The Commission found the accident arose out of Petitioner's employment as the Petitioner's injuries resulted directly from the "hazardous" condition of the parking lot.

In the present case, Petitioner testified he was starting an overtime shift at Sycamore Hall when he parked in the parking lot several feet from the building. Petitioner identified the parking lot in which he parked the day of the accident, which he referred to as the rear parking lot closest to the entrance of Sycamore Hall and also referred to it as the "employee parking lot". He testified that other employees working in Sycamore Hall also parked in the rear parking lot.

Cathy Kennedy, the workers' compensation coordinator for Respondent, testified that employees of Respondent typically parked in the parking lot closest to the hall in which they were assigned to work out of convenience. She testified employees, visitors, and the public could park in any of the 12 parking lots and that the parking lots are maintained by the State of Illinois. Respondent also provided its employees with placards to place in their cars when parking in the lots.

Based on the evidence, Respondent provided its employees with parking lots where they customarily parked, including the lot where Petitioner's accident occurred, and is responsible for the maintenance of the parking lots. The Arbitrator finds the parking lot is part of Respondent's premises and Petitioner's accident arose out of his employment as his injuries resulted directly from the "hazardous" condition of the parking lot.

Issue (G): **What were Petitioner's earning?**

Although overtime wages are generally excluded from the calculation of an employee's compensation, an exception exists where the overtime hours are consistent and required by the employer. 820 ILCS 305/10; *Airborne Express v. Ill. Workers' Comp. Comm'n*, 372 Ill.App.3d 549, 554, 865 N.E.2d 979, 983, 310 Ill.Dec. 259 (2007). In *Airborne Express*, the court stated that overtime "includes those hours in excess of an employer's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment ***or*** which are not part of a set number of hours consistently worked each week." *Id.* at 554. (emphasis added). The claimant in *Airborne Express* testified that he worked overtime in 31 of the prior 32-week period. The court found that the claimant was not required to work the overtime hours as a condition of his employment because the claimant used his seniority to request the overtime hours. The court also found that the wage summary sheets in evidence showed that the claimant did not work any set number of hours in excess of his regular 4-hour work week. *Id.*

In *Freesen, Inc., v. Industrial Comm'n*, the court listed three bases on which to include overtime hours into the calculation of average weekly wage: that (1) he was required to work overtime as a condition of his employment, (2) he consistently worked a number of overtime hours each week, ***or*** (3) the overtime hours he worked was part of his regular hours of employment. *Freesen, Inc., v. Industrial Comm'n,* 348 Ill.App.3d, 1035, 811 N.E.2d at 322 (2004). (emphasis added). The Commission has interpreted the case law to require that only one of the bases must be proven in order for the overtime hours to be included in the calculation of average weekly wage.

In the present case, the evidence does not show that Petitioner was mandated to work overtime as a condition of his employment. Although Petitioner testified overtime was mandatory at Respondent's facility, there is no evidence that he specifically would have been chosen to work mandatory overtime. Angela Quick, the timekeeper that schedules employee overtime hours for Respondent, testified she only mandates employees to work overtime if she cannot fill the vacant positions with employees that volunteer for overtime. Thus, it is possible that had Petitioner not volunteered he would not be mandated to work overtime if enough employees volunteered. Petitioner testified he often volunteered for overtime and he was not able to state which overtime hours were mandated and which were voluntarily worked. Mrs. Quick also testified that approximately 90 percent of the time Petitioner volunteered to work overtime. Therefore, the Arbitrator finds insufficient proof that Petitioner's overtime hours were mandatory.

Petitioner testified his regular earnings for the 52 weeks preceding the accident were $39,485.05 and overtime earnings were $33,203.30. He testified he worked overtime every week. The wage statement entered into evidence shows Petitioner worked overtime 52 out of the 52 weeks preceding the accident. His regular hours per week were 37.5 at an hourly rate of $17.57. Petitioner has proven by a preponderance of credible evidence that he consistently worked a number of overtime hours each week and the Arbitrator finds that said overtime wages should be included in the calculation of Petitioner's average weekly wage.

During the 52 weeks prior to 2/11/18, Petitioner earned $39,485.05 in straight time earnings. He also worked a total of 1,371.1 hours of overtime in the 52 out of 52 weeks prior to the accident. His testimony in this regard was unrefuted. Therefore, the Arbitrator finds the Petitioner's earnings in the year preceding the accident were:

$39,485.05 (straight time earnings)
+$24,090.23 (1,371.1 overtime hours at straight time rate $17.57)
$63,575.28 (includable earnings)

The Arbitrator further finds Petitioner worked 52 weeks prior to the accident. Based on the foregoing and the record taken as a whole, the Arbitrator finds Petitioner's average weekly wage is $1,222.60 ($63,575.28 includable earnings, divided by 52 weeks worked).

Issue (J): Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The parties stipulated that Petitioner's current condition of ill-being is causally connected to his accident of 2/11/18. Therefore, the Arbitrator finds that Petitioner is entitled to medical benefits related to his face/head. The Arbitrator finds Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling **$1,124.00**, equating to **$230.00** due and owing to Logan Primary Care/SIH, **$589.**00 due and owing to Union County Hospital, and **$305.00** due and owing to Ciampa Oral Surgery, 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.

Respondent disputes liability for medical bill with date of service 12/9/17 from Logan Primary Care in the amount of $166.00. As the treatment record reflects the services were related to an abscessed tooth and Petitioner testified at trial this treatment was unrelated to the work accident of February 11, 2018, Respondent is not liable for payment of this bill.

The Arbitrator further finds Respondent is not liable for payment of the following medical bills: $176.00 due and owing Logan Primary Care/SIH for date of service 2/24/18 and $238.00 due and owing Wells Dental Care for date of service 2/12/18, as there was no evidence submitted into evidence that such treatment was related to Petitioner's injuries resulting from the accident of 2/11/18. Respondent is also not liable for payment of medical expenses in the amount of $307.00 due and owing Ciampa Oral Surgery for date of service 3/5/18 (specifically charges $25.00 and $25.00 for periapical imaging and $227.00 and $130.00 for extraction), as such expenses were not related to teeth Petitioner injured as a result of his accident on 2/11/18.

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 without restrictions for Respondent as a mental health technician. No evidence was introduced showing Petitioner's injuries interfere with the performance of his job, therefore the Arbitrator places greater weight on 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. Petitioner's age had no effect on his injury, recovery, or occupation. The Arbitrator therefore places lesser weight on 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 has returned to full-duty work for Respondent in the same position he was working prior to the accident. Petitioner testified he has no ongoing symptoms other than difficulty eating and therefore no difficulty performing his job duties that would affect his future earnings capacity. The Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. Petitioner was examined by Respondent's facility nurse immediately following the accident with complaints of mouth pain and one broken tooth. Petitioner was treated at the hospital the day of the accident where he was diagnosed with a fractured upper tooth with noted pain in the upper right lateral incisor (tooth to the right of Petitioner's right front tooth-Lateral Incisor #7). He was prescribed Tramadol and ordered to follow up with his primary care physician.

Petitioner presented to Logan Primary Care on 2/15/18 with complaints of moderate, constant aching and sharp, shooting and throbbing pain at the right upper central incisor #8 (Petitioner's right front tooth). Facial swelling was noted. The record submitted into evidence does not state what treatment, if any, was provided to Petitioner. However, the medical bill associated with visit 2/15/18 indicates Petitioner received a Ketorolac Tromethamine injection used to treat inflammation and pain. Petitioner underwent extraction of the right upper lateral incisor #7.

The day of the accident, Petitioner complained of pain in his lateral incisor #7 which was ultimately extracted approximately 20 days following 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).

Causation may be shown by a chain of events which demonstrates a previous condition of good health, an accident and a subsequent injury resulting in disability. That scenario may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n,* 93 Ill.2d 69, 63-63 (1982). In the case at hand, no evidence was presented that Petitioner had a history of pain or treatment with regard to his lateral or central incisors prior to his 2/11/18 accident. There is direct evidence and testimony that Petitioner sustained injury and/or complained of pain immediately following the accident to his lateral and central incisors.

Petitioner testified he has no ongoing symptoms with regard to his facial injuries; however, his chipped tooth has not been repaired making it difficult to eat. The Arbitrator 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 1% of the person as a whole under §8(d)2 of the Act.

Linda J. Cantrell

Linda Cantrell, Arbitrator

4/10/20

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 *exclude OT from wage calculation*	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify Reduce PPD to -0-	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEFFREY TURNER,

Petitioner,

vs. NO: 18 WC 24534

STATE OF ILLINOIS,
CHOATE MENTAL HEALTH CENTER,

21IWCC0080

Respondent.

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The Commission specifically addresses the issues of average weekly wage/benefit rates and permanent partial disability. The Commission affirms the decision of the Arbitrator as to medical expenses, and specifically affirms the denial of the 12/8/17 medical bill. All else is affirmed and adopted.

Petitioner identified RX 1 as his wage statement. RX 1 shows Petitioner's regular wages and overtime wages for the period 9/15/16-8/31/17. Petitioner testified he earned $38,616.65 in regular wages for this time period and $27,391.83 in overtime. (T.18-24) Petitioner testified that some overtime was mandatory and some was voluntary. (T.35) Petitioner testified he volunteered a lot as he did not want to go to some other place. (T.35) Petitioner testified he knew his job at

Sycamore and he felt comfortable working with those people. (T. 35) He testified if he did not volunteer, he was mandated to work somewhere else. RX 1 shows that during this time period Petitioner worked overtime during 21 out of 24 pay periods and the number of hours varied. (RX 1)

Angela Quick testified on behalf of Respondent. Quick is employed by Respondent as a Mental Health Technician IV and her job duties included timekeeping, calling people for overtime and calling people to mandate them to work overtime. (T. 121) Quick testified that when she needs people to fill vacancies, so the units are staffed, she first contacts volunteers. (T. 121). If there are not enough volunteers, then she mandates individuals. (T. 121) Quick testified she was the timekeeper at the time of Petitioner's accident of 9/20/17. Quick testified she reviewed Mr. Turner's time for one year preceding the date of accident. (RX 1, T.125) Quick was asked what percentage of that time was volunteered to which she replied 90%. (T. 126) Quick further testified that Petitioner's overtime was not consistent every single day. (T. 126)

Quick testified if you volunteer you get to pick the vacancy that is open. She stated as far as she knew, Sycamore always had been open. She stated there are four different units available when she calls for OT and a volunteer can choose the unit. What she cannot fill with volunteers she fills with mandatory. Quick testified that Petitioner would not necessarily have been mandated to Dogwood. She stated there is usually overtime left, but that did not mean you would get mandated overtime there every day. She indicated the employee days off are set and they rotate days off so each week they do have days off. If they volunteer, that has nothing to do with their days off. (T.126-129)

Section 10 of the Act states that overtime is to be excluded in calculating a claimant's average weekly wage. *820 ILCS 305/10.* Although overtime wages are generally excluded from the calculation of an employee's compensation, an exception exists where the overtime hours are consistent and required by the employer. *Airborne Express v. Illinois Workers' Compensation Comm'n*, 372 Ill.App.3d 549, 545, 865 N.E.2d 979, 983, 310 Ill. Dec. 259 (2007). The Commission notes that for overtime to be included in the calculation of the average weekly wage, the claimant must show: 1) he was required to work overtime as a condition of employment; 2) he consistently worked a set number of overtime hours each week; or 3) the overtime hours worked were part of his regular hours of employment. *Freesen v. Industrial Comm'n*, 348 Ill. App. 3d 1035, 1042, 811 N.E.2d at 322 (2004). .

In this case, Petitioner's regular work week consisted of 37.5 hours. (RX1) In the period 9/15/16-8/31/17, he worked 37.5 hours per week during his regular shift and 1,133.3 total hours of overtime. Overtime was worked in all but three pay periods during the 52 week period and the hours varied. No evidence was admitted showing Petitioner was required to work the overtime as a condition of his employment. In addition, the wage statement admitted into evidence shows Petitioner did not work a set number of hours in excess of his regular work week. The wage statement shows Petitioner worked an irregular number of overtime hours ranging from, for example, no overtime in pay periods 9/15/16, 9/30/16 and 10/15/16, to 7.3 hours for pay period ending 3/31/17, to 36.6 hours for pay period ending 5/31/17, to 114.5 for pay period ending 6/30/17. (RX1) The Commission finds *Airborne Express* applicable here. In *Airborne Express*, the Appellate Court found that overtime should not have been included in the claimant's AWW

because, "Although the claimant consistently worked overtime, he did not work a set number of overtime hours each week." *Airborne Express, Inc.,* 372 Ill.App.3d 549, 545. The same rationale applies in the case at bar. Although Petitioner may have worked overtime during a number of the 52 weeks preceding the injury, the number of hours varied significantly and were not "a set number of overtime hours each week."

The Commission notes here that Petitioner admitted no evidence as to a consistent set number of overtime hours worked per week and presented no credible evidence of mandatory versus voluntary overtime hours and locations actually worked or being a regular part of employment hours. As the overtime was not set and Petitioner worked voluntary overtime, it was not consistent, mandatory overtime for inclusion in the average weekly wage. Overtime is, therefore, excluded from the calculation of the AWW. As such, the Commission finds RX1 which established Petitioner earned $38,616.65 for regular hours worked for the 52 weeks preceding this accident for an average weekly wage, excluding overtime of $742.63.

As to permanent partial disability, the Commission takes notice of the following;

> §8.1(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.

(i). Neither party submitted an impairment rating so this factor is given no weight.

(ii). Petitioner was and is a mental health technician at Choate. No weight is given to this factor.

(iii). Petitioner was 48 years old and still has a good amount of potential work life dealing with his ongoing conditions. Some weight can be given to this factor.

(iv). Petitioner is earning the same as she did prior to the accident, no evidence of wage loss. No weight is given to this factor.

(v). Petitioner suffered injuries when he was struck in the right side of the head/face by a patient. Petitioner testified of being very light-headed, dizzy and seeing stars. Petitioner had been sent to Memorial Hospital and they sent him home after. Petitioner took off work for five days and was compensated for his lost time. There was little treatment in evidence to corroborate a disability from this accident. At hearing, Petitioner testified that as to his face that he currently has no symptoms or problems as a result of the injury. Significant weight is given to this factor.

The Commission finds that following the Section 8.1(b) factors, that Petitioner failed to

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prove he sustained any permanent partial disability as a result of the accident. The Commission vacates the Arbitrator's decision to find no 0% PPD award. The finding of the PPD rate is rendered moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's average weekly wage, excluding overtime, is $742.63; temporary total disability (TTD) rate at $495.08; and permanent partial disability (PPD) rate at $445.58.

IT IS FURTHER ORDERED BY THE COMMISSION that Arbitrator's permanent partial disability award under Section 8(d)(2) is hereby vacated finding Petitioner failed to prove he sustained permanent partial disability as a result of the accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $8,335.00 for medical expenses under §8(a) of the Act.

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

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

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

DATED: FEB 26 2021
o-1/12/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TURNER, JEFFREY
Employee/Petitioner

Case# **18WC024534**

18WC024533
18WC020355

ST OF IL/CHOATE MENTAL HEALTH
Employer/Respondent

21IWCC0080

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
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

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

21IWCC0080

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

JEFFREY TURNER
Employee/Petitioner
v.

Case # **18** WC **24534**

Consolidated cases: **18 WC 24533**
18 WC 20355

STATE OF ILLINOIS/CHOATE MENTAL HEALTH
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **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. ☐ 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 20, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,517.40**; the average weekly wage was **$1,125.33**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **2** dependent child(ren).

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling **$8,335.00**, equating to **$8,126.00** due and owing to Memorial Hospital of Carbondale, and **$209.00** due and owing to Cape Radiology, 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. Respondent is not liable for payment of medical bill dated 12/9/17 from Logan Primary Care as said services were not causally connected to his injury.

Respondent shall pay Petitioner permanent partial disability benefits of **$675.20**/week for **5** weeks, because the injuries sustained caused **1%** loss of **person as a whole**, as provided in §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

4/10/20
Date

APR 16 2020

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

21IWCC0080

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JEFFREY A. TURNER,
Employee/Petitioner,

v. Case No. 18 WC 24534

STATE OF ILLINOIS/CHOATE MENTAL HEALTH,
Employer/Respondent.

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Herrin on February 11, 2020, along with consolidated cases 18 WC 24533 and 18 WC 20355. The parties agree that on September 20, 2017, Petitioner was employed as a Mental Health Tech II at Choate Mental Health when he was struck by a patient on the right side of his head/face. The issues in dispute are average weekly wage, medical bill dated 12/9/17, and nature and extent of the injury. All other issues have been stipulated.

TESTIMONY

Petitioner is employed as a Mental Health Tech II for Respondent's Choate Mental Health Center and has worked for Respondent for five years. Petitioner testified that on 9/20/17 he was attempting to restrain a combative patient when the patient punched him in the head. Petitioner testified he did not lose consciousness, but he was light-headed, dizzy, and "seeing stars". Petitioner testified that Respondent sent him to the hospital to get checked out and ordered him to remain off work for five days to get some rest. Petitioner testified he had no ongoing symptoms from his injury.

Petitioner was shown a wage statement of his earnings for pay periods ending 9/15/16 through 8/31/17. (Page 11 of Respondent's Exhibit 1). Petitioner testified his regular earnings for that period were $38,616.65 and overtime earnings were $27,391.83. He testified he worked overtime every week. He testified that overtime was mandatory but he was allowed to volunteer due to his seniority. He testified he often volunteered because he could pick the unit in which he worked. Petitioner testified that if he did not volunteer he would likely get mandated. If mandated, he could have to work in an unfamiliar unit that could be more dangerous. Petitioner testified he was not able to state which overtime hours were mandated and which were voluntarily worked.

On cross-examination, Petitioner testified he was paid for five service-connected days per his union contract following the accident. Petitioner testified that his visit to Logan Primary Care on 12/9/17 was unrelated to his 9/20/17 accident. Petitioner testified the majority of his overtime hours were volunteered overtime hours. On re-direct, Petitioner clarified again that if he did not volunteer for the overtime, he could be mandated to work in an unfamiliar unit. He stated that most of the time overtime would be mandated.

Respondent called Angela Quick as a witness. Mrs. Quick is a Mental Health Tech IV and has worked for Respondent for 22 years. Mrs. Quick is the timekeeper that schedules employee overtime hours. Mrs. Quick testified that when units are understaffed she calls volunteer employees first and then mandates employees if there are not enough volunteers. Mrs. Quick testified she is familiar with Petitioner's time, but is not familiar with his wages. She testified that approximately 90 to 95 percent of the time Petitioner volunteered to work overtime. Mrs. Quick testified that Petitioner's overtime was not consistent in that he did not work the exact same overtime every day. Mrs. Quick testified that employees that volunteer for overtime get to chose which unit they want to work on. Mrs. Quick testified that if Petitioner did not volunteer it did not mean he would get mandated to work overtime every single day.

MEDICAL EVIDENCE

Petitioner was evaluated by Respondent's Mental Health Services where an Employee Injury/Illness Treatment Record was completed immediately following the accident. Petitioner complained that the "room [was] spinning". His face appeared flushed and he was rapidly blinking. He was ordered to follow up with his primary care physician to determine further restrictions after 9/25/17. A Report of Injury or Illness was prepared that noted Petitioner was struck on the right side of his face by his ear. Petitioner reported he was very dizzy and his vision was blurred.

Petitioner was treated at Memorial Hospital of Carbondale where he complained of headaches, dizziness, nausea, neck and right-sided facial pain. Upon physical examination it was noted that Petitioner had mild tenderness to the right upper cheek without erythema, STS or ecchymosis, and muscular tenderness to the neck. A CT of the maxillofacial region showed no acute fracture and a CT of the cervical spine showed no acute osseous abnormality. The impression was a head injury, facial contusion, and cervical strain. Petitioner was prescribed Flexeril, given work restrictions, and advised to follow up with his primary care physician.

CONCLUSIONS OF LAW

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

Although overtime wages are generally excluded from the calculation of an employee's compensation, an exception exists where the overtime hours are consistent and required by the employer. 820 ILCS 305/10; *Airborne Express v. Ill. Workers' Comp. Comm'n*, 372 Ill.App.3d 549, 554, 865 N.E.2d 979, 983, 310 Ill.Dec. 259 (2007). In *Airborne Express*, the court stated that overtime "includes those hours in excess of an employer's regular weekly hours of

employment that he or she is not required to work as a condition of his or her employment *or* which are not part of a set number of hours consistently worked each week." *Id.* at 554. (emphasis added). The claimant in *Airborne Express* testified that he worked overtime in 31 of the prior 32-week period. The court found that the claimant was not required to work the overtime hours as a condition of his employment because the claimant used his seniority to request the overtime hours. The court also found that the wage summary sheets in evidence showed that the claimant did not work any set number of hours in excess of his regular 4-hour work week. *Id.*

In *Freesen, Inc., v. Industrial Comm'n*, the court listed three bases on which to include overtime hours into the calculation of average weekly wage: that (1) he was required to work overtime as a condition of his employment, (2) he consistently worked a number of overtime hours each week, ***or*** (3) the overtime hours he worked was part of his regular hours of employment. *Freesen, Inc., v. Industrial Comm'n,* 348 Ill.App.3d, 1035, 811 N.E.2d at 322 (2004). (emphasis added). The Commission has interpreted the case law to require that only one of the bases must be proven in order for the overtime hours to be included in the calculation of average weekly wage.

In the present case, the evidence does not show that Petitioner was mandated to work overtime as a condition of his employment. Although Petitioner testified overtime was mandatory at Respondent's facility, there is no evidence that he specifically would have been chosen to work mandatory overtime. Angela Quick, the timekeeper that schedules employee overtime hours for Respondent, testified she only mandates employees to work overtime if she cannot fill the vacant positions with employees that volunteer for overtime. Thus, it is possible that had Petitioner not volunteered he would not be mandated to work overtime if enough employees volunteered. Petitioner testified he often volunteered for overtime and he was not able to state which overtime hours were mandated and which were voluntarily worked. Mrs. Quick also testified that approximately 90 to 95 percent of the time Petitioner volunteered to work overtime. Therefore, the Arbitrator finds insufficient proof that Petitioner's overtime hours were mandatory.

Petitioner testified his regular earnings for the 52 weeks preceding the accident were $38,616.65 and overtime earnings were $27,391.83. He testified he worked overtime every week. The wage statement entered into evidence shows Petitioner worked overtime 46 out of the 52 weeks preceding the accident. His regular hours per week were 37.5 at an hourly rate of $17.56. Petitioner has proven by a preponderance of credible evidence that he consistently worked a number of overtime hours each week and the Arbitrator finds that said overtime wages should be included in the calculation of Petitioner's average weekly wage.

During the 52 weeks prior to 9/20/17, Petitioner earned $38,616.65 in straight time earnings. He also worked a total of 1,133.3 hours of overtime in the 46 out of 52 weeks prior to the accident. His testimony in this regard was unrefuted. Therefore, the Arbitrator finds the Petitioner's earnings in the year preceding the accident were:

$38,616.65 (straight time earnings)
+$19,900.75 (1,133.3 overtime hours at straight time rate $17.56)
$58,517.40 (includable earnings)

The Arbitrator further finds Petitioner worked 52 weeks prior to the accident. Based on the foregoing and the record taken as a whole, the Arbitrator finds Petitioner's average weekly wage is $1,125.33 ($58,517.40 includable earnings, divided by 52 weeks worked).

Issue (J): Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent disputes only the medical bill for date of service 12/9/17 from Logan Primary Care. As the treatment record reflects the services were related to an abscessed tooth and Petitioner testified at trial this treatment was unrelated to the work accident of September 20, 2017, Respondent is not liable for payment of this bill.

The parties stipulated that Petitioner's current condition of ill-being is causally connected to his accident of 9/20/17. Therefore, the Arbitrator finds that Petitioner is entitled to medical benefits related to his face/head. The Arbitrator finds Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, totaling **$8,335.00**, equating to **$8,126.00** due and owing to Memorial Hospital of Carbondale, and **$209.00** due and owing to Cape Radiology, 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.

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 without restrictions for Respondent as a mental health technician. No evidence was introduced showing Petitioner's injuries interfere with the performance of his job, therefore the Arbitrator places greater weight on 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. Petitioner's age had no effect on his injury, recovery, or occupation. Petitioner testified he has no ongoing symptoms from his injury. The Arbitrator therefore places lesser weight on 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 has returned to full-duty work for Respondent in the same position he was working prior to the accident. Petitioner testified he has no ongoing symptoms from his injuries and therefore no difficulty performing his job duties that would affect his future earnings capacity. The Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. Petitioner sustained a head injury, facial contusion, and cervical strain after being struck in the face by a combative patient. Petitioner complained of headaches, dizziness, nausea, neck and right sided facial pain. Petitioner was released at MMI without restrictions. Petitioner testified he has no ongoing symptoms from his injuries. The Arbitrator 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 1% of the person as a whole under §8(d)2 of the Act.

Linda Q. Cantrell

Linda Cantrell, Arbitrator

4/10/20

Date

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHERYL HAGOPIAN,

Petitioner,

vs. NO: 15 WC 11895

JETRO HOLDINGS, LLC.,

Respondent.

21IWCC0081

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 31, 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 $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:
o-2/23/21 FEB 2 6 2021
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

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

HAGOPIAN, CHERYL
Employee/Petitioner

Case# 15WC011895

JETRO HOLDINGS LLC
Employer/Respondent

21IWCC0081

On 1/31/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5094 SKLARE LAW GROUP
MICHAEL TRYBALSKI
20 N CLARK ST SUITE 1450
CHICAGO, IL 60602

0532 HOLECEK & ASSOCIATES
MONICA DEMBNY
PO BOX 64093
ST PAUL, MN 55164-0093

21IWCC0081

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) 8(a)

11895
Cheryl Hagopian
Employee/Petitioner
v.
Case # **15** WC-~~11985~~

Jetro Holdings LLC
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine Ory**, Arbitrator of the Commission, in the city of **Wheaton**, on **November 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. **X** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. **X** Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. **X** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. **X** Is Petitioner entitled to any prospective medical care?
L. **X** What temporary benefits are in dispute?
☐ TPD ☐ Maintenance **X** TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident **March 19, 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 an accident.

In the year preceding the injury, Petitioner earned **$45,514.04;** the average weekly wage was **$875.27.**

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

Respondent ***does owe*** for all reasonable and necessary medical services.

Respondent shall be given a credit of **$106,990.74** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$106,990.74**

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

ORDER

Medical benefits

Respondent shall pay the bills totaling **$270,693.72** subject to the fee schedule and pursuant to §8 and §8.2 of the Act and subject to credit for any payments already made by respondent.

Temporary Total Benefits

Respondent shall pay **Temporary Total Disability from March 20, 2015 to November 20, 2019,** which is a total of **243-6/7 weeks** at the rate of **$583.51 per week.**

Prospective Medical benefits

Respondent shall authorize and pay for all reasonable and necessary costs to treat petitioner of her CRPS and right knee pursuant to the fee schedule and in accordance with §8 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.

Christine M Ong

Signature of Arbitrator

January 30, 2020

Date

JAN 31 2020

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cheryl Hagopian	)	
Petitioner,	)	
vs.	)	**No. 15 WC 11895**
Jetro Holdings, LLC	)	
Respondent.	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing under the provisions of §19b/§8a in Wheaton on November 20, 2019. The parties agree that on March 19, 2015, petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act, that their relationship was one of employee and employer and that petitioner gave timely notice of the claimed accident to respondent. They agreed in the year predating the accident, petitioner earned $45,514.04 and his average weekly wage calculated pursuant to §10, was $875.27.

At issue in this hearing is as follows:

1. Whether petitioner sustained accidental injuries that arose out of and in the course of his employment with respondent.
2. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
3. Whether respondent is liable for the unpaid medical bills
4. Whether petitioner is entitled to payment for prospective medical treatment.
5. Whether petitioner is due temporary total disability.

STATEMENT OF FACT

Petitioner's testimony

Petitioner testified that on March 19, 2015 she was employed as an FMR for Jetro Holdings LLC/ Restaurant Depot. (Tr. 11-12). Her job was in sales; she would use an iPad. The job involved signing up new customers or re-activate customers there were signed up but didn't shop there. (Tr. 12-13). She would try to get them to sign up for membership or if they were already signed up, I would try to get them back into the store. There were sheets she used to tell us if the restaurant needed to be re-activated or not. (Tr. 13). She carried fliers with her and bring Xerox copies of what they had on sale. (Tr. 14). At times she would bring a sample of something. (Tr. 15). She started 9 months prior to the accident. (Tr. 15). On 3/19/15 she visited a Red Rooster in Carol Stream, IL. This was an existing client. (Tr. 16). She was told to come back because a person was not there. She returned between 12 and 1. She was walking towards the bathroom and she heard "some hammering and the next thing you know the chairs came down off all the booths and stuff." (Tr. 17-18). They were putting in a floor on the left and there were chairs piled up on tables and booths. (Tr. 18). "The chair came down and took my legs and I landed on my head and evidently my right knee and hand." (Tr. 19). The chairs "took my left foot out first, which them pushed my right, and then my head came down and hit – it was concert I think because they had taken out the floor, and my knee and my hand." (Tr. 21). No one understood English, so she hit her OnStar button and got directions back to the Restaurant Depot because I knew I wasn't that

far…" (Tr. 21). When she arrived, Priscilla was at the front desk and got her a towel and ice. (Tr. 23-24). Priscilla got Frank the general manager who got Tomas the Assistant Manager to take her to the hospital. (Tr. 24). She went to Elmhurst Hospital. (Tr. 25). They examined her right hand, right knee, right shoulder, right arm, neck, head and left foot. She had surgery on her left foot by Dr. Kelikian at Northwestern. (Tr. 31). She had surgery to her cervical spine by Dr. Yapor, a three-level fusion. (Tr. 32). Dr. Yapor passed away so she followed up with a different surgery to make sure nothing was loose. (Tr. 33). She had injections to neck maybe ten years prior, maybe seven years prior. (Tr. 34). She has had three surgeries to her right knee. (Tr. 23). She had arthroscopy of the right knee in February 2017, by Dr. Stamelos then she had knee replacement in April 2017. (Tr. 35). She had revision surgery to that knee December 2018. (Tr. 36). The surgery to the right knee in December 2018 resolved the way the knee was working and it is stable. (Tr. 38-9). Petitioner complained of pain on the inside of the right knee down to the foot. (Tr. 39). Northwestern wants to put a stimulator in her right thigh which would need the battery changed every 2 months for the rest of her life. (Tr. 42). Dr. Xie wants to put a stimulator into the spine with batteries that need to be changed. (Tr. 43). She has not worked since March 2015. (Tr. 45). Restaurant Depot held her job then she got a letter that they were not holding it anymore. (Tr. 46). Prior to 3/19/15 she no pain to right knee or left foot or right arm. (Tr. 50). She met Dr. Xie before 3/19/15 because she had "A little stiffness" to her neck. (Tr. 51). Because the neck and foot surgeries were so close together, she had purchased a chair from the Relax the Back store for about $3,000. (Tr. 53).

On cross examination she agreed she could access GPS on her iPad. The iPad gave her routes and customers to visit. (Tr. 55-56). She carried a cell phone. (Tr. 56). She would carry fliers mostly sale papers, she would on average make 30 to 50 stops. (Tr. 57). Before working for Restaurant Depot she was raising her children. (Tr. 59). She does not know how many chairs fell. The chairs came down, hit my left foot and flipped on my head and evidently I tried to break the fall with my hand and my right knee. (Tr. 60-61). She could not tell whether her hand or head hit the floor first. (Tr. 61). Her head was not bleeding. (Tr. 61). She uses Onstar instead of the iPad to get around for her job, but she did not know that she could call 911 from Onstar. (Tr. 62). The Restaurant Depot she drove back to on 3/19/15 is on North Avenue in Lombard. She agreed her job was to bring business to the Lombard Restaurant Depot store. (Tr. 62). She was not good at using the iPad or the computer. (Tr 64). She loved her job and her store was the highest store after she became their FMR. (Tr. 65). She was able to drive from the Red Rooster to the Lombard store. (Tr. 64). She has a nonprofit she shops for at the Restaurant Depot (Tr. 66-67). She agrees she was treating with Dr. Xie at least since 2009, she did not remember if she was treating with Dr. Xie before 2009. (Tr. 68) The first doctor she saw the day after the injury was Dr. Xie, and Dr. Xie is a pain specialist. (Tr. 69). The recliner she purchased for $3,000 is an electric recliner. (Tr. 69-70).

On redirect Petitioner testified that she went the Red Rooster because they were going to do a different style of food. (Tr. 72). Petitioner testified she had never been told she needed to see a neurosurgeon. She took MRIs before the accident "I believe one or two with Dr. Xie to make sure I had no problems." (Tr. 73). She

Testimony of Frank Gurgone

Frank Gurgone testified on behalf of Respondent. In March of 2015, he was the branch manager for the Restaurant Depot in Lombard. Petitioner was the field marketing representative for the store, or an FMR. (Tr. 77). The job was to visit restaurants to draw customers to the store.

(Tr. 77). The FMR would come in with a list of stops they had and try to make 20 or 25 visits, spend a few minutes with anyone that does the ordering or the owner. (Tr. 78). The FMR carries an electronic tablet which is about 10 inches by 11 inches. They use it for routing putting gin comments for the stops, it would be a permanent record of their day. The FMR would not carry product unless it's something a customer asked for, but she would not be bringing a 100 lbs. bag of pinto beans to a customer. (Tr. 80) Petitioner was on his payroll for the store. (Tr. 83). On 3/19/2015 she came to store to report an injury. He saw her, he observed she was hobbling, not walking correctly (Tr. 84). She said "an accident happed at a customer she was visiting, and she tripped and fell and hit her knee, head and elbow I think. I wrote it down on the report." (Tr. 84-5) He completed the Accident Report (RX 19) the same day. There was a portion that Ms. Hagopian filled out. (Tr. 85). In his training on completing accident reports, he writes down "whatever they tell me." (Tr. 87). He did not recall any bleeding, no cuts or scraps on her forehead or her leg. (Tr. 87-88). About two and a half years ago he saw her shopping at the Pulaski store, he saw her walking, she seemed okay to him. (Tr. 89-90). He was there under subpoena. She could have called the store on 3/19/15, he does not recall if he received a call (Tr. 90-91).

Testimony of Sandra Roberts

Sandra Roberts testified on behalf of Respondent. She works out of the corporate which is 1030 Division Street in Chicago, but her main office is out of the Milwaukee location. (Tr. 100) She is employed at Restaurant Depot, which is under Jetro Holdings. Her position is director of sales and marketing Midwest, which entails watching over the field marketing representatives for the Midwest. She held that position in 2015 also. She covers 16 stores in 8 states. (Tr. 101). She was present in response to a subpoena. (Tr. 101). She knew Petitioner as she worked for her as field marketing representative out of the Lombard store. (Tr. 102). She worked there since March 2014, on referral from the CEO. (Tr. 103). The goal of the job is to get customers into active every day shopping Restaurant Depot customers. (Tr. 103). There is one field marketing representative for each store. (Tr. 104). Each representative gets a radius of each store, and they are responsible for the radius, of about 25 miles. (Tr. 104). They make between 20 and 25 visits a day. (Tr. 104-5). They are supposed to use a program to bring up jobs, which would include inactive customers, in particular zip codes for that time period. We supply the tablet and the route connect program is an app which would have the list of 200 jobs (Tr. 105). It normally takes a week or week and a half, depending on what they have in the route. (Tr. 105-6). The FMRs carry the tablet and a folder with an application for new membership card. The folders are less than a pound. (Tr. 106-7). It possible but not normal that an FMR would bring product. (Tr. 107). Respondent Exhibit 20 is an FMR visit sheet, it shows where the FMR was in a given day, for March 19. (Tr. 108-9). The FMR would punch it in to start a job, you call on the customer, you come out, you end the job and enter in notes to identify what you have done. The column titled GPS location comes from when the FMR inputs the information into the tablet. (Tr. 109). The GPS location on RX 20 is blank which is not what she would expect. The time stamp on RX 20 says 2:49pm for the Red Rooster visit. (Tr. 111). Prior to that La Tasca at 2:10pm, prior to that she had a customer number punched in at 1:46 pm. Normally the FMR would upload a route to the tablet but she was hand punching in everything (Tr. 112). Respondent Exhibit 21 is from March 17, 2015 sheet detail. It shows Petitioner stopped at Red Rooster on March 17, 2019 (Tr. 117). There is a note that the store was remodeling and would have Latin food, she did not note that follow up was needed at Eddie's Red Rooster. (Tr. 117-8), (Tr. 123). Respondents Exhibit

22 is visit detail showing what the sheet should show. The sheet details come from an Excel spreadsheet on a computer which is printed on paper. (Tr. 114).

Petitioner was a challenge as an employee, she did not follow company policies or procedures, she did not follow the list. (Tr. 125-6). They have a bonus program which requires meeting criteria in categories, and she was not meeting the new category. (Tr. 127-8). She was written up twice. Once in response to a letter she wrote to corporate and once as a result of her behavior during a meeting. (Tr. 129-131). If she had another write-up she would have been terminated. She was made aware of the write-ups. (Tr. 132). The witness explained to her that if she didn't change and if she did not start following procedure and be a team player, she would be let go. (Tr. 133). Since March 19, 2015, Ms. Roberts saw Petitioner once at the Pulaski store walking, nothing special or different about her walking. (Tr. 133-4). Petitioner carried a cell phone and could call with any questions, she did not receive a phone call from Petitioner on March 19, 2015. (Tr. 134).

Elmhurst Medical Records (PX.1)

On March 19, 2017, petitioner presented to the emergency room of Elmhurst Memorial Hospital. Petitioner reported to the nurse she was at work "where a chair fell behind her and PT fell forward hitting her head." She reported to the emergency room doctor that "one of the chairs fell causing the patient to fall forward and strike her head on the concrete." She denies any loss of consciousness. She denied numbness or tingling in her upper or lower extremities. She was noted to have soft tissue swelling to forehead. X-rays of the left ankle was suspicious for a facture. There was a bone cyst from prior fixation tract, and a calcaneal spur. Right hand ray showed osteophyte formation but no fracture. She was treated conservatively and released with recommendation to follow up with orthopedics.

Dr. Xie/Swedish Covenant Records (PX.3)

Petitioner presented on 3/20/15 to Dr. Xiaoyuan Xie with new onset of left ankle pain, right knee pain, right hand pain and headache following injury at work day prior. She reported "when she walked pass a table, the chairs on top of the table fell on her left leg, she fell on the floor with face down and hit the head and right knee and right wrist. She passed out for about 30 seconds." Diagnosis was arthropathy of cervical spine facet joint, pain in the neck, cervicalgia, shoulder pain acute.

On follow up MRI was prescribed for cervical and left shoulder. MRI left shoulder showed osteoarthritis and degeneration but no tear. MRI of cervical showed disc bulges with osteophytes C4-5 through C6-7, slight progression of disc herniations at C4/5 to C6/7, mild canal stenosis and flattening ventral aspect of spinal cord from C4/5-C6/7 due to disc bulge and associated endplate osteophytes, severe right C4/5 and bilateral C5/6 neural foramen stenosis due to uncovertebral and facet hypertrophy. Dr. Xie performed a cervical spine facet bloc on 5/7/15.

On 5/26/15 Dr. Xie referred Petitioner to Dr. Yapor for possible surgery. On 7/28/15 Petitioner reported 70% improvement to pain in cervical following the facet injection. Epidural steroid injection to cervical was performed 8/14/15. Medial branch blocks performed on 11/13/15 and 11/30/15. On 12/15/15 Petitioner reported 75% relief.

Petitioner presented on 3/29/17 reporting right knee pain, Dr. Xie ordered an MRI. MRI right knee showed near complete loss of cartilage, a hematoma, complex tear of the meniscus. She was scheduled to see Dr. Dzwinyk for right knee replacement on May 12. She continued to present to Dr. Xie for the knee, prescriptions for pain medications provided but no other

treatment given. On 12/5/2017 Dr. Xie diagnosed arthralgia of knee, neck pain, post laminectomy syndrome of the cervical, arthritis of knee.

On 1/31/18 Dr. Xie noted that the right knee is hot or warm all the time, skin painful, right knee swollen. This is the first note in which Dr. Xie mentions CRPS type I, and sympathetic blocks were recommended. There is no indication of the diagnostic criteria used by Dr. Xie. On 2/5/18 Dr. Xie performed sympathetic ganglion block, and again on 2/19/18, and 2/26/18, 3/5/18, 3/12/18. On 3/13/18 she reported she had her 5th injection. She reported 75% pain reduced. MRI of lumbar performed on 4/13/18 was normal, some degenerative findings. On 4/23/18 she had lumbar ESI due to lumbar pain, which resulted in right leg pain reduced by 25%. She had genicular nerve blocks on 5/14/18. On follow up she indicated the relief was better than from the sympathetic block. Dr. Xie preformed a right infrapatellar saphenous nerve block on 9/24/18, the next day she reported decrease in pain. Second saphenous nerve block was preformed 10/8/18. On 11/2/18 she had right ankle and foot MRI which showed bone spurring and severe osteoarthritis of the mid foot. In a letter dated 3/29/19 Dr. Xie recommended spinal cord simulator vs recommendation by Dr. Nader for placement of a peripheral nerve stimulator. The last note in evidence is dated 8/30/19, Dr. Xie notes CRPS, saphenous neuralgia, knee joint pain, arthritis of the knee, osteoarthritis, with recommendation to continue current pain meds and follow up in one month. Dr. Xie refers her to Dr. Lubenow for a second opinion. There is no note regarding work status.

AMC Anesthesia Ltd. /Dr. Xiaoyuan Xie Records (PX.5)

Petitioner was seen by Dr. Xiaoyuan Xie of Swedish Covenant Hospital on March 20, 2015 (Px. 5, pg. 5-8). Petitioner provided a history consistent with that given a day earlier to Elmhurst Memorial Hospital. Petitioner's primary complaints were left ankle pain, headache, left side neck pain, right knee pain, and right wrist pain (Px. 5, pg. 5). Dr. Xie referred Petitioner to Dr. Joseph D'Silva of Illinois Bone & Joint Institute for further evaluation regarding her head injury and for discussion/completion of a "CT of brain to R/O Hematoma" (Px. 5, pg. 7).

On 5/7/15 Dr. Xie performed "Bilateral C2-3, C3-4, C4-5, C5-6 facet steroid injection" in Petitioner's cervical spine (Px. 5, pg. 9).

On 11/13/15 Dr. Xie performed "Bilateral Cervical (BIL C2-3, C3-4, C4-5 Facet Inje" (Px. 5, pg. 13). Dr. Xie's notes indicate that Petitioner had a "history of neck pain" which was "exacerbated after work related injury" (Px. 5, pg. 14). Dr. Xie further noted the emergence of "new onset of right and left UE pain after the injury" (Px. 5, pg. 14).

Illinois Bone and Joint Records (PX 7)

Petitioner presented to Dr. Silva on March 24, 2015, who noted there was a well healed surgical scar along the left ankle from ankle surgery 30 years ago. She had pain diffusely over the left ankle. He reviewed a CT of left ankle which showed midfoot osteoarthritis, bone fragments. Petitioner engaged in therapy for the foot.

Dr. Spiros G. Stamelos Records (PX 9)

Petitioner presented to Dr. Stamelos on June 2, 2015. who noted she was an old patient of his. He noted she has osteoarthritis in the shoulder, cartilage degeneration of the c-spine. He noted she has what seem to be mild arthritic changes without "any sign of destruction or deformity." He referred her for therapy. She was seeing Dr. Yapor for the c-spine. He gave her an ankle injection. She followed up with him many times. On 9/9/15 he diagnosed tendinitis of the left foot. On 12/7/15 he notes she presented to Dr. Kelikian, who Dr. Stamelos calls a "superspecialist."

Petitioner continued to follow up with Dr. Stamelos on walk in basis, even though she had started treating with Dr. Yapor and Dr. Kelikian. (pg 58) Dr. Stamelos recommended she have foot surgery with Dr. Kelikian. Dr. Stamelos recommended a right knee MRI on 2/15/16, which showed degeneration and a sign suspicious of a tear. Dr. Stamelos notes on 5/4/16 "So there are some obvious issues of preexisting and arthritic changes which were preinjury and which she was predisposed to significant pain." She needs MRI of the right foot under Blue Cross Blue Shield. On 2/28/2017 Dr. Stamelos performed arthroscopic surgery on the right knee. The operative report indicates osteochondral disease, fraying and chondromalacia.

MRI Lincoln Imaging Center Report (PX.11)

The June 9, 2015 left ankle MRI showed residual posterior tibial tendon tenosynovitis, chronic sprain lateral collateral ligaments, talon navicular arthritis/DJD.

Northwestern Neurosurgical Associates/Dr. Wesley Yapor Records (PX 13)

Petitioner presented to Dr. Yapor on 6/30/15 and reported she went into a meeting in a restaurant when "a pile of chairs fell on her." Physical exam showed normal strength and reflexes. He reviewed MRI which showed mild stenosis from C4-7 with some flattening of the anterior cord. He prescribed physical therapy. On 9/10/15 Dr. Yapor now diagnoses herniated cervical disc but no new imaging was done. He prescribed therapy. On 1/19/2016 Dr. Yapor noted "It is my opinion that although the discs were degenerated the accident brought about symptoms and worsening of the anatomy. Will await her to decide as to when to operate on her neck to do a C4-7 ACDF." On 3/10/16 Petitioner had loss of reflexes which were normal at the prior visit. He recommended cervical surgery prior to the foot surgery. The operative report is not included but notes indicate she had the cervical fusion surgery. There is a post-surgical EMG dated 8/1/16 which notes mild median mono neuropathy and no ulnar or cervical radiculopathy. On 10/25/16 Dr. Yapor noted she was doing well, and was cleared from neurosurgery.

Foundation for Medical Development (PX.15)

Petitioner presented for cervical physical therapy from August 4, 2015 through March 23, 2016. These records do not indicate which provider prescribed the therapy.

Northshore University Health System Dr. Kelikian and Dr. Ghate Records (PX.17)

Dr. Raju Ghate examined Petitioner on September 7, 2018. She presented for evaluation of her right knee. She developed CRPS type 2 postop, has complaints of ongoing nerve type pain. She also complains of instability going up and down stairs." On exam, she had a little bit of instability, x-rays showed well aligned knee replacement with no signs of hardware loosening or migration. His impression was table knee implants. He recommended treating CRPS before proceeding with a revision procedure. He agreed she may need a revision of the poly or conversion to a PS knee to resolve instability on stairs.

Dr. Kelikian initially saw Petitioner on request of Respondent as an Independent Medical Examination on December 14, 2015. He recommended hindfoot osteotomy with possible cuneiform osteotomy, FDL transfer and Strayer procedure, all related to the work injury. He reviewed the job description and authored an addendum stating "would have to see an FCE but she can perform most of these functions, especially the upper body and she can carry up to 25 lbs." On May 31, 2016 Dr. Kelikian saw Petitioner for pre-op exam, diagnosis posterior tibial tendon

dysfunction state II left. The note dated June 10,2016 indicates she underwent left Strayer, tendon transfer, calcaneal osteotomy, 1st cuneiform with autograft and bone marrow aspirate on June 9, 2016. On October 10, 2017 Dr. Kelikian examined Petitioner for right and left foot pain, gave an injection to the right foot and recommended FCE. His note on 1/30/18 indicates the injection was "unrelated to left PTT prior visit." On January 30, 2018 Dr. Kelikian wrote a note "She got an FCE performed on January 25, 2018. She met 20% of our job demands, 4 of 20 were inconsistent, i.e. 50 of 4 of 20 and inconsistent performance, 56% of time, i.e. 20/50. She can tolerate sedentary work. Her job is medial level type job. She can lift up to 35 pounds from floor to waist. On February 28, 2018 Dr. Kelikian wrote another note indicating the same except adding "She can return to work within restrictions of the FCE as stated January 25, 2018." On July 10, 2018 Petitioner presented to Dr. Kelikian with left and right foot pain. He prescribed compressions socks. He advised activity as tolerated.

Swedish Covenant Hospital/Dr. Dzwinyk Records (PX.19)

On March 30, 2017 Petitioner presented to Dr. Jaroslaw Dzwinyk after her prior orthopedic doctor retired. She was status post 6 weeks from prior surgery. He notes recent MRI scan taken subsequent to the surgery showed substantial cartilage loss. On 4/6/17 x-rays showed complete loss of joint space. Dr. Dzwinyk performed right total knee arthroplasty on April 28, 2017. On January 9, 2018 Dr. Dzwinyk examined Petitioner who reported residual pain and stiffness especially after much activity, overall improved, experiencing weakness with stair climbing. On exam the doctor noted the knee was stable, gait was normal, mild quadriceps atrophy on right, patella tracking was normal. She was to follow up in 6 weeks. There is no mention of CRPS.

On January 13, 2018. Dr. Dzwinyk reported severe pain on the medial aspect of the knee which she reported present since surgery last year. On exam he noted no obvious swelling, discoloration of surgical scar, tend over the medial aspect. Knee was stable. He noted CRPS type 1, possibly secondary to saphenous nerve injury, referred her to pain clinic. This is the first note of CRPS. On April 19, 18 she reported pain with prolonged weight bearing activities. 6/6/18 she reported instability especially on descending stairs. X-ray on June 8, 2018 of right knee showed bone mineralization normal, standard alignment of arthroplasty. On October 25, 2018 Dr. Dzwinyk noted PCL deficiency CRPS and recommended revision surgery to be performed December 26, 2018. On November 15, 2018 Dr. Dzwinyk reviewed the Dr. Bare IME report and indicates that the x-rays demonstrate significant posterior instability. On December 13, 2018 Dr. Dzwinyk notes Petitioner saw Dr. Mark Gonzalez at U of I, but those records are not included. Dr. Dzwinyk recommended ESP, CRP to rule out infection and bone scan. Bone scan performed on December 20, 2018 showed hardware loosening. January 17, 2019 Dr. Dzwinyk examined Petitioner and noted she was status 3 weeks' post revision of right total knee arthroplasty for instability. Last note dated May 2, 2019 indicates status post revision of total right knee. She was doing well and attending PT. No work status is noted.

Athletico Records (PX. 20)

The Functional Capacity Evaluation dated January 24, 2018 states inconsistent performance/ unacceptable effort (56% or 28/50 expected responses). In physical demand level, the evaluator indicates she demonstrated the physical capabilities and tolerances function at least in the sedentary physical demand level. The recommendation was that because the client failed the majority of the objective effort criteria, that a physical demand level could not be determined. The report describes observations by the evaluator of Petitioner's effort, observations of body

movement, comments on expectations vs. results in testing. For example, maximum occasional load handling should exceed frequent load handling, but her frequent handling exceeded the occasional. There is no mention of CRPS diagnosis in the history.

Petitioner engaged in physical therapy with Athletico from August 15, 2016 through December 6, 2017 on referral from Dr. Kelikian and Dr. Dzwinyk. In the last note dated December 6, 2017 there is no mention of CRPS, and she had achieved most goals except stairs with a briefcase/ bag. She engaged in therapy prescribed by Dr. Peter Chioros DPM for right foot arthritis from October 18, 2017 through December 20, 2017.

ATI Physical Therapy Records (PX. 22)

Petitioner engaged in physical therapy from August 8, 2016 to August 11, 2016, 3 visits, on referral from Dr. Kelikian. She engaged in physical therapy again from January 10, 2019 through August 7, 2019.

There is a document titled FCA dated 11/29/18 which notes that the occupation of field representative is light physical demand level. Petitioner advised the therapist that she drives 300-400 miles a day and makes 300 stops a day, carry catalogs, and does bending. She reported the box of catalogs weighed 25 lbs. She demonstrated a sedentary to light duty.

Advocate Lutheran General Hospital Records (PX. 24)

Petitioner presented to the Lutheran General Hospital on March 14, 2017 with complaint of knee pain and infection. She had knee surgery on February 28, 2017 and there was drainage. Blood test was ordered and she was released.

On February 5, 2018 Petitioner obtained an order for an X-ray of the cervical from Dr. Bovis. February 27, 2018 she had X-ray as ordered by Dr. George Bovis. There is no treatment record by Dr. Bovis.

Northwestern Medicine/Dr. Nader Records (PX. 26)

On May 21, 2018, petitioner presented to NW Pain Medicine and was examined by a resident. She reported pain to medial aspect of right knee. Exacerbating factor is bed sheets on her knee. She has tried LESI, genicular nerve block and possible peripheral nerve blocks at Swedish with no relieve. She was to get another knee procedure done. She denied any color changes. She has swelling at end of day. The doctor noted normal skin color temperature and tugor. No edema, normal nail bed appearance. Impression was infrapatellar saphenous neuralgia to right leg. She was to get repeat knee surgery then attempt diagnostic saphenous nerve block. She was to bring records from Swedish Covenant.

On August 20, 2018 she returned and was examined by a different resident. She was given saphenous nerve diagnostic block. On November 26, 2018 Dr. Nader examined Petitioner, he notes diagnosis saphenous neuropathy and "possible CRPS." He recommended another nerve bloc after knee surgery. On March 11, 2019 another resident examined Petitioner. She had revision knee replacement surgery in December. She had infrapatellar saphenous nerve block in another clinic with relief. She is interested in proceeding with SPR peripheral stimulation. She was recommended another nerve bock, then consider nerve stimulation. There is no indication that other records were reviewed. Dr. Nader wrote a letter dated March 18, 2019 stating she has been managing her infrapatellar saphenous neuralgia and CRPS of right lower extremity. She was being considered for peripheral nerve stimulator. She was referred to Dr. Kelikian for further evaluation.

University of Illinois Hospital/Dr. Gonzalez Records (PX 27)

Petitioner presented to Dr. Mark Gonzalez on December 12, 2018 for second opinion for persistent right knee pain. He noted that the patient did not bring old records. He gave the opinion that she had mid-flexion instability as opposed to true posterior PCL instability, she would benefit from a revision to a more constrained implant. He suggested a new CT scan and bone scan prior to another surgery.

Rush Pain Center/Dr. Lubenow Records (PX.28)

Petitioner presented to Dr. Lubenow on September 19, 2019. She reported she slipped on the floor and a pile of chairs toppled over and fell on her, "resulting in a crush injury to her left foot." She flipped over and landed on her neck and right knee. She was seen for second opinion on CRPS. He noted the right leg appeared darker, he noted no temperature change between legs, range of motion was normal. He diagnosed crushing injury left foot and CRPS type 2. On 10/17/19 Petitioner returned. She wanted to pursue DRG trial.

Dr. Kenneth Candido September 22, 2015 Report (RX.3)

Based upon the long history of chronic neck pain which she denied, while the fall could cause a neck strain, the fall did not cause the severe degenerative changes in her cervical spine. On that date she did not describe neck pain but pain to shoulder, and she demonstrated some impingement syndrome of right shoulder. Dr. Candido placed her at MMI and indicated she could return full duty to her job.

Dr. Kenneth Candido June 19, 2018 Report RX.4)

On physical exam she had a well healed surgical scar to right knee. There was swelling. There was allodynia of right knee. There was hyperesthesia noted in the right lateral in the genicular area. The right knee was warmer than the left. Dr. Candido notes this is typical of inflammation which is not CRPS. He noted no color changes which would be consistent with CRPS. On this date Petitioner reported pain at 5-6/10 at rest and with activity 10/10 in her right lower extremity. She reported her pain at that time as 8-9/10. A rating of 10 indicates unspeakable pain and individuals with 10/10 pain are bedridden and delirious. She reported that pain had interfered with her activity 10/10 in the past 24 hours. Petitioner reported to Dr. Candido that Dr. Nader recommended genicular nerve blocks. Dr. Candido agreed with that recommendation and gave the opinion that one would not do a genicular nerve block if she truly had CRPS. Genicular nerve pain is common post knee surgery. If the blocks helped, she could have cooled RF of the genicular nerves. If not, then she is at MMI from pain management, and able to return to work as she failed the FCE. He noted she said the blocks by Dr. Xie were not helpful whereas she told Dr. Xie that they were 75% helpful.

Dr. Kenneth Candido October 29, 2019 Deposition & CV (RX.5 & RX.6)

Dr. Kenneth David Candido testified via deposition on October 29, 2019 on behalf of Respondent. (RX 5). He is board certified in anesthesiology and pain medicine, he has been in practice for 35 years (Id. at 5-6). He is Chairman of Anesthesiology at Advocate Illinois Masonic Medical Center, owns his own practice and he is a Clinical Professor of Surgery at University of Illinois College of Medicine. (Id. at 6). Dr. Candido examined Petitioner on September 22, 2015 relative to her cervical and on June 19, 2018 relative to her right leg. (Id. at 8-9). When he saw

her on September 22, 2015, Petitioner told him she was a field management representative for Jetro Holdings and her job was to recruit restaurants to shop at Restaurant Depot. (Id. at 11). She stated she walked into a restaurant where a floor was undergoing repair, and there was hammering and stacked chairs came tumbling down and knocked her knees out from under her, she landed on her forehead. She drove herself back to work. (Id. at 11). The next day she was evaluated by Dr. Xie at Swedish Covenant Hospital. (Id. at 11-12). On exam she had no pain over the cervical spine and no limitations of range of motion. Id. at 14-15. He diagnosed neck pain, status posttraumatic head injury, left ankle fracture, contusion of forehead, cervical strain (Id at 16). He reviewed MRI reports of lumbar spine dated 1/28/09, cervical spine dated 1/28/09, thoracic spine 6/10/10, lumbar MRI, cervical MRI dated 9/10/12, thoracic MRI 9/20/12, cervical MRI 4/30/15, shoulder MRI 4/30/15, left ankle MRI 6/9/15, left foot MRI 6/9/15. (Id at 17). The MRIs from Jan 2009 showed diffuse spondylosis and degenerative disc disease with foraminal stenosis from C3-C7, and it notes it was compared to an MRI from 2007 which he didn't have. "The fact that there were MRIs dating back to 2007 – or eight years before her injury – indicated to me that she had a chronic stable degenerative condition at multiple levels throughout her cervical spine." (Id. at 18). They showed disc osteophyte complexes from 9/2012. A disc osteophyte is when the bone has overgrown the disc and is a chronic degenerative spondylosis. (Id at 18). The accident did not cause or contribute to cervical spondylosis, she may have sustained a cervical strain, but she didn't sustain any changes anatomically. (Id. at 19). She didn't describe neck pain to him, rather she had right shoulder pain. (Id. at 20). On September 22, 2015 she was at MMI for the cervical, and she was capable of returning to full duty with no restrictions as related to the cervical spine. (Id at 20).

Dr. Candido examined her again on June 19, 2018 (Id. at 21). She gave the history that she had undergone a cervical discectomy and fusion by Dr. Yapor, and she was now complaining of pain to the right knee. She was scheduled to undergo two knee surgeries for her right knee. (Id. at 21-22). She reported receiving multiple sympathetic nerve blocks to the right knee by Dr. Xie. (Id. at 21). She reported swelling, color changes, temperature changes and limited range of motion to right knee. (Id. at 22). She was scheduled to have a nerve block with Dr. Nader (Id. at 22). The purpose of the sympathetic nerve block is to relax the blood vessels in people with a cold extremity, so you cause the blood to flow into the extremity. (Id. at 25). She reported no improvement from the sympathetic nerve blocks (Id at 26), but the records from Dr. Xie noted 75% improvement. (Id. at 26). She had received 4 blocks, and perhaps one or 2 blocks were reasonable and customary, and more was unnecessary, as the injured leg was warmer than the non-injured leg. (Id at 26- 27). "a sympathetic block is indicated where there's a sympathetic dysfunction. Sympathetic dysfunction causes vasoconstriction not vasodilation." Id. st 27. Dr. Candido had trained Dr. Nader and he would not have proposed a genicular nerve block if he really thought she had CPRS. (Id. at 28). The genicular nerves are 3 small nerves that innervate the knee, after knee arthroplasty surgery the nerve can fire up and become dysfunction (Id. at 28-29).

CRPS is a regional pain syndrome, and the genicular nerves are isolated small nerves. Id. at 29-30). CPRS is neuropathic pain which is a dysfunction of the peripheral nerves. Id. at 32). CRPS is diagnosed by clinical exam. Symmetry between affected limb and non-affected limb is the antithesis of CRPS. In early stages there is severe swelling, and over time the limb becomes atrophic due to dysfunction. (Id. at 31-32). We look for color changes to indicate blood flow, a pale extremity indicates reduction in blood flow whereas a hot red extremity indicates increased blood flow. (Id. at 32). Type 1 CRPS is where there is no documented nerve injury and Type II is where there is a documented nerve injury. (Id. at 32). The hair typically becomes very course

and falls off on the affected limb. (Id. at 32-33). CPRS is a diagnosis of exclusion, and we look for other causes of pain before attributing CRPS. (Id. at 33). Petitioner was no suffering from CRPS, but she had genicular nerve dysfunction. (Id. at 33-34).

Dr. Candido reviewed the FCE from 1/24/18 (Id. at 35). Dr. Candido felt the FCE was "a comprehensive evaluation conducted over several hours with several metrics built in to determine validity." Id at 40). The examiner reported that this was an invalid examination based upon first person observation for thinks like range of motion, strength, and effort. The quality of effort was rated as zero. (Id. at 40). He noted that her resting heart rate was 104 the same as when he examined her, and he was not concerned by it, heart rate could be elevated by caffeine, pain, thyroid conditions, blood pressure, cardiac or heart conditions. (Id at 41-42). As to her right knee she had neuropathic pain, and she had pain from her genicular nerve, he recommended addressing the genicular nerve as recommended by Dr. Nader. (Id. at 45). If she had a genicular nerve block on May 14, 2018, either she forgot to tell him or she intentionally didn't tell him. (Id. at 48) "If she had CRPS it was mild, but it didn't appear to me that she had that condition at all because by exclusion the genicular nerves were the offending targets resulting in her knee pain. So my conclusion would be that, in fact, she did not have CPRS. Furthermore, Dr. Nader who I trained, who is board certified as well would not have injected the genicular nerves in anyone with CRPS because he wasn't trained to do that. I trained him personally." (Id. at 46-47). The subsequent operation involving revision of the total right knee replacement in December 2018 was "completely inconsistent with CRPS." (Id at 47).

Based upon his clinical exam and the FCE he found she was capable of full duty work. Id. at 47). There is no reason she could not drive a vehicle or use a computer or make phone calls. (Id. 47-48). When he saw her in 2018 he had reviewed records that she had undergone a cervical fusion surgery. Dr. Candido gave the opinion that the cervical fusion was not causally related to the work injury "because she had chronic, stable degenerative arthritic conditions for at least 8 years prior to the transient exacerbation associated with her slip and fall. There was no indication that surgery could be linked causally to that event when she had been evaluated previously for almost a decade, and the findings had not changed substantially." (Id. at 48-49.)

Dr. Aaron Bare July 12, 2017 Report (RX.7)

Dr. Bare gave the opinion that she had arthritis of the knee which was aggravated by the work injury. The arthroscopic surgery and the knee replacement surgery were related to the work injury. He recommended more therapy to be followed by an FCE which would document validity of effort and any functional limitations of the knee.

Dr. Aaron Bare December 27, 2017 Report RX.8)

He noted normal color tone and turgor, no evidence of muscle atrophy. She was 8 months' status post right total knee arthroplasty. He felt she was capable of driving a car and lifting up to 35 lbs. He felt she could work her normal job. He found she was at MMI.

Dr. Aaron Bare October 3, 2018 Report (RX.9)

Dr. Bare reviewed the FCE from Jan 2018 (PX 20). HE noted there was failure to provide full effort. She reported being diagnosed with CRPS and being recommended for a revision of the total knee replacement. He noted an increase of warmth of the right knee. She had similar pain complaints as last time. She had possible neuropathic pain. Her subjective complaints did not match his objective findings. He gave the opinion that she would not benefit from future knee

surgery, and she could return to work full duty given the FCE. He suggested a diagnostic saphenous nerve block.

Dr. Aaron Bare Deposition & CV (RX10 &11)

Dr. Aaron Bare testified via deposition on February 15, 2019 on behalf of Respondent. (RX 11). Dr. Bare is board certified and is Direction of Northwestern West Regions, Department of Sports Medicine and Shoulder surgery. He manages shoulder and knee departments. He does 10 to 15 surgeries per week, and has been doing surgeries for 15 years. (Id. at 7-8). He initially examined Petitioner on July 12, 2017. (Id. at 8) She reported she had tripped on a chair and fell forward, and hit her head, and had strained neck and ankle fracture, and pain to left and right knees. (Id at 10). He examined her right knee. She was 3 months' status post total knee replacement. He gave the opinion that causation exists linking the need for treatment to her knee which included two surgeries (Id. at 12). She had arthritis which was pre-existing, but the trauma caused or accelerated the condition. (Id.). He noted that the knee replacement surgery was only 2 months after the arthroscopy, and his opinion is you would typically wait 3-4 months after a surgery to see if the patient reaches maximum medical improvement, but the second surgery could be reasonable. (Id. at 16) He felt she could work light duty and could drive 3 months' post-surgery. (Id. at 15-16). He recommended she obtain an FCE and if the FCE indicated a lack of effort, that she would be at full duty. (Id. at 17).

Dr. Bare re-examined Petitioner on December 27, 2017. (RX 11 at 18). At that time Petitioner reported she was working on a home exercise program and doing aquatic therapy. On exam she had normal stability, good strength, no swelling. She complained of occasional swelling in the knee, when she had pain it was to the back of the knee and some pain driving long distances. He recommended she continue her exercises, and he felt she could work her regular job and drive at that time.

Dr. Bare examined her a third time on October 3, 2018 (RX 11 at 21). He reviewed an FCE from January 24, 2018, reports from Dr. Candido, Dr. Dzwinyk, Dr. Nader and Dr. Xie. (Id. at 22-23). At that time, she reported she was still treating for her foot, she had the FCE and she had been diagnosed with CRPS and that a revision procedure had been recommended. (Id. at 23-24) She had no pain in her hip or thigh and no pain radiating down the leg, just pain to knee. She denied clicking or catching of the knee. (Id.) On exam she was tender to top part of the knee, strength was normal, there was no skin discoloration or abnormality of the skin (Id. at 25). Dr. Bare does not treat CRPS (Id. at 25-26) but he knows what red flags to note when a referral would be needed. (Id.) The red flags are disproportionate pain to the joint, abnormal swelling or discoloration of the skin, hypersensitivity to touch, and pain with range of motion. (Id. at 26). On cross exam he commented he noted an increase in warmth of the skin compared to the other knee (Id. at 40). He did not feel she had CRPS (Id. at 27). He did not feel she was a candidate for further knee surgery, and she did not need further orthopedic treatment (Id. at 28). He felt the FCE showed she showed a lack of consistent effort, and the evaluator noted the test was therefore unreliable. He felt that even if she had CRPS, that she could have still performed the FCE, and the FCE would have shown increase in heart rate due to pain. (Id. at 29-32). He noted that a heart rate of 104 is not alarming, and that the FCE evaluator made observational findings including cogwheel muscle release and observational findings. (Id at 50-51). After reviewing the ATI report from 11/28/18, he still felt she was able to work. (Id. at 52).

Dr. Harel Deutsch January 1, 2017 Report (RX.12 & RX.13)

Petitioner was angry and uncooperative, refusing to answer questions. Reflexes were good, motor strength was normal. Waddel's signs were negative. She reported she treated with Dr. Xie for low back pain prior to the work injury, but the records showed she was treating for neck pain. He reviewed the 4/30/15 MRI and 9/20/12 MRI of the cervical. He agreed with the radiologist reading that there was slight progression of disc herniations at C4/5 to C6/7. There was no evidence of any new trauma or significant change. He agrees with Dr. Candido that she was at MMI in September 2015. Petitioner reported no neck pain at this exam. The accident did not precipitate aggravate or accelerate her cervical degenerative disc changes. The CT shows a 3 level fusion. The surgery was related to her chronic neck pain and degenerative disc condition.

Dr. Brian Cole January 5, 2017 report (RX.14)

Petitioner was examined by Dr. Brian Cole on January 5, 2017 at respondent's request. She reported she fell on 3/19/15 when a stack of chairs knocked her over. She tried to break her fall with her hand and right knee. She denied pain to left knee. She had not yet had surgery to right knee. She reported pain and clicking in right knee. Dr. Cole recommended cortisone injection with possible arthroscopy. This treatment would be related to the injury. He felt she suffered aggravation of early arthritis.

Dr. Arman Kelikian December 14, 2015 Report (RX.15

Dr. Kelikian examined petitioner on December 14, 2015 and recommended hind foot osteotomy. He did not find the condition related to the problems 30 years before.

Athletico Physical Therapy (RX.16)

Petitioner underwent a Functional Capacity Evaluation on January 24, 2018 which showed petitioner only met 20.00% of her job demand, but also showed a 56% or 28/50 inconsistent performance, which was an unacceptable effort.

Swedish Covenant Records -Predating Accident (RX. 17)

On 11/6/13 Petitioner presented to Dr. Xie with neck pain. Dr. Xie diagnosed cervical spondylosis, cervicalgia, pain in thoracic spine, arthropathy. There is a lumbar MRI from 9/20/12 which was compared to MRI from 2009. MRI of cervical dated 9/20/12 showed small central disco-osteophytic protrusions at C2/3 C3/4 and C4/5. There was mild central and bilateral foraminal stenosis at C5-C6 and C6-C7. Dr. Xie examined Petitioner on 9/8/12, she reported pin in lower started 4 days prior, and pain in neck going into the shoulder has gotten worse since visit last year. Diagnosis cervical spondylosis, arthropathy of cervical spine facet joint, cervical stenosis. Dr. Xie ordered MRI of cervical thoracic and lumbar. On 9/22/11 Petitioner presented to Dr. Xie with history of chronic neck pain. On 6/7/10 Petitioner presented to Xie with complaint of chronic lower back and neck pain secondary to cervical and lumbosacral degenerative disease, degenerative joint disease, facet arthropathy and spinal stenosis. When she last saw the patient, she had epidural injections. Petitioner engaged in physical therapy in 2011 and 2012 for pain to neck, rib, and sciatica. MRI of cervical spine performed on 1/28/2009 showed mild foraminal stenosis at C3-C4 and moderate stenosis at C4-C5, and moderate to severe foraminal stenosis at C5-C6 and C6-C7. The findings were unchanged when compared to 11/10/2007.

Swedish Covenant Hospital/Dr. Jaroslaw Dzwinyk (PX.19)

Petitioner was first seen by Dr. Dzwinyk on March 30, 2017 due to her right knee injury. She followed up with Dr. Dzwinyk on April 6, 2017 and performed a right total knee replacement to petitioner on April 28, 2017. She continued under Dr. Dzwinyk's care.

On February 5, 2018, Dr. Dzwinyk authored a letter on February 5, 2018, in which he states, "Ms. Cheryl Hagopian is under my care for treatment of a work-related injury to her right knee, which rapidly progressed to osteoarthritis, and for which she underwent total knee arthroplasty on April 28, 2017. Based on a recent evaluation in the office on 01/30/2018, she has been diagnosed with complex regional pain syndrome of the right knee...which explains her ongoing knee pain and which will require additional treatment" (Px. 19, pg. 50).

Petitioner continued to experience pain and other symptoms in her right knee following the total replacement surgery. Eventually it was decided that revision surgery was indicated, and on December 26, 2018, Dr. Dzwinyk performed a "partial revision arthroplasty of the right knee for posterior cruciate ligament failure" (Px. 19, pg. 104).

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

The petitioner appeared to be credible in that she was straight-forward with her testimony.

C. With respect to the issue of whether an accident occurred on December 9, 2014 that arose out of and in the course of petitioner's employment by respondent, the Arbitrator finds the following facts:

Based upon the testimony and medical records, the Arbitrator finds petitioner was injured in an accident, while at the Red Rooster Restaurant in Carol Stream on March 19, 2015, which arose out of and in the course of her employment with respondent.

F. With respect to the issue of whether the petitioner's condition of ill-being is related to the injury, the Arbitrator makes the following conclusions of law:

The Arbitrator petitioner's condition of ill-being is causally-related to the work accident of March 19, 2015.incident of 3/19/15. In reaching this determination, the Arbitrator relied on the medical evidence and petitioner's testimony.

Petitioner alleges injuries to her: 1.) head, 2.) left foot/ankle, 3.) right knee, 4.) right arm/hand, 5.) neck, 6.) back.

Petitioner's head injuries were fairly minor in nature, consisting of abrasions and a hematoma. By the time of trial, Petitioner's head injuries/symptoms had largely resolved.

Petitioner's right arm/hand were similarly minor in nature and presented no ongoing pain/symptomology at the time of trial.

Petitioner's left foot and ankle injuries necessitated surgery. Specifically, a hind foot osteotomy performed by Dr. Kelikian of Northwestern Medicine on June 9, 2016 (After his exam of petitioner at respondent's request. At the time of trial, Petitioner's left foot/ankle symptoms had largely resolved.

The Arbitrator also finds petitioner's neck/back injuries, that necessitated surgical intervention, were the result of the work accident; specifically, the April 8, 2016 three-level cervical fusion performed by Dr. Yapor of Swedish Covenant Hospital. The status of Petitioner's

neck has essentially reached the point of maximum medical improvement, with little in the way of further treatment discussed or anticipated. Petitioner does, however, exhibit the need for ongoing restrictions related to her neck injuries. Specifically, the most recent FCE, dated 11/29/18 indicates that Petitioner can only rotate her head/neck on an occasional basis (Px. 22, pg. 24).

Petitioner's primary complaints now relate to her right knee (T. pg. 49). Petitioner has undergone three surgeries to date in her right knee, which included: an arthroscopy done by Dr. Spiros Stamelos on February 28, 2017; a total knee replacement performed by Dr. Dzwinyk on April 28, 2017; and a revision surgery also performed by Dr. Dzwinyk on December 28, 2017. Petitioner continues to seek post-operative care regarding her right knee.

As Petitioner's symptoms evolved throughout the course of treatment, a discussion of complex regional pain syndrome began. Subsequently, Petitioner has been diagnosed with CRPS by at least five doctors with facilities such as: Swedish Covenant Hospital, NorthShore University HealthSystem, University of Illinois Hospital & Health Sciences System, and Northwestern Medicine.

Dr. Xiaoyuan Xie of Swedish Covenant Hospital had been treating Petitioner for many years prior to the alleged date of loss. According to Dr. Dzwinyk, after Petitioner's total knee replacement, "she complained of burning pain, dysesthesia, shooting pain, swelling, temperature and color change in her knee and right low leg. The symptoms continued even after the revision surgery. Subsequently, I diagnosed her condition as Complex Regional Pain syndrome (CRPS) of the right low extremity which was later confirmed by Dr. Nader…" (Px. 3, pg. 1218).

Dr. Jaroslaw Dzwinyk of Swedish Covenant Medical Group authored a letter dated February 5, 2018 in which he states, "Ms. Cheryl Hagopian is under my care for treatment of a work-related injury to her right knee, which rapidly progressed to osteoarthritis, and for which she underwent total knee arthroplasty on 04/28/2017. Based on a recent evaluation in the office on 01/30/2018, she has been diagnosed with complex regional pain syndrome of the right knee…which explains her ongoing knee pain and which will require additional treatment" (Px. 19, pg. 50).

Dr. Dzwinyk reiterated his opinion on the matter over a year later, notating on 3/21/19, that Petitioner "has been under my care since March 2017 for treatment of posttraumatic osteoarthritis of the right knee (related to work injuries sustained in March 2015), for which she underwent total knee arthroplasty on 04/28/2017. Additionally, the patient was diagnosed with CRPS due to injury of an infrapatellar branch of the saphenous nerve, for which she was referred to the pain clinic at Swedish Covenant Hospital, where she has been receiving treatment by Dr. Xie" (Px. 19, pg. 104).

Dr. Raju Ghate of Northshore University HealthSystem examined Petitioner in September of 2018. Dr. Ghate diagnosed Petitioner with "status post right knee with mid flexion instability and complex regional pain syndrome type 2" (Px. 17, pg. 3-4).

Dr. Mark Gonzalez of University of Illinois Hospital & Health Sciences System, examined Petitioner on 12/12/18 (Px. 27, pg. 2-3 of 9). Dr. Gonzalez noted that Petitioner "has had persistent right knee pain after undergoing a right total knee arthroplasty in February 2017…The patient subsequently developed CRPS after her surgery" (Px. 27, pg. 2 of 9).

Dr. Antoun Nader of Northwestern Medicine diagnosed Petitioner with "complex regional pain syndrome type 2 of right lower extremity" and "chronic pain of right knee" (Px. 26, pg. 51). On 3/18/19 he authored a letter stating, "Ms. Hagopian has been my patient since May 2018. I have been managing her infrapatellar saphenous neuralgia and CRPS of the right lower

extremity. These conditions have no known cure, but are treated with chronic management and intermittent interventional procedures." (Px 26, pg. 50).

Dr. Timothy Lubenow of the Rush Pain Center examined Petitioner on 9/19/19 (Px. 28). Dr. Lubenow diagnosed Petitioner with "complex regional pain syndrome type 2 of right lower extremity" (Px. 28, pg. 2).

The only doctor to dispute Petitioner's CRPS diagnosis is one of Respondent's section 12 examining physicians – Dr. Kenneth Candido. The Arbitrator does not find Dr. Candido's opinion on the matter sufficiently convincing for several reasons.

First, Dr. Candido's last and most recent examination of Petitioner was on 6/19/18 – a full year and a half prior to the time of trial. Petitioner has continued to treat during that year and a half period, meaning Dr. Candido's opinion, at best, is missing the past eighteen months' worth of treatment and records.

Furthermore, Dr. Candido's last examination of Petitioner came a full six months prior to Dr. Dzwinyk's right knee revision surgery. Undoubtedly the structure, symptoms, and condition of ill being present in Petitioner's right knee evolved with the completion of revision surgery and subsequent post-operative therapy.

Second, the Arbitrator has reason to doubt whether Dr. Candido's opinion is as well-developed as Petitioner's treating physicians. Dr. Candido could not recall how long he'd spent with Petitioner during his examination (Rx. 5, pg. 15). While Dr. Candido testified that he typically spends an hour or more with a patient, he also noted that the length of an exam varies, "it depends. Obviously, in a practice where I'm seeing 50 patients a day in 8 or 9 or 10 hours, I can't spend an hour" (Rx. 5, pg. 16). The Arbitrator notes that 50 patients a day spread out over an 8 to 10-hour work day, with all patients lined up back to back, and with no breaks or lunch, equates to between 9.6 minutes and 12 minutes per patient.

Moreover, Dr. Candido's report contains numerous statements, which appear on their face to be direct quotes. However, Dr. Candido conceded during his deposition that no such recordings are performed and that any statements contained in his reports are only the product of his note taking during the exam (Px. 5, pg. 54). The Arbitrator finds this practice somewhat misleading. Further, Dr. Candido's report contained several sections which were directly copied from a cover-letter. Dr. Candido did not recall whom had authored the letter, nor did he have a copy available to him at the time of his deposition (Px. 5, pg. 57). The Arbitrator finds the practice of copying and pasting sections from an unidentified and unavailable letter to be questionable.

Third, Dr. Candido does concede that several of the "hallmarks" typically associated with CRPS were present in Petitioner's knee. As Dr. Bare explained, there are several hallmarks associated with CRPS – those include (Rx. 11, pg. 26):

1.) Recent trauma or surgery in the area
2.) A disproportionate level of pain than one might expect
3.) Some abnormal swelling or discoloration or appearance of the skin
4.) Hypersensitivity to touch
5.) Pain with range of motion

Dr. Candido evidenced his awareness of the first hallmark when in replying "yes" when asked "if you're looking to diagnose CRPS, a common question would be…whether or not in that area recently or in recent history there had been an injury or surgery or trauma, is that correct?" (Rx. 5, pg. 60-60). Obviously, Petitioner's underlying right knee injury and three subsequent surgeries would meet such a threshold.

The fact that Petitioner's symptoms have been ongoing for this length of time would suggest that what she is experiencing is disproportionate to what one might expect.

Dr. Candido confirmed that "yes", "another question you might ask is whether or not there are color changes to the skin, temperature changes to the skin, or a visual change to the texture or appearance of the skin" (Rx. 5, pg. 61). When asked whether he noted a difference in temperature between Petitioner's knees and thighs, he replied "yes" (Rx. 5, pg. 61). Dr. Candido stated that typically a decrease of temperature is present in an area affected by CRPS, as opposed to an increase in temperature – as was the case when he measured Petitioner's knee and thighs (Rx. 5, pg. 62). However, when asked to confirm whether "CRPS will never involve an increased temperature in the affected area?" Dr. Candido replied "I would not use the words never or always…" (Rx. 5, pg. 63).

Furthermore, Petitioner's right thigh temperature was actually lower than the temperature Dr. Candido measured in Petitioner's left thigh (Rx. 5, pg. 65). This hallmark would seem to be present.

Moreover, when asked whether "symmetry would also be something that you would be measuring in terms of temperature and circumference?" Dr. Candido affirmed "yes" (Rx. 5, pg. 67). Dr. Candido agreed that there was not symmetry in the circumference measurements he obtained of Petitioner's left and right legs (Rx. 5, pg. 67).

Dr. Candido's 6/19/18 report states, "there was notable swelling in the right knee" (Rx. 4, pg. 27). Third hallmark present.

As to the fourth hallmark, Dr. Candido noted in his IME report dated 6/19/18 that Petitioner "assuredly does have pain to light touch (tactile allodynia), one of the hallmarks of CRPS" (Rx. 4, pg. 33). Hallmark present.

Finally, the fifth hallmark seems evidenced by the fact that Dr. Candido noted limited ROM in Petitioner's right lower extremity.

The Arbitrator further relies on the testimony of Petitioner in support of finding a causal connection. Petitioner denied ever having experienced similar pain/symptoms in her right knee or leg prior to 3/19/15. Petitioner denied ever being unable to perform the essential duties of her job on account of any medical condition involving her right knee or leg (T. pg. 39).

The Arbitrator is not convinced that the FCE conducted by Athletico in January of 2018 represents an accurate description of Petitioner's current physical abilities. For one, that FCE was performed approximately two years ago. Petitioner has continued to seek medical treatment, including having a knee revision surgery. It seems more logical to the Arbitrator to use the most recent FCE, which was conducted some ten months later by ATI.

The Arbitrator notes that both FCE's found Petitioner capable of only sedentary or light duty work. There is no indication from either report that Petitioner would be capable of performing the activities required of her pre-injury employment. While two of Respondent's section 12 physicians, Dr. Candido and Dr. Bare have suggested that Petitioner is capable of performing unrestricted work, those opinions were premised on the idea that Petitioner did not put forth a full effort at the 1/24/18 Athletico FCE. Given all of the issues that exist with regard to Athletico's use of a resting heart rate of 104 beats per minute, the Arbitrator does not agree with Dr. Candido or Dr. Bare on this issue.

The fact that Athletico measured heart rates below Petitioner's alleged resting heart rate following twelve of the fifteen exercises, is reason enough to suggest that the results are not reliable. According to Athletico's FCE report, petitioner's heart rate actually decreased by over 20 beats per minute following some exercises.

Dr. Dzwinyk commented on the 1/24/18 Athletico FCE report, noting that it "documents a resting heart rate of 104, which has never been recorded on multiple occasions during the course of my treatment." Dr. Dzwinyk explained further that "to the extent that validity is determined by the changes in heart rate with activity, an erroneous heart rate of 104 would call into question at least some of the results of the evaluation. Additionally, it is certain that the evaluation did not take into account the recently diagnosed CRPS 1."

The Arbitrator, having weighed all the evidence, find the preponderance of the evidence supports a finding that petitioner has Complex Regional Pain Syndrome involving the right knee that was caused by petitioner's work accident of March 19, 2015.

J. With respect to the issue regarding medical bills, the Arbitrator makes the following conclusions of law:

The first issue to address is whether petitioner exceeded the choice-of-two-doctor rule. The Arbitrator finds the record supports the following:

Petitioner received emergency treatment on March 19, 2015 at Elmhurst Hospital. Petitioner also sought emergency treatment at Advocate Lutheran General Hospital on March 24, 2017 due to issues after her surgery on her right knee of February 28, 2017.

The first petitioner's choice of doctor's was Dr. Xiaoyuan Xie, whom she saw on March 20, 2015. Dr. Xie referred petitioner to Dr. DiSilva, Dr. Yapor and Dr. Lubenow.

The second choice of doctors was Dr. Stamelos, who performed the first surgery to petitioner's right knee and then retired. Petitioner, therefore began treatment with Dr. Dzwinyk.

Petitioner received treatment by Dr. Kelikian, who was originally chosen by respondent. Dr. Ghate and Dr. Nader were within Dr. Kelikian's group. Therefore, these doctors would not be considered a choice of the petitioner.

The only doctor the Arbitrator finds that falls outside of petitioner's two-choices was Dr. Mark Gonzalez. There was not bill submitted for Dr. Gonzalez' treatment.

The Arbitrator notes the following:

Respondent's section 12 examining doctor, Dr. Candido, expressed his opinion that all treatment relating to Petitioner's left foot which had been completed at the time of his examination was reasonable, necessary, and work-related. Dr. Candido opined that further treatment and surgery was indicated.

Respondent's section 12 examining doctor, Dr. Cole, expressed his opinion that all treatment relating to Petitioner's right knee which had been completed at the time of his examination was reasonable and necessary. Dr. Cole opined that Petitioner wasn't yet at MMI and would require further medical treatment.

Respondent's section 12 examining doctor, Dr. Deutsch expressed his opinion that at least the first three months' worth of treatment relating to Petitioner's cervical spine would be reasonable, necessary, and work-related.

Respondent's section 12 examining doctor, Dr. Bare expressed his opinion that all treatment relating to Petitioner's right knee which had been completed by the time of his first examination (7/12/17) was reasonable, necessary, and work-related. Dr. Bare opined that Petitioner required further treatment relative to the right knee.

Following his second examination of Petitioner on 12/27/17, Dr. Bare again opined that all treatment related to Petitioner's right knee which had been done to date was reasonable and necessary.

Dr. Bare opined that Petitioner had reached MMI and required no further medical treatment involving the right knee following his third and final examination of petitioner on October 3, 2018.

The reasonableness and necessity of petitioner's medical treatment is well supported by the numerous records and opinions prepared by petitioner's treating and examining physicians, including Dr. Xie, Dr. Dzwinyk, Dr. Candido, Dr. Yapor Dr. Stamelos, Dr. Gonzalez, Dr. Nader, Dr. Lubenow and Dr. Ghate.

Accordingly, the Arbitrator awards the following bills to be paid in accordance with the fee schedule and pursuant to §8 and §8.2 as said charges were reasonable and the medical treatment necessary to treat petitioner's March 19, 2015 work-related injuries (All amounts are listed in the full amount before deductions for payments made or adjustments.) Respondent to be given credit for any payments already made by respondent.

$2,933.00 Elmhurst Memorial Healthcare & Elmhurst Emergency Medicine (PX.1)
$68,564.59 Swedish Covenant Hospital/Dr. Xie (PX.4)
$53,617.50 (Before Payments) AMC Anesthesia, Ltd. (PX.6)
$1,147.00 Illinois Bone and Joint (PX.8)
$15,959.07 Advanced Orthopaedic Associates (Dr. Stamelos) (PX.10)
$4,200.00 MRI Lincoln Imaging Center (PX.12)
$68,525.94 Northwestern Neurosurgical Associates/Dr. Yapor (PX.14)....
$26,220.00 Foundation for Medical Development (PX.16)
$18,369.00 Northshore University Healthcare (Dr. Kelikian & Dr. Ghate) (PX.18)
$8,577.62 ATI, Physical Therapy PX.23).
$2,580.00Advocate Lutheran General Hospital (PX.25)

K. With respect to the issue regarding prospective medical care, the Arbitrator makes the following conclusions of law:

The Arbitrator finds that Petitioner is entitled to prospective medical care in connection with the injuries sustained on 3/19/15. In so finding, the Arbitrator relies upon Petitioner's testimony, and the medical records introduced at trial.

With regard to further treatment, Dr. Xie opined, "CRPS is difficult to treat and has no known specific cure although improvement can occur with continued care. My treatment now is focused on pain management with recommendation for spinal cord stimulator (DRG VS regular) VS recommendation by Dr. Dr. Nader for placement of peripheral nerve stimulator. My recommendation is that the patient needs to continue with pain management treatments including physical therapy, medication management and interventional pain procedures" (Px. 3, pg. 1218).

Dr. Jaroslaw Dzwinyk of Swedish Covenant Medical Group noted that Petitioner's 12/26/18 revision surgery would entail postoperative rehabilitation for a period of 3-6 months, monthly office evaluations for the first six months, followed by yearly evaluations for 2-3 years after that, and then evaluations every five years going forward (Px. 19, pg. 104).

Dr. Raju Ghate of Northshore University HealthSystem noted his recommendation to "treat the complex regional pain syndrome first before proceeding with a revision procedure on the knee itself" (Px. 17, pg. 4).

Dr. Mark Gonzalez of University of Illinois Hospital & Health Sciences System, examined Petitioner on 12/12/18 (Px. 27, pg. 2-3 of 9). Dr. Gonzalez noted that Petitioner "has had persistent right knee pain after undergoing a right total knee arthroplasty in February 2017…The patient

subsequently developed CRPS after her surgery. She has been seen by pain therapy specialist who has done multiple injections for her. They are also planning on implanting a nerve stimulator after she undergoes her next procedure to help control pain postoperatively. This would be done at Northwestern" (Px. 27, pg. 2 of 9).

Dr. Antoun Nader of Northwestern Medicine documented his ongoing management of Petitioner's "infrapatellar saphenous neuralgia and CRPS of the right lower extremity. These conditions have no known cure, but are treated with chronic management and intermittent interventional procedures. We are in the process of considering Ms. Hagopian for placement of a peripheral nerve stimulator. I have also recommended Ms. Hagopian to see an orthopaedic foot specialist (Dr. Kelikian) for further evaluation. I have also recommended she proceed with physical therapy given her lower extremity atrophy" (Px 26, pg. 50).

Dr. Timothy Lubenow of the Rush Pain Center made the recommendation for various medications and a "DRG stimulator trial" (Px. 28, pg. 2).

Based upon the aforementioned medical evidence, the Arbitrator awards the costs of all reasonable, necessary and related treatment of petitioner's Complex Regional Pain Syndrome, as well as any additional treatment of petitioner's right knee, to be paid pursuant to the fee schedule and in accordance with §8 and §8.2 of the Act.

L. With respect to the issue regarding TTD, the Arbitrator makes the following conclusions of law:

Respondent last issued TTD benefits on 1/30/18. Since then Petitioner has continued to receive treatment. The medical records contain ample support for the fact that Petitioner was unable to work during this period. Nor does the record contain any evidence that Respondent offered to a light duty work accommodation.

Furthermore, various restrictions would make the performance of Petitioner's pre-injury job very difficult if not impossible. Specifically, the fact that Petitioner's job as an FMR involved driving some 300 miles per day while visiting 30-50 sales visits, does not seem to be feasible given Petitioner's ability to only occasionally use her right foot or occasionally turn her head/neck.

The Arbitrator is not persuaded otherwise by the surveillance footage offered into evidence by Respondent at trial and contained in Rx. 26 & Rx. 27 for the reason that said footage fails to evidence Petitioner performing any activity/action clearly beyond those restrictions in place at the time.

Accordingly, the Arbitrator awards temporary total disability benefits of at the rate of $583.51 per week for 243-6/7 weeks for the period from March 20,2 015 through November 20, 2019.